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 16 OF 17

MARK A. HUTCHISON, Nev. Bar No. 4639
MICHAEL K. WALL, Nevada Bar No. 2098
HUTCHISON & STEFFEN, LLC.
10080 Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086

PETER C. BERNHARD, Nev. Bar No. 734
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135-2958
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

DONALD J. KULA, Cal. Bar No. 144342
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067-1721
Telephone: (310) 788-9900
Facsimile: (310) 788-3399
Attorneys for Respondent Gilbert P. Hyatt

Chronological Index

Doc No.	Description	Vol.	Bates Nos.
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

7	Correspondence re: 1991 state income tax balance, dated December 23, 2019	17	RA004028-RA004032
8	Court Minutes re: motion for attorney fees and costs, dated April 23, 2020	17	RA004033-RA004034

Alphabetical Index

Doc No.	Description	Vol.	Bates Nos.
7	Correspondence re: 1991 state income tax balance, dated December 23, 2019	17	RA004028-RA004032
1	Court Minutes re: case remanded, dated September 3, 2019	1	RA000001
8	Court Minutes re: motion for attorney fees and costs, dated April 23, 2020	17	RA004033-RA004034
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	16, 17	RA003698-RA004027

	Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019		
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

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 16 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;

_____X_____ via Federal Express;

_____ via hand-delivery;

_____ via Facsimile;

upon the following person(s):

James A. Bradshaw, Esq.
MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
Reno, NV 89501

Attorneys for Appellant Franchise Tax Board of the State of California

Patricia K. Lundvall, Esq.
MCDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102

Attorneys for Appellant Franchise Tax Board of the State of California

Robert L. Eisenberg, Esq.
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno, NV 89519

Attorneys for Appellant Franchise Tax Board of the State of California

/s/ Kaylee Conradi
An employee of HUTCHISON & STEFFEN, PLLC

an IIED claim could not lie against a self-insured employer and plan administrator for delay in payment of workers' compensation benefits. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1013, 823 P.2d 888, 894 (1991). As explained by the Court, the IIED 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.* In other words, the defendants' immunity from an IIED claim in *Falline* derived from a Nevada agency's immunity from punitive damages. *See id.*

Contrary to Hyatt's assertion, FTB made no "misstatement" regarding the *Falline* decision. (Suppl. AB 38). *Falline's* analytical underpinning was that a public entity is exempt from punitive damages that are otherwise allowed under NRS 42.005. *See Falline*, 107 Nev. at 1013, 823 P.2d at 894. The fact that *Falline* arose in the workers' compensation context is immaterial to that analysis. *See id.* In the 2014 Opinion, the Court granted FTB immunity from punitive damages because punitive damages are unavailable against Nevada's public agencies. 335 P.3d at 154. Just as the Court held that *Falline*'s bad-faith exception to discretionary function immunity applied outside the workers' compensation context, to enforce *Falline* in a non-discriminatory manner, it must also conclude that FTB cannot be subject to an IIED claim. *See id.*

The pre-*Martinez* cases cited by Hyatt do not alter this conclusion. (Suppl. AB 40-41 and citations therein). None of the defendants in those cases appear to have raised an immunity defense, and the Court provided no analysis on this issue. In contrast, *Falline* expressly points to a public agency's exemption from NRS 42.005 as the basis for granting immunity from the plaintiff's IIED claim. *See* 107 Nev. at 1013, 823 P.2d at 894.

The California cases cited by Hyatt also are not persuasive because it is undisputed that FTB would have complete immunity from liability in California's courts. *See* Cal. Govt. Code Ann. § 860.2. Moreover, the *Asgari* case allowed a new trial on punitive damages, which as this Court recognized in the 2014 Opinion, clearly are not allowed against a Nevada agency or FTB. *Compare Asgari v. City of Los Angeles*, 937 P.2d 273 (Cal. 1997), as modified on denial of reh'g (Mar. 17, 1997) *with* 2014 Opinion, 335 P.3d at 154.

4. Hyatt Does Not Identify Any Nevada Precedent That Allows A Fraud Claim Against A Nevada Agency.

The cases from other jurisdictions cited by Hyatt confirm there is no Nevada precedent for a fraud claim against a public entity and, to the extent the Court wants to make new law now, they constitute a shaky foundation for doing so. (Suppl. AB 41). The leading case on which Hyatt relies is an unpublished disposition from a federal court in Oregon adopting a magistrate judge's report and recommendation. *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). The court's decision was based on an "aiding and assisting theory" that the public entity could be liable for the intentional torts of individual employees. *Id.* at *9, appearing to refer to *7.[2] Hyatt advanced no such theory.

Moreover, not a single case that Hyatt cites involves a fraud claim that depends on statements made in a legislatively mandated form document to prove intent to defraud. For the fraud verdict against FTB to survive the *Hyatt II* mandate, the Court must establish new Nevada law that the Nevada Department of Taxation can be liable for fraud based on the Taxpayer Bill of Rights. *See* NRS 360.291(1)(a). No such precedent exists or should exist.

C. Hyatt's Use Of The Nevada Jury Verdict To Manipulate The California Administrative Process Underscores The Dangers Of Sister-State Hostility.

1. Hyatt's Contention That His California Administrative Appeal And Nevada Tort Case Are Separate Is Wholly Disingenuous As The Record Is Clear He Tried His Tax Case To The Las Vegas Jury.

Rather than address FTB's substantive arguments, Hyatt deceitfully contends that his Nevada tort case and California administrative appeal are distinct. (Suppl. AB 7). Hyatt cannot sidestep the 2014 Opinion's failure to grant FTB the

[2] The *Christina H* court's discussion mixed its analysis of the fraud and false imprisonment claims, further confirming that it provides shaky authority to support Hyatt. 2011 WL 976463 at *9.

protections of Nevada's exhaustion, immunity and deference doctrines by misrepresenting what his trial was all about: a collateral attack on the California administrative process.

The record is clear that Hyatt tried his tax case to the Nevada jury (AOB 23-27 and citations therein), thereby exceeding the jurisdictional limitations established by the Supreme Court. *See Franchise Tax Bd. of Calif. v. Hyatt* ("*Hyatt I*"), 538 U.S. 488, 499 (2003). From start to finish, Hyatt's counsel specifically told the jury it was their job to act as a "check and balance" on California's legislative and executive functions. 32 AA 07974 (131); 52 AA 12837 (90). 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. 2014 Opinion, 335 P.3d at 150; 44 AA 10814-10946. Hyatt's trial attorneys then relied heavily on Jumelet's testimony in both their initial and rebuttal closing arguments.

For example, 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. In fact, 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."); *see also* 53 AA 13166-67, 13169, 13172, 13176.

The 2014 Opinion clearly recognized that Hyatt's trial strategy was to get a Las Vegas jury to review FTB's audit. 2014 Opinion, 335 P.3d at 150. As stated by this Court, the inadmissible expert testimony from Malcolm Jumelet "is precisely what this case was not allowed to address" because it "went to the audits' determinations and had no utility in showing any intentional torts …." *Id.* Given these acknowledgements, it is clear the 2014 Opinion violated the Full Faith and Credit mandate of *Hyatt I* and *II* insofar as it affirmed liability determinations made by a Las Vegas jury that second-guessed the agency statutorily charged with making factual findings and legal conclusions as to Hyatt's tax liability. *See Int'l Game Tech.*, 122 Nev. at 157-59, 127 P.3d at 1093, 1106.

2. Hyatt Misused A Nevada Discovery Order To Conceal From The California Protest Hearing Officer Documents That Undermined His Protests.

Hyatt does not dispute FTB's argument that the protective order Hyatt obtained from the district court ("Nevada Protective Order") interfered with FTB's administrative review of Hyatt's protest. (Suppl. OB 25). Shielded by the Nevada Protective Order, Hyatt abused the Nevada litigation process to hide key documents from FTB's auditors and hearing officer, including contracts, royalty schedules and wire transfer documents that showed he received $56 million of

income in 1991 instead of 1992, as Hyatt had represented to FTB. (AOB 20-21, 23-37 and record citations therein).

FTB's Nevada litigation attorneys learned of these hidden documents, but because of the Nevada Protective Order that prohibited them from sharing that information with others within FTB, the hearing officer who presided over Hyatt's protests did not. (*Id.*). Hyatt not only asked that his protest hearing be delayed, but because of Hyatt's litigation tactics, the protest hearing officer could not proceed until Hyatt provided all documents that had been requested in the administrative proceeding. (*Id.*). Yet the district court precluded FTB from presenting this evidence to the jury, and this Court then used the Hyatt-caused delay as a basis to affirm the jury's IIED verdict. 2014 Opinion, 335 P.3d at 148-49.

In light of this evidence in the record, Hyatt's contention that the Nevada tort case and the California administrative proceedings are purportedly "two different trains traveling on separate tracks" is entirely disingenuous. (Suppl. AB 7). Hyatt's trial tactic was to attack every discretionary decision made by FTB in Hyatt's audit. Then, based on one-sided evidence and manipulation of the California administrative process through overreaching Nevada discovery and evidentiary orders, the Nevada jury determined that FTB's routine audit procedures constituted fraud and IIED. *See* 2014 Opinion, 335 P.3d at 148; AOB 23:3-27:9

and record citations therein. This is precisely the "derange[d]" intrusion into a sovereign's tax collection that this Court long ago prohibited. *Wells Fargo*, 11 Nev. at 168. It likewise exhibits the "chaotic interference" into a state's taxing functions that the Supreme Court deemed unconstitutional. *Hyatt II*, 136 S.Ct. at 1282.

3. Hyatt Continues to Misuse The Nevada Jury Verdict To Manipulate His Administrative Appeal in California.

Should this Court question whether Hyatt has intertwined this case and the administrative appeal, it need look no further than Hyatt's actions in California. Buoyed by his success in his Nevada tort case, Hyatt now parades the Nevada jury verdict in his ongoing California administrative appeal before the California State Board of Equalization ("BOE") to argue that the tax liability issues have already been litigated in his favor. (*See* documents attached to Request for Judicial Notice).[3]

In his submissions to BOE, Hyatt made the following statements with specific citations to the 2014 Opinion and evidence presented at his Nevada trial:

- "It has been ***conclusively determined*** that FTB committed fraud, intentionally inflicted emotional distress and acted in bad faith in its

[3] FTB requests that the Court take judicial notice of these documents and concurrently files a separate motion to that effect. *See* NRS 47.130.

audits and protests of Mr. Hyatt." RJN 053:2-13, RJN 089:23-090:3, RJN221 (emphasis added).

- "A Nevada jury found that FTB engaged in gross misconduct and fraud, including bad faith acts, referring to Mr. Hyatt in derogatory terms, and much more. FTB's bad faith continues in these appeals." RJN 018:15-17; *see also* RJN 053:12-13 ("Nowhere in its briefing [to the BOE] has FTB addressed the fraud, intentional infliction of emotional distress, and bad faith ***found by the Nevada jury***") (emphasis added); RJN 090:10-11; RJN260.
- "***The Nevada Supreme Court found that FTB committed fraud and intentional infliction of emotional distress in part because of its delays***… In upholding the Nevada jury finding that FTB personnel committed fraud in Mr. Hyatt's audits and protests, the Nevada Supreme Court expressly highlighted FTB's extreme delay in processing Mr. Hyatt's two protests." RJN 216:1-8 (emphasis added).
- Hyatt asked for interest abatement based on "[t]he Nevada Supreme Court [finding] that FTB committed fraud and intentional infliction of emotional distress in part because of its delays." RJN 037:15-18.
- "The Nevada Supreme Court upheld the Nevada jury findings that FTB committed fraud in connection with his audits and protests. The

jury found that FTB made specific representations to Mr. Hyatt that it intended Mr. Hyatt to rely upon, but which FTB did not intend to fully meet." RJN221 (citing the same findings from the 2014 Opinion that Hyatt referenced at Suppl. AB 43).

- "The Nevada Supreme Court upheld the Nevada jury findings that FTB intentionally inflicted emotional distress against Mr. Hyatt." RJN222 (citing 2014 Opinion's findings regarding FTB's audit procedures); *see also* RJN236.

Hyatt's manipulation of his administrative appeal using the jury's verdict and this Court's 2014 Opinion underscores the dangers of sister-state hostility. The Court allowed Hyatt to circumvent the exhaustion requirement; declined to grant deference to FTB's fact finding and legal conclusions; and deprived FTB of the immunity that protects Nevada's Department of Taxation. Had Hyatt sued Nevada's Department of Taxation, the Court would have granted immunity to the agency. *See* NRS 372.670; NRS 375B.370. At a minimum, the Court would have required Hyatt to finish the administrative process and, thereafter, would have afforded deference to the agency's findings and conclusions. *See Int'l Game Tech.*, 122 Nev. at 157-59, 127 P.3d at 1093, 1106. Hyatt could not then substitute a Nevada jury verdict for the agency's own decision-making process, as the Court allowed him to do with FTB. *See id.*

D. The Court Has No Authority To Simply Enter Judgment Against FTB At The Statutory Cap Because The Jury In A New Trial May Award No Damages.

1. The 2014 Opinion Held That FTB Has The Constitutional Right To A New Trial On Damages.

The Court cannot, based on the "efficiency" argument advanced by Hyatt (Suppl. AB 13-14, 27-28), summarily enter judgment against FTB in the amount of the statutory cap. The presumptuousness of Hyatt's request is staggering, and Hyatt identifies no legal process to justify taking away what the 2014 Opinion recognized as FTB's constitutional right to a new trial. *See* Nev. Const. Art. I, § 3 (securing right to jury trial); 2014 Opinion, 335 P.3d at 149. The 2014 Opinion remanded for a new trial on emotional distress damages, and nothing in the *Hyatt II* mandate alters that decision in favor of FTB. 335 P.3d at 131. The jury at the new trial may very well award no damages to Hyatt, and FTB is entitled to a trial that could lead to this favorable result.

///

///

///

2. Hyatt's Maximum Damages Recovery Is $50,000 Per Claim, Not $75,000.

Contrary to Hyatt's assertion (Suppl. AB 24-26), the applicable statutory cap at the time of Hyatt's alleged injuries was $50,000 per claim, not $75,000.[4] For actions accruing before 2007, the cap was set at $50,000. *See* 1995 Nev. Stat. 1071, 1073.4. That cap increased to $75,000 for actions accruing between Oct. 1, 2007 and Oct. 1, 2011, and to $100,000 for actions accruing after the latter date. 2007 Nev. Stat. 3015, 3024-25, 3027. A tort claim accrues at the time of the plaintiff's alleged injuries. *See LVMPD v. Yeghiazarian*, 129 Nev. Adv. Op. 81, 312 P.3d 503, 509 (2013).

Hyatt's alleged injuries occurred prior to the filing of his complaint in 1999, at which time the statutory cap was $50,000. *See* 1995 Nev. Stat. 1071, 1073.4. The law does not give this Court discretion to impose a higher cap. *See* NRS 41.035(1). As a result, under no circumstance could the Court enter a judgment

[4] FTB's opening and reply briefs stated that the applicable statutory cap was $75,000. (AOB 100, 102; ARB 110-11, 115-16). This was incorrect because the applicable version of NRS 41.035(1) at the time of Hyatt's alleged injuries (i.e. prior to Hyatt's 1999 filing of the complaint) was $50,000. 1995 Nev. Stat. 1071, 1073.4. FTB corrected the error in its briefing to the Supreme Court, in which it argued that $50,000 was the applicable statutory cap. (SCOTUS Brief of Petitioner at 9, FTB's Suppl. App. ASA 021). Hyatt did not contest FTB's assertion of the corrected amount, instead arguing that the damages cap only applied to Nevada agencies, not FTB. (SCOTUS Brief of Respondent at 14, FTB's Suppl. App. ASA 100). The additional briefing requested by Hyatt is neither warranted nor justified. (Suppl. AB 27 n.42).

against FTB for more than $50,000 on Hyatt's remaining claims, which is what the Supreme Court concluded in *Hyatt II*. *See* 136 S.Ct. at 1282.

3. There Is Insufficient Evidence To Support The Fraud Verdict.

The "evidence" cited on page 42 of Hyatt's supplemental answering brief does not, as a matter of law, satisfy the essential elements of a fraud claim and therefore could not support the Court summarily entering judgment in the amount of the statutory cap. To establish fraud, the plaintiff must prove 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. *Bartmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998). The only alleged "representation" referenced by Hyatt is the 1991 notice of audit that California's Legislature required FTB to send to taxpayers who are being audited. Calif. Revenue & Tax. Code §21007.

As explained by FTB (Suppl. OB 16-17), just as Nevada's Taxpayer Bill of Rights would not show intent to defraud, the notice of audit that the California Legislature required FTB to send likewise cannot. *Compare* NRS 360.291(1)(a) *to* Calif. Revenue & Tax. Code §21007. The California Legislature's intent – not the intent of any FTB employee – is all that can be discerned from the notice of audit. *See id* Hyatt's supplemental answering brief is silent on this point.

The FTB employee who sent out the legislatively mandated notice of audit could not know what FTB's auditors would or would not do in the course of the audit in relation to the statements in the notice. Indeed, the 2014 Opinion does not even identify the employee who sent the notice or discuss any facts relating to what that employee did or did not know. Absent the requisite intent, the fraud claim fails as a matter of law. *See Reno Air, Inc.*, 114 Nev. at 446-47, 956 P.2d at 1386.

FTB does not ask the Court to "re-weigh the fraud evidence" as Hyatt contends. (Suppl. AB 44). It simply asserts that: (1) no evidence in the record can satisfy the intent element of fraud and (2) the Court has never and would never make the Nevada Department of Taxation liable for fraud based upon statements in the Taxpayers' Bill of Rights. *See* NRS 360.291(1)(a). By affirming the fraud verdict based upon statements in the 1991 notice of audit, the Court has engaged in the precise sister-state discrimination that the Supreme Court held unconstitutional. *See Hyatt II*, 136 S.Ct. at 1282-83.

4. There Is Insufficient Evidence To Support The IIED Verdict.

Additionally, in the 2014 Opinion, the Court allowed FTB's routine audit procedures, which the Court expressly held should have been outside the province of the jury, to serve as evidence of "extreme and outrageous conduct." 335 P.3d at 148-49. That same evidence, the Court acknowledged, was tainted by evidentiary

and instructional errors that were prejudicial to FTB. *Id.* at 150-153, 157. Concurrently, the Court held that FTB's audit procedures were insufficient to prove Hyatt's privacy-based tort claims. *Id.* at 140, 142. As a result, contrary to Hyatt's assertion (Suppl. AB 28 n.43), had the Court viewed FTB as Nevada's taxing authority, it would have concluded that Hyatt did not satisfy the elements of his IIED claim. *See Int'l Game Tech.*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106.

E. Hyatt's Procedural Arguments Are Not Supported By The Law Or The Record.

1. The 2014 Opinion Is Not "Law Of The Case" Because It Was Vacated By The Supreme Court

Because of the intervening *Hyatt II* decision, the 2014 Opinion it is not "law of the case." As even Hyatt recognizes (Suppl. AB 32-33), "the 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." *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (quotation omitted). "[A]n exception to the law of the case doctrine occurs when … an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003) (internal quotation omitted).

The *Hyatt II* mandate, not the 2014 Opinion, is the law that this Court must follow because *Hyatt II* constitutes intervening law that dismantled the precedential effect of any part of the 2014 Opinion adverse to FTB. *See Durant*, 101 U.S. at 556-57. The "rule of mandate presents a specific and more binding variant of the law of the case doctrine…." *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1214 (C.D. Cal. 2005) (internal quotation omitted). Moreover, to retain an unconstitutional decision would "work a manifest injustice" against FTB. *See id.*

Even if any portion of the 2014 Opinion adverse to FTB could be deemed to remain intact (which FTB disputes), the law of the case doctrine "merely expresses the [general] practice of the courts" and is "not a jurisdictional rule … or a limit to the[courts'] power." *Hsu*, 123 Nev. at 630, 173 P.3d at 728. Hyatt concedes that, at a minimum, this Court has "discretion to revisit and review issues unrelated to the *Hyatt II* damages issue." (Suppl. AB 4). The Court should exercise that discretion to ensure that its new judgment complies with its Full Faith and Credit responsibility in all respects.

2. FTB Adequately Preserved All Of The Arguments It Now Presents To The Court.

Hyatt erroneously argues throughout his supplemental answering brief that FTB's only argument that the district court violated *Hyatt I* concerned the award of

compensatory damages in excess of Nevada's statutory cap. (Suppl. AB 17, 28-31). This is simply untrue and is contradicted by the record in this case.[5]

FTB's opening brief was premised on the argument that the district court "failed to provide FTB with any of the protections and limitations to which a similarly situated Nevada government agency would have been afforded." (AOB 2, 34). FTB argued that Hyatt's tort case was an improper attack on the California administrative process, which Hyatt should have exhausted prior to seeking judicial review. (AOB 2, 34-51, 55-58). As FTB emphasized, the district court impermissibly allowed a Las Vegas jury to review and second guess the discretionary decisions made by FTB in its audit process. (AOB 2-3, 34-51). The district court's errors, FTB argued, were of constitutional magnitude, "exhibiting hostility toward FTB and the State of California." (AOB 4, 33).

Moreover, in its opening brief, FTB argued that the district court had violated the immunity statutes and exceeded the jurisdictional scope authorized by the *Hyatt I* decision. (AOB 58-60, n.53 and n.55 and citations therein). On remand from *Hyatt I*, the district court allowed Hyatt to morph his case into an attack

[5] Hyatt is not in a legitimate position to raise a waiver argument where he argued to the district court repeatedly that "this is not a bad faith case" (*see* 51 AA 12502 (79), 12507 (99) (100), 12511 (110-111)) yet then, in defense of the jury verdict, argued on appeal that a bad-faith exception to discretionary function immunity should be applied to FTB (RAB 57-60) and now makes approximately 2,000 "bad-faith" accusations throughout his BOE appeal. (*See* Request for Judicial Notice, Ex. 6).

against California's tax laws and process. 14 AA 3257-3300; 32 AA 07974 (131); 52 AA 12837 (90). Through its affirmative defenses, trial memorandum and proposed jury instructions, FTB labored to keep the case within the jurisdictional confines authorized by *Hyatt I*. 14 AA 3437; 24 AA 5804-6000; 25 AA 6001-6145.

The district court disregarded those efforts, and in the 2014 Opinion, this Court deemed the district court's extra-jurisdictional conduct to be erroneous as to the jury's liability determinations but then, inexplicably, found those errors to be harmless.[6] 2014 Opinion, 335 P.3d at 146 n.14, 152-53. The waiver doctrine does not apply to jurisdictional issues, which can be raised any time. *Vaile v. Eighth Jud. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506, 516 (2002). In light of *Hyatt II's* mandate that Nevada treat FTB as Nevada treats its own tax collectors, FTB's arguments that Hyatt's fraud and IIED claims must be dismissed are simply in furtherance of the jurisdictional argument FTB has asserted all along.

[6] The gravity of the Court's "harmless error" finding is particularly acute in the context of Hyatt's administrative appeals to BOE. In his briefs to the BOE, Hyatt has already signaled a harbinger of what is to come by making approximately 2,000 allegations of "bad faith" conduct by FTB in the course of the BOE appeal. (Request for Judicial Notice, Ex. 6). Having successfully circumvented the audit and protest process in California through his Nevada tort case, Hyatt appears to be planning a second Nevada trial to challenge FTB's discretionary decisions in the SBE appeal. Because *Hyatt II* prohibits the Court from facilitating Hyatt's collateral attack on a sister-state's administrative process, should the Court remand, it should do so with instructions that Hyatt may not further supplement the pleadings.

In addition, in its earlier briefing to this Court, FTB focused on the argument that the then-new *Martinez* decision, which adopted the federal *Berkowitz-Gaubert* test for discretionary function immunity, rendered *Falline* obsolete. (AOB 34-36, *citing Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007)). To the extent FTB was immune from being sued in tort, Hyatt's IIED and fraud claims necessarily failed, as a matter of law. (AOB 38-52). The Court rejected FTB's argument and embraced *Falline* as continuing to be good law.[7] 2014 Opinion, 335 P.3d at 138-39. FTB could not have anticipated that in retaining *Falline*'s "bad faith" carve out, this Court would then stray from *Hyatt I*'s equal treatment mandate and apply *Falline* in a discriminatory fashion. *See* 2014 Opinion, 335 P.3d at 147-49.

Because FTB simply submits that the 2014 Opinion has numerous constitutional defects, the arguments in FTB's supplemental opening brief are consistent with all arguments that FTB made previously. *See Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (barring only theories raised on appeal that are inconsistent with arguments raised below); *see also Brown v. E. Side Nat. Bank of Wichita*, 411 P.2d 605, 609 (Kan. 1966) (holding that a party can "challenge a judgment on consistent alternative grounds without being charged

[7] FTB petitioned for certiorari on the issue of whether this Court properly interpreted the *Berkowitz-Gaubert* test. The Supreme Court's decision to deny certiorari on that issue did not address whether this Court applied the holding of *Falline* to FTB in a non-discriminatory manner.

with estoppel by admission or acquiescence"). The errors that FTB contests are of jurisdictional and constitutional dimension, which may be reviewed *sua sponte* whether or not they were preserved in earlier proceedings. *See Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (*citing Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991)). Once the 2014 Opinion was vacated as unconstitutional for its failure to afford FTB the protections of Nevada's damages cap, all similarly unconstitutional sister-state hostility became subject to challenge on remand and must now be rectified. *See Hyatt II*, 136 S.Ct. at 1282-83.

III. CONCLUSION.

Hyatt's answering brief does not dispute FTB's numerous examples of sister-state hostility in the 2014 Opinion. Instead, Hyatt urges this Court to ignore the Supreme Court's wide-reaching mandate and to enter a new judgment that would be inconsistent with the *Hyatt II* opinion. This is not permitted. Viewing this case as if FTB were Nevada's Department of Taxation, Hyatt's fraud and IIED claims should be dismissed as a matter of law.

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 2nd day of December, 2016.

McDONALD CARANO WILSON LLP

By: /s/
PAT LUNDVALL
DEBBIE LEONARD
RORY KAY
2300 W. Sahara Avenue, Ste. 1200
Las Vegas, Nevada 89102
(702) 873-4100 (Phone)

Attorneys for Appellant

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 6,993 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 2nd day of December, 2016.

McDONALD CARANO WILSON LLP

By: /s/_____
PAT LUNDVALL
DEBBIE LEONARD
RORY KAY
2300 W. Sahara Avenue, Ste. 1200
Las Vegas, Nevada 89102
(702) 873-4100 (Phone)

Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 2nd day of December, 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:

Peter Bernhard
Mark Hutchinson
Michael Wall
Daniel Polsenberg
Bruce J. Fort
Charles Wayne Howle
Clark Len Snelson

I further certify that on this date I served a copy, postage prepaid, by U.S. Mail to:

Donald J. Kula
Perkins Coie
18888 Century Park East, Suite 1700
Los Angeles, California 90067-1721

/s/ Pamela Miller
An employee of McDonald Carano Wilson, LLP

EXHS

Mark A. Hutchison (4639)
Hutchison & Steffen, PLLC
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
(702) 385-2500
mhutchison@hutchlegal.com

Peter C. Bernhard (734)
Kaempfer Crowell
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135
(702) 792-700
pbernhard@kcnvlaw.com

Attorneys for Plaintiff Gilbert P. Hyatt

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100 inclusive,

Defendants.

Case No. A382999
Dept. No. X

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

Plaintiff Gilbert P. Hyatt hereby submits Exhibits 83 to 94 to Plaintiff Gilbert P. Hyatt's

///

///

///

///

///

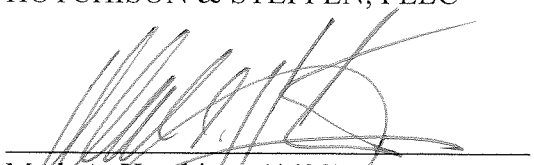
///

///

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.

Dated this 15th day of October, 2019.

HUTCHISON & STEFFEN, PLLC



Mark A. Hutchison (4639)
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145

Peter C. Bernhard (734)
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135

Attorneys for Plaintiff Gilbert P. Hyatt

EXHIBIT 83

133 Nev. 826
Supreme Court of Nevada.

FRANCHISE TAX BOARD OF the STATE OF CALIFORNIA, Appellant/Cross–Respondent,
v.
Gilbert P. HYATT, Respondent/Cross–Appellant.

No. 53264
|
FILED DECEMBER 26, 2017

Synopsis

Background: Taxpayer brought action against out-of-state Franchise Tax Board, alleging intentional torts and bad-faith conduct during audits. After years of litigation, including an appeal to the United States Supreme Court, 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, the Eighth Judicial District Court, Clark County, Jessie Elizabeth Walsh, J., entered judgment on a jury's verdict in favor of taxpayer and awarded damages. Board appealed and taxpayer cross-appealed. The Supreme Court, 335 P.3d 125, affirmed in part and reversed in part. Certiorari was granted, and the United States Supreme Court, 136 S.Ct. 1277, 194 L.Ed.2d 431, vacated and remanded.

Holdings: On remand, the Supreme Court, Hardesty, J., held that:

[1] Board was not entitled, under principles of comity, to discretionary-function immunity;

[2] taxpayer did not have objective expectation of privacy, as required to recover on invasion of privacy claims;

[3] no evidence supported jury's conclusion that Board portrayed taxpayer in false light;

[4] parties did not have type of relationship required to support claim for breach of confidential relationship;

[5] Board did not use any legal enforcement process, as required for an abuse of process claim;

[6] substantial evidence supported jury's conclusion that Board committed fraud; and

[7] Board was not completely immune from liability for fraud, but was entitled to statutory cap on damages.

Affirmed in part, reversed in part, and remanded.

West Headnotes (57)

[1] States
Relations Among States Under Constitution of United States

States
Torts

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general
360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112(1) In general

Out-of-state's Franchise Tax Board was not entitled, under principles of comity, to discretionary-function immunity from taxpayer's action alleging intentional torts and bad-faith conduct during audits; discretionary-function immunity under state law did not include intentional torts and bad-faith conduct, in-state government agency would not have received immunity, and thus extension of immunity to Board would have been contrary to policy. Cal. Gov't Code § 860.2; Nev. Rev. St. § 41.032(2).

1 Cases that cite this headnote

[2] Courts
Comity between courts of different states

States
Relations Among States Under Constitution of United States

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(C) Courts of Different States or Countries
106k511 Comity between courts of different states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

"Comity" is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state.

Cases that cite this headnote

[3] States

Relations Among States Under Constitution of United States

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

Whether to invoke comity is within the forum state's discretion.

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

When a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies.

Cases that cite this headnote

[5] Municipal Corporations

Discretionary powers and duties

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties

Discretionary-function immunity will apply if the government actions at issue (1) involve an element of individual judgment or choice, and (2) are based on considerations of social, economic, or political policy. Nev. Rev. St. § 41.032(2).

1 Cases that cite this headnote

[6] Municipal Corporations

Discretionary powers and duties

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties

If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-function exception to the waiver of sovereign immunity does not apply to the employee's action because the employee is not acting with individual judgment or choice. Nev. Rev. St. § 41.032(2).

Cases that cite this headnote

[7] Municipal Corporations

Discretionary powers and duties

Public Employment

Discretionary function immunity

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties
316P Public Employment
316PXI Liabilities
316PXI(A) In General
316Pk896 Privilege or Immunity; Good Faith
316Pk901 Discretionary function immunity

If a government employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test for the discretionary-function exception to the waiver of sovereign immunity requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis; even assuming the challenged conduct involves an element of judgment or choice, the court is required to determine whether that judgment or choice is of the kind that the discretionary function exception was designed to shield. Nev. Rev. St. § 41.032(2).

Cases that cite this headnote

[8] Municipal Corporations

Discretionary powers and duties

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties

If the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime, discretionary-function immunity will not bar the claim. Nev. Rev. St. § 41.032(2).

Cases that cite this headnote

[9] Municipal Corporations

Discretionary powers and duties

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties

Whether the government actions are based on considerations of social, economic, or political policy, as an element of the test for discretionary-function immunity, focuses on whether the conduct undertaken is a policy-making decision regardless of the government employee's subjective intent when he or she acted. Nev. Rev. St. § 41.032(2).

1 Cases that cite this headnote

[10] Municipal Corporations

Discretionary powers and duties

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 Discretionary powers and duties

Discretionary-function immunity 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. Nev. Rev. St. § 41.032(2).

3 Cases that cite this headnote

[11] Appeal and Error

De novo review

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)1 In General
30k3137 De novo review
(Formerly 30k893(1))

Questions of law are reviewed de novo.

Cases that cite this headnote

[12] Appeal and Error

Substantial Evidence

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3459 Substantial Evidence
30k3460 In general
(Formerly 30k1001(1))

A jury's verdict will be upheld if it is supported by substantial evidence.

Cases that cite this headnote

[13] Appeal and Error

Correctness or Error

30 Appeal and Error
30XVI Review
30XVI(F) Presumptions and Burdens on Review
30XVI(F)1 In General
30k3862 Correctness or Error
30k3863 In general

(Formerly 30k901)

An order or judgment will not be reversed unless error is affirmatively shown.

Cases that cite this headnote

[14] Torts

Types of invasions or wrongs recognized

379 Torts
379IV Privacy and Publicity
379IV(A) In General
379k329 Types of invasions or wrongs recognized

The tort of invasion of privacy embraces four different tort actions: (a) unreasonable intrusion upon the seclusion of another, (b) appropriation of the other's name or likeness, (c) unreasonable publicity given to the other's private life, or (d) publicity that unreasonably places the other in a false light before the public. Restatement (Second) of Torts § 652A.

2 Cases that cite this headnote

[15] Torts

Particular cases in general

Torts

Public interest, record, figures

Torts

Miscellaneous particular cases

Torts

Matters of Public Interest or Public Record; Newsworthiness

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k341 Particular cases in general
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k343 Public interest, record, figures
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k351 Miscellaneous particular cases
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record; Newsworthiness
379k357 In general

Taxpayer did not have objective expectation of privacy in name, address, and social security number, as required to recover on causes of action for intrusion upon seclusion and public disclosure of private facts against out-of-state Franchise Tax Board; information had been publicly disclosed on several occasions, before Board's disclosures occurred, in old court documents from taxpayer's divorce proceedings and in probate case, and taxpayer disclosed information himself when he made information available in various business license applications. Restatement (Second) of Torts §§ 652B, 652D.

Cases that cite this headnote

[16] Torts

Intrusion

Torts

Publications or Communications in General

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k340 In general
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k350 In general

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. Restatement (Second) of Torts §§ 652B, 652D.

1 Cases that cite this headnote

[17] Torts

Matters of Public Interest or Public Record; Newsworthiness

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k356 Matters of Public Interest or Public Record; Newsworthiness
379k357 In general

One defense to invasion of privacy torts, referred to as the "public records defense," arises when a defendant can show that the disclosed information is contained in a court's official records; such materials are public facts, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D.

Cases that cite this headnote

[18] Torts
Particular cases in general

Torts
Miscellaneous particular cases

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)2 Intrusion
379k341 Particular cases in general
379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k351 Miscellaneous particular cases

Taxpayer did not have objective expectation of privacy in his credit card number and his licensing contracts, as required to recover on causes of action for intrusion upon seclusion and public disclosure of private facts against out-of-state Franchise Tax Board; information was only disclosed to one or two third parties that already had information in their possession from prior dealings with taxpayer. Restatement (Second) of Torts §§ 652B, 652D.

1 Cases that cite this headnote

[19] Appeal and Error
Defects, objections, and amendments

30 Appeal and Error
30XII Briefs
30k766 Defects, objections, and amendments

Supreme Court would not consider whether out-of-state Franchise Tax Board violated taxpayer's privacy rights by looking through trash, looking at package on doorstep, or speaking with neighbors, postal carrier, and trash collector, where taxpayer did not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to Board's conduct.

Cases that cite this headnote

[20] Torts
False Light

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k352 False Light
379k353 In general

False light invasion of privacy is a valid cause of action.

1 Cases that cite this headnote

[21] Torts
Particular cases in general

379 Torts
379IV Privacy and Publicity
379IV(B) Privacy
379IV(B)3 Publications or Communications in General
379k352 False Light
379k354 Particular cases in general

No evidence supported jury's conclusion that out-of-state Franchise Tax Board portrayed taxpayer in false light, as required to recover on false light invasion of privacy claim, despite contention that Board's letters, neighborhood visits, and inclusion of case on Board's litigation roster suggested that taxpayer was a "tax cheat;" Board's contacts with third parties were not highly offensive to reasonable person, did not falsely portray taxpayer as "tax cheat," and were done to conduct its routine audit investigation.

1 Cases that cite this headnote

[22] States

Nature of Act or Claim

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(1) In general

Taxpayer and out-of-state Franchise Tax Board auditing him did not have type of relationship required to support claim for breach of confidential relationship; Board was not required to act with taxpayer's interests in mind in conducting audits, but rather had duty to proceed on behalf of state's interest, and relationship was not akin to family or business relationship.

Cases that cite this headnote

[23] Fraud

Fiduciary or confidential relations

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 Fiduciary or confidential relations

A breach of confidential relationship cause of action arises by reason of kinship or professional, business, or social relationships between the parties.

Cases that cite this headnote

[24] Process

Improper, ulterior, collateral, or unlawful purpose

Process

Overt act

313 Process
313IV Abuse of Process
313IV(A) In General
313k178 Improper, ulterior, collateral, or unlawful purpose
313 Process
313IV Abuse of Process
313IV(A) In General
313k180 Overt act

A successful abuse of process claim requires (1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.

Cases that cite this headnote

[25] Process

Nature and elements in general

313 Process
313IV Abuse of Process
313IV(A) In General
313k173 Nature and elements in general

A plaintiff claiming abuse of process must show that the defendant willfully and improperly used the legal process to accomplish an ulterior purpose other than resolving a legal dispute.

Cases that cite this headnote

[26] Process

Particular cases

313 Process
313IV Abuse of Process
313IV(A) In General
313k192 Particular cases

Out-of-state Franchise Tax Board did not use any legal enforcement process, such as filing court action, in relation to its demands for information or otherwise during audits of taxpayer, and therefore taxpayer could not meet requirements for establishing an abuse of process claim against Board.

Cases that cite this headnote

[27] Fraud

Elements of Actual Fraud

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 In general

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the

representation, and that the plaintiff had reason to rely on the representation and suffered damages.

2 Cases that cite this headnote

[28] Fraud

Questions for Jury

184 Fraud
184II Actions
184II(F) Trial
184k64 Questions for Jury
184k64(1) In general

It is the jury's role to make findings on the factors necessary to establish a fraud claim.

1 Cases that cite this headnote

[29] Appeal and Error

What constitutes substantial evidence

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)10 Sufficiency of Evidence
30k3459 Substantial Evidence
30k3463 What constitutes substantial evidence
(Formerly 30k1001(1))

"Substantial evidence," which will allow an appellate court to uphold a jury's verdict, is defined as evidence that a reasonable mind might accept as adequate to support a conclusion.

1 Cases that cite this headnote

[30] States

Nature of Act or Claim

360 States
360III Property, Contracts, and Liabilities
360k112 Torts
360k112.2 Nature of Act or Claim
360k112.2(1) In general

Substantial evidence supported jury's conclusion that out-of-state Franchise Tax Board committed fraud against taxpayer by representing that Board would provide courteous treatment and keep information confidential; Board disclosed taxpayer's social security number, home address, and fact that he was being audited to numerous people, former auditor testified that main auditor made disparaging comments and was intent on imposing assessment, and taxpayer testified that he would not have hired professionals to assist in audits had he known how he would be treated.

Cases that cite this headnote

[31] Appeal and Error

Evidence in General

Appeal and Error

Negligence and torts in general

30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)5 Evidence in General
30k4291 In general
(Formerly 30k1026)
30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)11 Instructions
30k4437 Particular Cases or Issues, Instructions Relating to
30k4439 Negligence and torts in general
(Formerly 30k1026)

Trial court's erroneous evidentiary rulings and jury instruction were harmless as to taxpayer's fraud claim against out-of-state Franchise Tax Board, where sufficient evidence of fraud existed for jury to find in taxpayer's favor on each required element for fraud.

Cases that cite this headnote

[32] States

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

States

Judgment and relief

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
360 States
360VI Actions
360k212 Judgment and relief

Out-of-state Franchise Tax Board was not completely immune from liability for taxpayer's

fraud action, but rather Board was entitled to statutory cap on damages of $50,000; complete immunity under out-of-state law was inconsistent with in-state law, but states' laws were consistent with regard to damages awards greater than $50,000. Cal. Gov't Code § 860.2; Nev. Rev. St. § 41.035(1) (1987).

Cases that cite this headnote

[33] Appeal and Error

Amount of recovery or extent of relief

30 Appeal and Error
30XVI Review
30XVI(L) Subsequent Review
30k4126 Determination on Prior Review, Effect on Subsequent Review
30k4130 Questions Concluded by Prior Determination
30k4130(9) Amount of recovery or extent of relief
(Formerly 30k1097(1))

Law-of-the-case doctrine did not apply to require statutory cap on fraud damages and immunity from punitive damages, based on Supreme Court's conclusions in earlier proceedings, where Court did not previously address issues and issues were different.

Cases that cite this headnote

[34] Municipal Corporations

Damages

States

Judgment and relief

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 Damages
360 States
360VI Actions
360k212 Judgment and relief

Statutory cap on liability damages in tort actions against a present or former officer of employee of the state or any political subdivision applies to prejudgment interest on damages. Nev. Rev. St. § 41.035(1).

Cases that cite this headnote

[35] Municipal Corporations

Damages

States

Costs

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 Damages
360 States
360VI Actions
360k215 Costs

The statutory cap on liability damages in tort actions against a present or former officer or employee of the state or any political subdivision does not include awards for attorney fees and costs. Nev. Rev. St. § 41.035(1).

Cases that cite this headnote

[36] Damages

Government; criminal justice

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.25 Particular Cases
115k57.25(2) Government; criminal justice

Evidence was sufficient for jury to determine that taxpayer suffered severe emotional distress during out-of-state Franchise Tax Board's audit, and thus evidence supported recovery on claim for intentional infliction of emotional distress; even though taxpayer did not present medical evidence of distress, Board's conduct in disclosing confidential information and delaying resolution, which cost taxpayer $8,000 per day in interest, was at more extreme end of sliding scale and required less evidence of physical injury, and taxpayer presented testimony from three people as to how Board's treatment physically affected him. Restatement (Second) of Torts § 46.

Cases that cite this headnote

[37] Damages
Elements in general

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage
115k57.21 Elements in general

To recover on a claim for intentional infliction of emotional distress, a plaintiff must prove: (1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation.

1 Cases that cite this headnote

[38] Damages
Mental suffering and emotional distress

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress

To recover on a claim for intentional infliction of emotional distress, a plaintiff must set forth objectively verifiable indicia to establish that the plaintiff actually suffered extreme or severe emotional distress.

1 Cases that cite this headnote

[39] Damages
Mental suffering and emotional distress

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 Mental suffering and emotional distress

Under the sliding-scale approach to proving a claim for intentional infliction of emotional distress, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered. Restatement (Second) of Torts § 46.

1 Cases that cite this headnote

[40] Appeal and Error
Instructions

Appeal and Error
Evidence and Witnesses in General

Appeal and Error
Admission or exclusion of evidence in general

30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)7 Trial
30k3348 Instructions
(Formerly 30k969)
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)8 Evidence and Witnesses in General
30k3361 In general
(Formerly 30k969)
30 Appeal and Error
30XVI Review
30XVI(D) Scope and Extent of Review
30XVI(D)8 Evidence and Witnesses in General
30k3364 Reception of Evidence
30k3366 Admission or exclusion of evidence in general
(Formerly 30k970(2))

The admissibility of evidence and the propriety of jury instructions are reviewed for an abuse of discretion.

Cases that cite this headnote

[41] Damages
Mental suffering and emotional distress

115 Damages
115IX Evidence
115k164 Admissibility
115k178 Mental suffering and emotional distress

Evidence challenging various aspects of fraud penalties assessed by out-of-state Franchise Tax Board violated restriction against considering audits' conclusions, and thus evidence was inadmissible in taxpayer's action against Board for intentional infliction of emotional distress; testimony went to audits' determinations and had no utility in showing any intentional torts unless it was first concluded that audits' determinations were incorrect.

Cases that cite this headnote

[42] Trial

Exclusion of evidence from consideration

Trial

Nature of action or issue in general

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k208 Exclusion of evidence from consideration
388 Trial
388VII Instructions to Jury
388VII(D) Applicability to Pleadings and Evidence
388k253 Instructions Excluding or Ignoring Issues, Defenses, or Evidence
388k253(6) Excluding or Ignoring Facts or Evidence
388k253(8) Nature of action or issue in general

Jury instruction that allowed jury to consider "appropriateness or correctness of the analysis conducted by" out-of-state Franchise Tax Board employees in reaching its conclusion on taxpayer's audits improperly violated jurisdictional limit that district court imposed on case that precluded consideration of audits' determinations, even though court instructed jury before trial and at various times during trial that jury was not to consider whether audits' conclusions were correct.

Cases that cite this headnote

[43] Evidence

Suppression or spoliation of evidence

Trial

In general; grounds for admission

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence
388 Trial
388IV Reception of Evidence
388IV(B) Order of Proof, Rebuttal, and Reopening Case
388k62 Evidence in Rebuttal
388k62(1) In general; grounds for admission

Out-of-state Franchise Tax Board should have been permitted, in taxpayer's action for intentional infliction of emotional distress, to explain steps that it took to collect relevant emails to demonstrate that none of the destroyed information was damaging, despite contention that Board's evidence was actually attempt to reargue spoliation issue that led to trial court giving adverse inference jury instruction; court had concluded that Board's conduct was negligent, and court excluded evidence Board sought to admit to rebut adverse inference, which could have been used to explain why nothing harmful was destroyed.

Cases that cite this headnote

[44] Evidence

Suppression or spoliation of evidence

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence

An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party.

Cases that cite this headnote

[45] Evidence

Suppression or spoliation of evidence

Evidence

Rebuttal of presumptions of fact

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence
157 Evidence
157II Presumptions

157k89 Rebuttal of presumptions of fact

Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable; if the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. Nev. Rev. St. § 47.250(3).

Cases that cite this headnote

[46] Evidence

Suppression or spoliation of evidence

157 Evidence
157II Presumptions
157k74 Evidence Withheld or Falsified
157k78 Suppression or spoliation of evidence

A lesser adverse inference that does not shift the burden of proof to the spoliating party is permissible; the lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. Nev. Rev. St. § 47.250(3).

Cases that cite this headnote

[47] Evidence

Tendency to mislead or confuse

157 Evidence
157IV Admissibility in General
157IV(D) Materiality
157k146 Tendency to mislead or confuse

Probative value of evidence regarding taxpayer's loss of patent and his federal tax audit was not substantially outweighed by danger of unfair prejudice in taxpayer's action against out-of-state Franchise Tax Board for intentional infliction of emotional distress during audit; even though evidence may have been prejudicial, probative value of evidence as to taxpayer's claim, in particular in regard to damages caused by Board as opposed to other events in his life, was more probative than unfairly prejudicial. Nev. Rev. St. § 48.035(1).

Cases that cite this headnote

[48] Appeal and Error

Evidence in General

Appeal and Error

Negligence and torts in general

Appeal and Error

Damages and amount of recovery

30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)5 Evidence in General
30k4291 In general
(Formerly 30k1047(1))
30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)11 Instructions
30k4437 Particular Cases or Issues, Instructions Relating to
30k4439 Negligence and torts in general
(Formerly 30k1064.1(8))
30 Appeal and Error
30XVII Harmless and Reversible Error
30XVII(B) Particular Errors
30XVII(B)11 Instructions
30k4452 Relation Between Error and Final Outcome or Result
30k4455 Damages and amount of recovery
(Formerly 30k1047(1))

Trial court's erroneous evidentiary decisions and jury instruction were harmless as to taxpayer's claim for intentional infliction of emotional distress against out-of-state Franchise Tax Board; Board's conduct in disclosing confidential information and delaying resolution, which cost $8,000 per day in interest, was at more extreme end of sliding scale and required less evidence to prove claim, and facts supported damages award up to statutory damages cap. Nev. Rev. St. § 41.035(1).

Cases that cite this headnote

[49] States

Costs

360 States
360VI Actions
360k215 Costs

Out-of-state Franchise Tax Board was immune, under principles of comity, from punitive damages in taxpayer's action alleging intentional torts and bad-faith conduct during audits; in-

state and out-of-state statutes precluded punitive damages for their respective government entities, and in-state statute generally allowing punitive damages did not explicitly authorize such damages against government entities. Cal. Gov't Code § 818; Nev. Rev. St. §§ 41.035(1), 42.005.

Cases that cite this headnote

[50] Damages

Nature and Theory of Damages Additional to Compensation

115 Damages
115V Exemplary Damages
115k87 Nature and Theory of Damages Additional to Compensation
115k87(1) In general

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries.

Cases that cite this headnote

[51] Municipal Corporations

Damages

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k743 Damages

The general rule is that no punitive damages are allowed against a government entity unless expressly authorized by statute.

Cases that cite this headnote

[52] States

Costs

360 States
360VI Actions
360k215 Costs

Taxpayer, following jury verdict in his tort action against out-of-state Franchise Tax Board, was allowed to supplement his request for costs to provide additional documentation, despite five-day time limit for filing memorandum for costs, where time limit was not jurisdictional, and statute specifically allowed for further time as allowed. Nev. Rev. St. § 18.110.

Cases that cite this headnote

[53] Costs

Objections and exceptions

States

Judgment and relief

102 Costs
102IX Taxation
102k219 Objections and exceptions
360 States
360VI Actions
360k212 Judgment and relief

Out-of-state Franchise Tax Board should have been allowed to challenge special master's recommendation on taxpayer's claim for costs, after jury verdict for taxpayer in his tort action against Board; even though there was jury trial, costs issue was not placed before jury, and thus any party was allowed to serve written objections to master's report. Nev. R. Civ. P. 53(e)(2, 3).

Cases that cite this headnote

[54] Damages

Weight and Sufficiency

Evidence

Damages

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k184 In general
157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(10) Damages

Evidence was too speculative to support claim to economic damages, resulting from out-of-state Franchise Tax Board contacting foreign companies that allegedly led to other foreign companies refusing to do business with taxpayer because of investigation; expert testimony detailed what might have happened based on foreign business culture, but no evidence established that any hypothetical steps actually

occurred or that other businesses were contacted regarding investigation.

1 Cases that cite this headnote

[55] Damages
Weight and Sufficiency

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k184 In general

Damages cannot be based solely upon possibilities and speculative testimony; this is true regardless of whether the testimony comes from the mouth of a lay witness or an expert.

Cases that cite this headnote

[56] Evidence
Circumstantial evidence

157 Evidence
157XIV Weight and Sufficiency
157k587 Circumstantial evidence

When circumstantial evidence is used to prove a fact, the circumstances must be proved, and not themselves be presumed.

Cases that cite this headnote

[57] Evidence
Grounds

157 Evidence
157II Presumptions
157k54 Grounds

A party cannot use one inference to support another inference, but rather, only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof; thus, a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed.

Cases that cite this headnote

****723** Appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and from a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Attorneys and Law Firms

McDonald Carano Wilson LLP and Pat Lundvall, Debbie Leonard, Rory T. Kay, Carla Higginbotham, and Megan L. Starich, Reno; Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno, for Appellant/Cross–Respondent.

Hutchison & Steffen, LLC, and Mark A. Hutchison and Michael K. Wall, Las Vegas; Kaempfer Crowell and Peter C. Bernhard, Las Vegas; Lewis Roca Rothgerber Christie LLP and Daniel F. Polsenberg, Las Vegas; Perkins Coie LLP and Donald J. Kula, Los Angeles, California, for Respondent/Cross–Appellant.

Adam Paul Laxalt, Attorney General, and Lawrence J. VanDyke, Solicitor General, Carson City, for Amicus Curiae State of Nevada.

Dustin McDaniel, Attorney General, Little Rock, Arkansas, for Amicus Curiae State of Arkansas.

John V. Suthers, Attorney General, Denver, Colorado, for Amicus Curiae State of Colorado.

Joseph R. "Beau" Biden III, Attorney General, and Richard S. Gebelein, Chief Deputy Attorney General, Wilmington, Delaware, for Amicus Curiae State of Delaware.

Bill McCollum, Attorney General, Tallahassee, Florida, for Amicus Curiae State of Florida.

Lawrence G. Wasden, Attorney General, Boise, Idaho, for Amicus Curiae State of Idaho.

Shone T. Pierre, Baton Rouge, Louisiana, for Amici Curiae Louisiana Secretary and the Louisiana Department of Revenue.

Janet T. Mills, Attorney General, Augusta, Maine, for Amicus Curiae State of Maine.

Douglas F. Gansler, Attorney General, Baltimore, Maryland, for Amicus Curiae State of Maryland.

Chris Koster, Attorney General, Jefferson City, Missouri, for Amicus Curiae State of Missouri.

Anne Milgram, Attorney General, Trenton, New Jersey, for Amicus Curiae State of New Jersey.

Donnita A. Wald, General Counsel, Bismarck, North Dakota, for Amicus Curiae North Dakota State Tax Commissioner Cory Fong.

Richard Cordray, Attorney General, Columbus, Ohio, for Amicus Curiae State of Ohio.

W.A. Drew Edmondson, Attorney General, Oklahoma City, Oklahoma, for Amicus Curiae State of Oklahoma.

Robert E. Cooper, Jr., Attorney General and Reporter, Nashville, Tennessee, for Amicus Curiae State of Tennessee.

John Swallow, Attorney General, and Clark L. Snelson, Assistant Attorney General, Salt Lake City, Utah, for Amicus Curiae State of Utah.

William H. Sorrell, Attorney General, Montpelier, Vermont, for Amicus Curiae State of Vermont.

William C. Mims, Attorney General, Richmond, Virginia, for Amicus Curiae State of Virginia.

Robert M. McKenna, Attorney General, Olympia, Washington, for Amicus Curiae State of Washington.

Shirley Sicilian, General Counsel, and Bruce J. Fort, Washington, D.C., for Amicus Curiae Multistate Tax Commission.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, J.:

****724** ***828** This matter is before us on remand from the United States Supreme Court. We previously issued an opinion in this matter concluding, in part, that appellant Franchise Tax Board of the State of California (FTB) was not entitled to the statutory cap on damages a similarly situated Nevada agency would be entitled to under similar circumstances. *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. ——, 335 P.3d 125, 131 (2014), *vacated,* —— U.S. ——, 136 S.Ct. 1277, 194 L.Ed.2d 431 (2016). FTB petitioned the United States Supreme Court for certiorari. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II),* —— U.S. ——, 136 S.Ct. 1277, 1280, 194 L.Ed.2d 431 (2016). The Court agreed to decide two questions. *Id.* The first question was whether to overrule *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), and its holding, "that one State ... can open the doors of its courts to a private citizen's lawsuit against another State ... without the other State's consent." *Hyatt II,* —— U.S. ——, 136 S.Ct. at 1279–80. The Court split 4–4 on the *Hall* question and thus affirmed our "exercise of jurisdiction over California's state agency." *Id.* at ——, 136 S.Ct. at 1281.

The second question was "[w]hether 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." *Id.* The Court held that it does not and that this court's "special rule of law" that FTB was not entitled to a damages cap that a Nevada agency would be entitled to "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.* (internal quotation marks omitted). The Court thus granted FTB's certiorari petition, vacated our decision, and remanded the case back to us for further consideration in light of its decision. *Id.* at ——, 136 S.Ct. at 1283. In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II.* [1]

[1] We previously issued an opinion on September 14, 2017, but withdrew that opinion on rehearing to correct an error regarding the availability of prejudgment interest under the statutory damages cap.

In 1998, inventor Gilbert P. Hyatt sued FTB seeking damages for intentional torts and bad-faith conduct committed by FTB auditors during tax audits of Hyatt's 1991 and 1992 state tax returns. After years of litigation, a jury awarded Hyatt $139 million in damages on his tort claims and $250 million in punitive damages. In this appeal, we must determine, among other issues, whether we should revisit our exception to government immunity for intentional torts and bad-faith ***829** conduct as a result of this court's adoption of the federal test for discretionary-function immunity, which shields a government entity or its employees from suit for discretionary acts that involve an element of individual judgment or choice and that are grounded in public policy considerations. We hold that our exception to immunity for intentional torts and bad-faith conduct survives our adoption of the federal discretionary-function immunity test because intentional torts and bad-faith conduct are not based on public policy.

Because FTB cannot invoke discretionary-function immunity to protect itself from Hyatt's intentional tort and bad-faith causes of action, we must determine whether Hyatt's claims for invasion of privacy, breach of confidential relationship, abuse of process, fraud and intentional infliction of emotional distress survive as a matter of law, and if so, whether they are supported by substantial evidence. All of Hyatt's causes of action, except for his fraud and intentional infliction of emotion distress claims, fail as a matter of law, and thus, the judgment in his favor on these claims is reversed.

As to the fraud cause of action, sufficient evidence exists to support the jury's findings that FTB made false representations to Hyatt regarding the audits' processes and that Hyatt relied on those representations to his detriment and damages resulted. In regard to Hyatt's claim for intentional infliction ****725** of emotional distress, we conclude that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe. As a result, substantial evidence supports the jury's findings as to liability and an award of damages up to the amount of Nevada's statutory cap.

In connection with these causes of action, and in light of the Supreme Court's opinion in *Hyatt II,* we must address FTB's entitlement to the statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that, in accordance with *Hyatt II,* FTB is entitled to the $50,000 statutory cap on damages a similarly situated Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035(1) (1987).[2] We therefore reverse the $85 million of damages awarded to Hyatt on the fraud claim and the $1,085,281.56 of special damages awarded to Hyatt on the intentional infliction of emotional distress claim and conclude that FTB is entitled to the $50,000 statutory cap on Hyatt's fraud claim and intentional infliction of emotional distress claim.

2 The version of the statute in effect at the time Hyatt incurred his damages provided a statutory cap on damages awarded in a tort action against a state agency "not [to] exceed the sum of $50,000." *See* NRS 41.035(1) (1987).

We also take this opportunity to address as a matter of first impression whether, based on comity, it is reasonable to provide FTB with the same protection of California law, to the extent that it does ***830** not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

For the reasons discussed below, we affirm in part, reverse in part, and remand this case to the district court with instructions.

FACTS AND PROCEDURAL HISTORY

California proceedings

In 1993, after reading a newspaper article regarding respondent/cross-appellant Hyatt's lucrative computer-chip patent and the large sums of money that Hyatt was making from the patent, a tax auditor for appellant/cross-respondent FTB decided to review Hyatt's 1991 state income tax return. The return revealed that Hyatt did not report, as taxable income, the money that he had earned from the patent's licensing payments and that he had only reported 3.5 percent of his total taxable income for 1991. Hyatt's tax return showed that he had lived in California for nine months in 1991 before relocating to Las Vegas, Nevada, but Hyatt claimed no moving expenses on his 1991 tax return. Based on these discrepancies, FTB opened an audit on Hyatt's 1991 state income tax return.

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to provide certain information concerning his connections to California and Nevada and the facts surrounding his move to Nevada. A portion of the information request form contained a privacy notice, which stated in relevant part that "The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California." Also included with the notification was a document containing a list of what the taxpayer could expect from FTB: "Courteous treatment by FTB employees[,] Clear and concise requests for information from the auditor assigned to your case[,] Confidential treatment of any personal and financial information that you provide to us[,] Completion of the audit within a reasonable amount of time[.]"

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese ***831** companies that held licenses to ****726** Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were estranged from Hyatt during the relevant period in question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

The 1991 audit's finding that Hyatt did not move to Las Vegas until April 1992 prompted FTB to commence a second audit of Hyatt's 1992 California state taxes. Because he maintained that he lived in Nevada that tax year, Hyatt did not file a California tax return for 1992, and he opposed the audit. Relying in large part on the 1991 audit's findings and a single request for information sent to Hyatt regarding patent-licensing payments received in 1992, FTB found that Hyatt owed the state of California over $6 million in taxes and interest for 1992. Moreover, penalties similar to those imposed by the 1991 audit were later assessed.

Hyatt formally challenged the audits' conclusions by filing two protests with FTB that were handled concurrently. Under a protest, ***832** an audit is reviewed by FTB for accuracy, or the need for any changes, or both. The protests lasted over 11 years and involved 3 different FTB auditors. In the end, the protests upheld the audits, and Hyatt went on to challenge them in the California courts. [3]

[3] At the time of this appeal, Hyatt was still challenging the audits' conclusions in California courts.

Nevada litigation

During the protests, Hyatt filed the underlying Nevada lawsuit in January 1998. His complaint included a claim for declaratory relief concerning the timing of his move from California to Nevada and a claim for negligence. The complaint also identified seven intentional tort causes of action allegedly committed by FTB during the 1991 and 1992 audits: invasion of privacy—intrusion upon seclusion, invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against Hyatt were intended "to ****727** better bargain for and position the case to settle."

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district court granted FTB partial summary judgment. [4] As a result of the district court's ruling, the parties were required to litigate the action under the restraint that any determinations

as to the audits' accuracy were not part of Hyatt's tort action and the jury would not make any findings as to when Hyatt moved to Nevada or whether the audits' conclusions were correct.

4 That ruling was not challenged in this court, and consequently, it is not part of this appeal.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between ***833** Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hyatt's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ petitions filed by FTB in this court in 2000. In those petitions, FTB sought immunity from the entire underlying Nevada lawsuit, arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the full faith and credit clause, or comity. This court resolved the petitions together in an unpublished order in which we concluded that FTB was not entitled to full immunity under any of these principles. But we did determine that, under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive. In light of that ruling, this court held that FTB was immune from Hyatt's negligence cause of action, but not from his intentional tort causes of action. The court concluded that while Nevada provided immunity for discretionary decisions made by government agencies, such immunity did not apply to intentional torts or bad-faith conduct because to allow it to do so would "contravene Nevada's policies and interests in this case."

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). In *Hyatt,* the Supreme Court focused on the issue of whether the Full Faith and Credit Clause of the federal constitution required Nevada to afford FTB the benefit of the full immunity that California provides FTB. *Id.* at 494, 123 S.Ct. 1683. The Court upheld this court's determination that Nevada was not required to give FTB full immunity. *Id.* at 499, 123 S.Ct. 1683. The Court further upheld this court's conclusion that FTB was entitled to partial immunity ****728** under ***834** comity principles, observing that this 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.* The Supreme Court's ruling affirmed this court's limitation of Hyatt's case against FTB to the intentional tort causes of action.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Hyatt was also awarded prejudgment interest on the awarded damages for emotional distress, invasion of privacy, and fraud. Following the trial, Hyatt moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded approximately $2.5 million in costs. The district court adopted the master's recommendation.

FTB appeals from the district court's final judgment and the post-judgment award of costs. Hyatt cross-appeals, challenging the district court's partial summary judgment ruling that he could not seek, as part of his damages at trial,

economic damages for the alleged destruction of his patent-licensing business in Japan. [5]

5 This court granted permission for the Multistate Tax Commission and the state of Utah, which was joined by other states (Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and Washington), to file amicus curiae briefs.

DISCUSSION

We begin by addressing FTB's appeal, which raises numerous issues that it argues entitle it to either judgment as a matter of law in its favor or remand for a new trial. As a threshold matter, we address discretionary-function immunity and whether Hyatt's causes of action against FTB are barred by this immunity, or whether there is an exception to the immunity for intentional torts and bad-faith conduct. Deciding that FTB is not immune from suit, we then consider FTB's arguments as to each of Hyatt's intentional tort causes of action. We conclude our consideration of FTB's appeal by discussing Nevada's statutory caps on damages and immunity from punitive damages. As for Hyatt's cross-appeal, we close this opinion by considering his challenge to the district court's partial summary judgment in FTB's favor on Hyatt's damages claim for economic loss.

***835** *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*

[1] Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State ... or of any ... employee ..., whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States*, 623 F.3d 855, 860 (9th Cir. 2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application of discretionary-function immunity and comity as recognized in Nevada.

****729** **[2]** **[3]** **[4]** Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424–25 (1983); *see also Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 129 Ill.2d 372, 135 Ill.Dec. 787, 544 N.E.2d 283, 285 (1989); *McDonnell v. Ill.*, 163 N.J. 298, 748 A.2d 1105, 1107 (2000); *Sam v. Estate of Sam*, 139 N.M. 474, 134 P.3d 761, 764–66 (2006); *Hansen v. Scott*, 687 N.W.2d 247, 250, 250 (N.D. 2004). The purpose behind comity is to "foster cooperation, promote harmony, and build good will" between states. *Hansen*, 687 N.W.2d at 250 (internal quotations omitted). But whether to invoke comity is within the forum state's discretion. *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies. *Id.* at 98, 658 P.2d at 424–25. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. Cal. Gov't Code § 860.2 (West 2012). FTB contends that it should receive the immunity ***836** protection provided by California statutes to the extent that such immunity does not violate Nevada's public policies under comity.

Discretionary-function immunity in Nevada

[5] This court's treatment of discretionary-function immunity has changed over time. In the past, we applied different tests to determine whether to grant a government entity or its employee discretionary-function immunity. *See, e.g., Arnesano v. State ex rel. Dep't of Transp.*, 113 Nev. 815, 823–24, 942 P.2d 139, 144–45 (1997) (applying planning-versus-operational test to government action), *abrogated by Martinez*, 123 Nev. at 443–44, 168 P.3d at 726–27; *State v. Silva*, 86 Nev. 911, 913–14, 478 P.2d 591, 592–93 (1970) (applying discretionary-versus-ministerial test to government conduct), *abrogated by Martinez*, 123 Nev. at

443–44, 168 P.3d at 726–27. We also recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009 & n.3, 823 P.2d 888, 892 & n.3 (1991) (plurality opinion). More recently, we adopted the federal two-part test for determining the applicability of discretionary-function immunity. *Martinez*, 123 Nev. at 444–47, 168 P.3d at 727–29 (adopting test named after two United States Supreme Court decisions: *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988), and *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991)). Under the *Berkovitz–Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." *Martinez,* 123 Nev. at 446–47, 168 P.3d at 729. When this court adopted the federal test in *Martinez,* we expressly dispensed with the earlier tests used by this court to determine whether to grant a government entity or its employee immunity, *id*. at 444, 168 P.3d at 727, but we did not address the *Falline* exception to immunity for intentional torts or bad-faith misconduct.

In the earlier writ petitions filed by FTB in this court, we relied on *Falline* to determine that FTB was entitled to immunity from Hyatt's negligence cause of action, but not the remaining intentional-tort-based causes of action. Because the law concerning the application of discretionary-function immunity has changed in Nevada since FTB's writ petitions were resolved, we revisit the application of discretionary-function immunity to FTB in the present case as it relates to Hyatt's intentional tort causes of action. *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (stating that "the 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" (internal quotations omitted)).

***837** FTB contends that when this court adopted the federal test in *Martinez*, it impliedly overruled the *Falline* exception to discretionary-function ****730** immunity for intentional torts and bad-faith misconduct. 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.

In *Falline*, 107 Nev. at 1009, 823 P.2d at 891–92, this court ruled that the discretionary-function immunity under NRS 41.032(2) did not apply to bad-faith misconduct. The case involved negligent processing of a worker's compensation claim. Falline injured his back at work and later required surgery. *Falline*, 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006–07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide worker's compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to worker's compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his worker's compensation claims. *Id.* at 1006, 823 P.2d at 889–90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

On appeal, after concluding that a self-insured employer should be treated the same as the State Industrial Insurance System, this court concluded that Falline could maintain a lawsuit against the self-insured employer based on negligent handling of his claims. *Id.* at 1007–09, 823 P.2d at 890–92. In discussing its holding, the court addressed discretionary immunity and explained that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Id.* at 1009, 823 P.2d at 891. The court reasoned that the insurer did not have discretion to act in bad faith, and therefore, discretionary-function immunity did not apply to protect the insurer from suit. *Id.* at 1009, 823 P.2d at 891–92.

The *Falline* court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." *Falline,* 107 Nev. at 1009 n.3, 823 P.2d at 892 n.3. The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith "involves an implemented attitude that completely transcends the ***838** circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

[6] **[7]** **[8]** **[9]** Following *Falline*, this court adopted, in *Martinez,* the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first

step is to determine whether the government conduct involves judgment or choice. *Id.* at 446–47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert*, 499 U.S. at 322, 111 S.Ct. 1267. On the other hand, if an employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test's second step requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis. *Martinez,* 123 Nev. at 445–46, 168 P.3d at 729; *Gaubert,* 499 U.S. at 324, 111 S.Ct. 1267. "[E]ven assuming the challenged conduct involves an element of judgment [or choice]," the second step requires the court to determine "whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322–23, 111 S.Ct. 1267. If "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory ****731** regime," discretionary-function immunity will not bar the claim. *Id.* at 324–25, 111 S.Ct. 1267. The second step focuses on whether the conduct undertaken is a policy-making decision regardless of the employee's subjective intent when he or she acted. *Martinez*, 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an intentional or bad-faith tort will not meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

Other courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjective intent to apply broadly or is limited to determining if the decision is a policy-making decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135 (10th Cir. 1999); *see also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). But other courts focus on whether the employee's conduct can be ***839** viewed as a policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006); *Palay v. United States*, 349 F.3d 418, 431–32 (7th Cir. 2003); *Coulthurst v. United States,* 214 F.3d 106, 109 (2d Cir. 2000).[6] These courts bar the application of discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is "unrelated to any plausible policy objective[ ]." *Coulthurst*, 214 F.3d at 111. A closer look at these courts' decisions is useful for our analysis.

6 *Coulthurst* is affirmatively cited by the Seventh Circuit Court of Appeals in *Palay v. United States*, 349 F.3d 418, 431–32 (7th Cir, 2003). Although the Seventh Circuit in *Reynolds*, 549 F.3d at 1112, stated the proposition that claims of malicious and bad-faith conduct were not relevant in determining discretionary immunity because the courts do not look at subjective intent, the *Palay* court specifically held that discretionary immunity can be avoided if the actions were the result of laziness or carelessness because such actions are not policy-based decisions. *Palay*, 349 F.3d at 431–32. *Reynolds* was published after *Palay*, and while it cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay.*

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee's subjective intent

In *Franklin Savings Corp. v. United States*, 180 F.3d at 1127, 1134–42, the Tenth Circuit Court of Appeals addressed the specific issue of whether a claim for bad faith precludes the application of discretionary-function immunity. In that case, following the determination that the Franklin Savings Association was not safe or sound to conduct business, a conservator was appointed. *Id.* at 1127. Thereafter, plaintiffs Franklin Savings Association and its parent company filed suit against defendants United States government and the conservator to have the conservatorship removed. *Id.* Plaintiffs alleged that the conservator intentionally and in bad faith liquidated the company instead of preserving the company and eventually returning it to plaintiffs to transact business. *Id.* at 1128.

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was

intentionally done to achieve an improper purpose—to deplete capital and retroactively exculpate the conservator's appointment. *Id.* at 1134. Thus, the court focused on the second part of the federal test. In considering whether the alleged intentional misconduct barred the application of discretionary-function immunity under the federal test, the *Franklin Savings* court first noted that the United States Supreme Court had "repeatedly insisted ... that ***840** [tort] claims are not vehicles to second-guess policymaking." *Id.* The court further observed that the Supreme Court's modification to *Berkovitz,* in *Gaubert*, to include a ****732** query of whether the nature of the challenged conduct was "susceptible to policy analysis[,] ... served to emphasize that courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions." *Id.* at 1135 (internal quotations omitted). The *Franklin Savings* court ultimately concluded that discretionary-function immunity attaches to bar claims that "depend[ ] on an employee's bad faith or state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140–41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141–42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim was not sufficient to overcome discretionary-function immunity's application.

Courts that consider whether an employee subjectively intended to further policy by his or her conduct

Other courts have come to a different conclusion. Most significant is *Coulthurst v. United States,* 214 F.3d 106, in which the Second Circuit Court of Appeals addressed the issue of whether the inspection of weightlifting equipment by prison officials was grounded in policy considerations. In *Coulthurst*, an inmate in a federal prison was injured while using the prison's exercise equipment. *Id.* at 107. The inmate filed suit against the United States government, alleging " 'negligence and carelessness' " and a " 'fail[ure] to diligently and periodically inspect' " the exercise equipment. *Id.* at 108. The lower court dismissed the complaint, reasoning that the decisions that established the procedures and timing for inspection involved "elements of judgment or choice and a balancing of policy considerations," such that discretionary-function immunity attached to bar liability. *Id.* at 109. Coulthurst appealed.

***841** In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean different types of negligent or careless conduct. *Id.* The court explained that the complaint asserting negligence or carelessness could legitimately be read to refer to how frequently inspections should occur, which might fall under discretionary-function immunity. *Id.* But the same complaint, the court noted, could also be read to assert negligence and carelessness in the failure to carry out prescribed responsibilities, such as prison officials failing to inspect the equipment out of laziness, haste, or inattentiveness. *Id.* Under the latter reading, the court stated that

> the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the repairs or deal with the paperwork involved in reporting the damage.

Id. The court concluded that such conduct did not involve an element of judgment or choice nor was it based on policy considerations, and in such an instance, discretionary-function immunity does not attach to shield the government from suit. *Id.* at 109–11. In the end, the *Coulthurst* court held that the inmate's complaint sufficiently alleged conduct by prison officials that was not immunized by the discretionary-function immunity exception, and the court vacated the lower court's dismissal and remanded the case for further proceedings. *Id.*

[10] The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the ****733** statement in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred ..., but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325, 111 S.Ct. 1267. *Franklin Savings* interpreted this requirement expansively to preclude any consideration of whether an actor's conduct was done maliciously or in bad faith, whereas *Coulthurst* applied a narrower view of subjective intent, concluding that a complaint alleging a nondiscretionary decision that caused the injury was not grounded in public policy. Our approach in *Falline* concerning immunity for bad-faith conduct is consistent with the reasoning in *Coulthurst* that intentional torts and bad-faith conduct are acts "unrelated to any plausible policy objective[ ]" and that such acts do not involve the kind of judgment that is intended to be shielded from "judicial second-guessing." 214 F.3d at 111 (internal quotations omitted). We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government employee for intentional ***842** torts or bad-faith misconduct, as such misconduct, "by definition, [cannot] be within the actor's discretion." *Falline*, 107 Nev. at 1009, 823 P.2d at 891–92.

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt's claims. Because we conclude that discretionary-function immunity under NRS 41.032 does not include intentional torts and bad-faith conduct, a Nevada government agency would not receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

Hyatt's intentional tort causes of action

Given that FTB may not invoke immunity, we turn next to FTB's various arguments contesting the judgment in favor of Hyatt on each of his causes of action.[7] Hyatt brought three invasion of privacy causes of action—intrusion upon seclusion, publicity of private facts, and false light—and additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. We discuss each of these causes of action below.

7 We reject Hyatt's contention that this court previously determined that each of his causes of action were valid as a matter of law based on the facts of the case in resolving the prior writ petitions. To the contrary, this court limited its holding to whether FTB was entitled to immunity, and thus, we did not address the merits of Hyatt's claims.

[11] **[12]** **[13]** This court reviews questions of law de novo. *Martinez*, 123 Nev. at 438, 168 P.3d at 724. A jury's verdict will be upheld if it is supported by substantial evidence. *Prabhu v. Levine,* 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, we "will not reverse an order or judgment unless error is affirmatively shown." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Invasion of privacy causes of action

[14] The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion upon the seclusion of another; or (b) appropriation of the other's name or likeness; or (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977) (citations omitted); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). At issue in this appeal are the intrusion, disclosure, and false light aspects of the invasion of privacy tort. The jury ***843** found in Hyatt's favor on those claims and awarded him $52 million for invasion of privacy damages. Because the parties' arguments regarding intrusion and disclosure overlap, we discuss those privacy torts together, and we follow that discussion by addressing the false light invasion of privacy tort.

Intrusion upon seclusion and public disclosure of private facts

[15] On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number ****734** to various individuals and entities. FTB contends that Hyatt's claims fail because the information disclosed had been disseminated in prior public records, and thus, could not form the basis of an invasion of privacy claim.

[16] **[17]** Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. *PETA,* 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiff's expectation

of privacy must be objectively reasonable); *Montesano v. Donrey Media Grp.,* 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts §§ 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano,* 99 Nev. at 649, 668 P.2d at 1085. Such materials are public facts, *id.,* and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

[18] This court has never limited the application of the public records defense based on the length of time between the public disclosure and the alleged invasion of privacy. In fact, in *Montesano*, 99 Nev. 644, 668 P.2d 1081, we addressed disclosed information contained in a public record from 20 years before the disclosure at issue there ***844** and held that the protection still applied. Therefore, under the public records defense, as delineated in *Montesano*, Hyatt is precluded from recovering for invasion of privacy based on the disclosure of his name, address, and social security number, as the information was already publicly available, and he thus lacked an objective expectation of privacy in the information. [8]

8 Beyond his name, address, and social security number, Hyatt also alleged improper disclosures related to the publication of his credit card number on one occasion and his licensing contracts on another occasion. But this information was only disclosed to one or two third parties, and it was information that the third parties already had in their possession from prior dealings with Hyatt. Thus, we likewise conclude that Hyatt lacked an objective expectation of privacy as a matter of law. *PETA,* 111 Nev. at 631, 895 P.2d at 1279; *Montesano*, 99 Nev. at 649, 668 P.2d at 1084.

[19] Because Hyatt cannot meet the necessary requirements to establish his invasion of privacy causes of action for intrusion upon seclusion and public disclosure of private facts, we reverse the district court's judgment based on the jury verdict as to these causes of action. [9]

9 Hyatt also argues that FTB violated his right to privacy when its agents looked through his trash, looked at a package on his doorstep, and spoke with neighbors, a postal carrier, and a trash collector. Hyatt does not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to FTB's conduct in these instances, and thus, we decline to consider this contention. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued or supported by relevant authority).

False light invasion of privacy

Regarding Hyatt's false light claim, he argues that FTB portrayed him in a false light throughout its investigation because FTB's various disclosures portrayed Hyatt as a "tax cheat." FTB asserts that Hyatt failed to provide any evidence to support his claim. Before ****735** reaching the parties' arguments as to Hyatt's false light claim, we must first determine whether to adopt this cause of action in Nevada, as this court has only impliedly recognized the false light invasion of privacy tort. *See PETA,* 111 Nev. at 622 n.4, 629, 895 P.2d at 1273 n.4, 1278. "Whether to adopt [this tort] as [a] viable tort claim[ ] is a question of state law." *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002).

Adopting the false light invasion of privacy tort

Under the Restatement, an action for false light arises when

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light ... if
>
> ***845** (a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). The greatest constraint on the tort of false light is its similarity to the tort of defamation.

A majority of the courts that have adopted the false light privacy tort have done so after concluding that false light and defamation are distinct torts. [10] *See Welling v. Weinfeld*, 113 Ohio St.3d 464, 866 N.E.2d 1051 (2007) (explaining the competing views); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (same). For these courts, defamation law seeks to protect an objective interest in one's reputation, "either economic, political, or personal, in the outside world." *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70, 83 (1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling*, 866 N.E.2d at 1055–57; *West*, 53 S.W.3d at 646. Without recognizing the separate false light privacy tort, such an individual would be left without a remedy. *West*, 53 S.W.3d at 646.

10 This court, in *PETA*, while not reaching the false light issue, observed that " '[t]he false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation.' " 111 Nev. at 622 n.4, 895 P.2d at 1274 n.4 (quoting *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)).

On the other hand, those courts that have declined to adopt the false light tort have done so based on its similarity to defamation. *See, e.g., Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. 1986); *Renwick v. News & Observer Publ'g Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). "The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected." *Denver Publ'g Co.*, 54 P.3d at 898. For these courts, tort law serves to deter "socially wrongful conduct," and thus, it needs "clarity and certainty." *Id.* And because the parameters defining the difference between false light and defamation are blurred, ***846** these courts conclude that "such an amorphous tort risks chilling fundamental First Amendment freedoms." *Id.* In such a case, a media defendant would have to "anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation." *Id.* at 903. Ultimately, for these courts, defamation, appropriation, and intentional infliction of emotional distress provide plaintiffs with adequate remedies. *Id.* at 903.

[20] Considering the different approaches detailed above, we, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three ****736** privacy causes of action that this court has adopted. Because we now recognize the false light invasion of privacy cause of action, we address FTB's substantive arguments regarding Hyatt's false light claim.

Hyatt's false light claim

[21] The crux of Hyatt's false light invasion of privacy claim is that FTB's demand-for-information letters, its other contact with third parties through neighborhood visits and questioning, and the inclusion of his case on FTB's litigation roster suggested that he was a "tax cheat," and therefore, portrayed him in a false light. On appeal, FTB argues that Hyatt presented no evidence that anyone thought that he was a "tax cheat" based on the litigation roster or third-party contacts.

FTB's litigation roster was an ongoing monthly litigation list that identified the cases that FTB was involved in. The list was available to the public and generally contained audit cases in which the protest and appeal process had been completed and the cases were being litigated in court. After Hyatt initiated this litigation, FTB began including the case on its roster, which Hyatt asserts was improper because the protests in his audits had not yet been completed. FTB, however, argues that because the lawsuit was ongoing, it did not place Hyatt in a false light by including him on the roster. Further, FTB argues that the litigation roster that Hyatt relied on was not false. When FTB began including Hyatt on the litigation roster, he

was not falsely portrayed because he was indeed involved in litigation with FTB in this case. Hyatt did not demonstrate that the litigation roster contained any false information. Rather, he only argued that his inclusion on the list was improper because his audit cases had not reached the final challenge stage like other cases on the roster.

FTB's contacts with third parties through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a "tax cheat." In contacting ***847** third parties, FTB was merely conducting its routine audit investigations.

The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light. *See Prabhu*, 112 Nev. at 1543, 930 P.2d at 107. Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim. [11]

11 Based on this resolution, we need not address the parties' remaining arguments involving this cause of action.

Having addressed Hyatt's invasion of privacy causes of action, we now consider FTB's challenges to Hyatt's remaining causes of action for breach of confidential relationship, abuse of process, fraud and intentional infliction of emotional distress.

Breach of confidential relationship

[22] **[23]** A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan,* 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential relationship. In the underlying case, the district court denied FTB's motion for summary judgment and its motion for judgment as a matter of law, which presented similar arguments, and at trial the jury found FTB liable on this cause of action. Hyatt argues that his claim for breach of confidentiality falls within the parameters of *Perry* because FTB promised to protect his confidential information and its position over Hyatt during the audits established the necessary confidential relationship. [12]

12 FTB initially argues that Hyatt attempts to blend the cause of action recognized in *Perry* with a separate breach of confidentiality cause of action that, while recognized in other jurisdictions, has not been recognized by this court. We reject this contention, as the jury was instructed based on the cause of action outlined in *Perry.*

In *Perry*, this court recognized that a confidential relationship exists when a party gains the confidence of another party and purports to advise or act consistently with the other party's interest. ****737** *Id.* at 947, 900 P.2d at 338. In that case, store owner Perry sold her store to her neighbor and friend, Jordan, knowing that Jordan had no business knowledge, that Jordan was buying the store for her daughters, not for herself, and that Jordan would rely on Perry to run the store for a contracted one-year period after the sale was complete. *Id.* at 945–46, 900 P.2d at 336–37. Not long after the sale, Perry stopped running the store, and the store eventually closed. *Id.* at 946, 900 P.2d at 337. Jordan filed suit against Perry for, among other things, breach of a confidential relationship. *Id.* A jury found in Jordan's ***848** favor and awarded damages. *Id.* Perry appealed, arguing that this court had not recognized a claim for breach of a confidential relationship. *Id.*

On appeal, this court ruled that a breach of confidential relationship claim was available under the facts of the case. *Id.* at 947, 900 P.2d at 338. The court noted that Perry "held a duty to act with the utmost good faith, based on her confidential relationship with Jordan[, and that the] duty requires affirmative disclosure and avoidance of self dealing." *Id.* at 948, 900 P.2d at 338. The court explained that "[w]hen a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." *Id.* at 947, 900 P.2d at 338.

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in *Perry* to establish a breach of confidential relationship cause of action. In support of this proposition, FTB cites to *Johnson v. Sawyer,* which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir. 1995) (en banc). In *Johnson,* the plaintiff sought damages from press releases by the Internal Revenue Service (IRS) based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718–19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718–20. Following the plea agreement, two press releases were issued that contained improper and private information about

Johnson. *Id.* at 720–21. Johnson filed suit against the IRS based on these press releases, arguing that they cost him his job and asserting several causes of action, one being breach of a confidential relationship. *Id.* at 718, 725, 738. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling that a breach of a confidential relationship could not be maintained based on the relationship between Johnson and the IRS, as it was clear that the two parties "stood in an adversarial relationship." *Id.* at 738 n.47.

Hyatt rejects FTB's reliance on this case, arguing that the *Johnson* ruling is inapposite to the present case because, here, FTB made express promises regarding protecting Hyatt's confidential information but then failed to keep those promises. Hyatt maintains that although FTB may not have acted in his best interest in every aspect of the audits, as to keeping his information confidential, FTB affirmatively undertook that responsibility and breached that duty by revealing confidential information.

But in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather, it had a duty to proceed on behalf of the state of California's interest. ***849** *Johnson,* 47 F.3d at 738 n.47. Moreover, the parties' relationship was not akin to a family or business relationship. *Perry,* 111 Nev. at 947, 900 P.2d at 337–38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry,* but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim for a breach of confidential relationship.[13] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district ****738** court judgment in Hyatt's favor on this claim is reversed.

13 Further, we note that the majority of cases that Hyatt cites as authority for a more expansive viewpoint of a confidential relationship involve claims arising from a doctor-patient confidentiality privilege, which does not apply here. *See, e.g., Doe v. Medlantic Health Care Grp., Inc.,* 814 A.2d 939, 950–51 (D.C. 2003); *Humphers v. First Interstate Bank of Or.,* 298 Or. 706, 696 P.2d 527, 533–35 (1985).

Abuse of process

[24] **[25]** A successful abuse of process claim requires " '(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.' " *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Posadas v. City of Reno,* 109 Nev. 448, 457, 851 P.2d 438, 444–45 (1993)). Put another way, a plaintiff must show that the defendant "willfully and improperly *used the legal process* to accomplish" an ulterior purpose other than resolving a legal dispute. *Id.* at 31, 38 P.3d at 880 (emphasis added).

[26] FTB asserts that it was entitled to judgment as a matter of law on Hyatt's abuse of process cause of action because it did not actually use the judicial process, as it never sought to judicially enforce compliance with the demand-for-information forms and did not otherwise use the judicial process in conducting its audits of Hyatt. In response, Hyatt argues that FTB committed abuse of process by sending demand-for-information forms to individuals and companies in Nevada that are not subject to the California law cited in the form.

Because FTB did not use any legal enforcement process, such as filing a court action, in relation to its demands for information or otherwise during the audits, Hyatt cannot meet the requirements for establishing an abuse of process claim. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880; *ComputerXpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 113 Cal.Rptr.2d 625, 644 (2001) (explaining that abuse of process only arises when there is actual "use of *the machinery of the legal system* for an ulterior motive" (internal quotations omitted)); *see also Tuck Beckstoffer Wines LLC v. Ultimate Distribs., Inc.,* 682 F.Supp.2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is ***850** entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

[27] **[28]** **[29]** To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell,* 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n,* 114 Nev. 690, 697–98, 962 P.2d 596, 600–01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial evidence. *Taylor v. Thunder,* 116 Nev. 968, 974, 13 P.3d 43, 46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept

as adequate to support a conclusion." *Winchell v. Schiff,* 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

[30] When Hyatt's 1991 audit began, FTB informed him that during the audit process Hyatt could expect FTB employees to treat him with courtesy, that the auditor assigned to his case would clearly and concisely request information from him, that any personal and financial information that he provided to FTB would be treated confidentially, and that the audit would be completed within a reasonable time. FTB contends that its statements in documents to Hyatt, that it would provide him with courteous treatment and keep his information confidential, were insufficient representations to form a basis for a fraud claim, and even if the representations were sufficient, there was no evidence that FTB knew that they were false when made. In any case, FTB argues that Hyatt did not prove any reliance because he was required to participate in the audits whether he relied on these statements or not. Hyatt asserts that FTB knowingly misrepresented its promise to treat him fairly and impartially and to protect his private information. For the reasons discussed below, we reject FTB's argument that it was entitled to judgment as a matter of law on Hyatt's fraud claim.

The record before us shows that a reasonable mind could conclude that FTB made ****739** specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB represented to Hyatt that it would protect his confidential information and treat him courteously. 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 ***851** that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence. Furthermore, 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. Also at trial, 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, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken. Hyatt also testified that he would not have hired legal and accounting professionals to assist in the audits had he known how he would be treated. Moreover, Hyatt stated that he incurred substantial costs that he would not otherwise have incurred by paying for professional representatives to assist him during the audits.

[31] The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the representations were false, and that it intended for Hyatt to rely on the representations. [14] What's more, the jury could reasonably conclude that Hyatt relied on FTB's representations to act and participate in the audits in a manner different than he would have otherwise, which resulted in damages. Based on this evidence, we conclude that substantial evidence supports each of the fraud elements and that FTB is not entitled to judgment as a matter of law on this cause of action. [15]

14 FTB's argument concerning government agents making representations beyond the scope of law is without merit.

15 FTB further argues that several evidentiary errors by the district court warrant a new trial. These errors include admitting evidence concerning whether the audit conclusions were correct and excluding FTB's evidence seeking to rebut an adverse inference for spoliation of evidence. FTB also asserts that the district court improperly instructed the jury by permitting it to consider the audit determinations. Although we agree with FTB that the district court abused its discretion in these evidentiary rulings and in its jury instruction number 24, as discussed more fully below in regard to Hyatt's intentional infliction of emotional distress claim, we conclude that these errors were harmless as to Hyatt's fraud claim because sufficient evidence of fraud existed for the jury to find in Hyatt's favor on each required element for fraud. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC,* 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction, "prejudice must be established in order to reverse a district court judgment," and this is done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand).

***852** *Fraud damages*

[32] **[33]** Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim. [16] In doing so, we address FTB's entitlement to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps ****740** under principles of comity. [17]

16 The jury verdict form included a separate damage award for Hyatt's fraud claim. We limit our discussion of Hyatt's fraud damages to these special damages that were awarded. To the extent that Hyatt argues that he is entitled to other damages for his fraud claim beyond the special damages specified in the jury verdict form, we reject this argument and limit any emotional distress damages to his recovery under his intentional infliction of emotional distress claim, as addressed below.

17 FTB argues that under the law-of-the-case doctrine, comity applies to afford it a statutory cap on damages and immunity from punitive damages based on this court's conclusions in the earlier writ petitions. But this court did not previously address these issues and the issues are different, thus, law of the case does not apply. *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 44–45, 223 P.3d 332, 334–35 (2010).

NRS 41.035 (1987) provides a statutory cap on liability damages in tort actions "against a present or former officer or employee of the state or any political subdivision." At the time Hyatt suffered his injuries in 1993, the applicable statutory cap pursuant to NRS 41.035(1) was $50,000. *See Las Vegas Metro. Police Dep't v. Yeghiazarian,* 129 Nev. 760, 768, 312 P.3d 503, 509 (2013) (noting that a tort claim accrues at the time of the plaintiff's injuries). The parties agree that NRS 41.035 applies on a per-claim basis.

The Supreme Court disagreed with our determination that FTB was not entitled to the statutory damages cap on Hyatt's fraud claim. *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt II),* —— U.S. ——, 136 S.Ct. 1277, 1281, 194 L.Ed.2d 431 (2016). In reviewing our prior decision, the Court noted that we "explained [our] 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 [FTB] a statutory cap on damages under comity." *Id.* at ——, 136 S.Ct. at 1280 (second alteration in original) (internal quotation marks omitted). The Court determined that this explanation "cannot justify the application of a special and discriminatory rule" that would deprive FTB of the benefit of the statutory damages cap. *Id.* at ——, 136 S.Ct. at 1282. The Court held that "[w]ith respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not conflict with California law, for both laws would grant immunity. Similarly, in respect to such amounts, the policies underlying California law and Nevada's ***853** usual approach are not opposed; they are consistent." *Id.* (internal quotation marks and citation omitted).

[34] Accordingly, although immunity with respect to damages against FTB in an amount greater than $50,000 is consistent with both Nevada and California law, California's law of *complete* immunity from recovery is inconsistent with Nevada law. *See id.* at ——, 136 S.Ct. at 1281. We thus conclude that, while FTB is not immune such that any recovery is barred in this case, FTB is entitled to the $50,000 statutory cap on damages a Nevada agency would be entitled to in similar circumstances. *See* NRS 41.035 (1987). We thus reverse the damages award for fraud and instruct the district court to enter a damages award for fraud in the amount of $50,000. Because the statutory cap also applies to prejudgment interest on damages, we reverse the award for prejudgment interest and conclude that Hyatt is not entitled to prejudgment interest on the fraud claim because it would cause the total award to exceed $50,000. NRS 41.035(1) ("An award for damages ... may not exceed the sum of $50,000, exclusive of interest computed from the date of judgment...."); *Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 822, 942 P.2d 139, 144 (1997) ("[C]laims for prejudgment interest are only valid when the interest award does not cause the total individual award, exclusive of post-judgment interest, attorney fees and costs, to exceed $50,000."), *abrogated on other grounds by Martinez v. Maruszczak,* 123 Nev. 433, 168 P.3d 720 (2007).

[35] The statutory cap does not include awards for attorney fees and costs. *See Yeghiazarian,* 129 Nev. at 769, 312 P.3d at 509 (allowing recovery of attorney fees in addition to damages subject to NRS 41.035's cap). Therefore, a determination by the district court with respect to fees and costs must be made on remand.

Intentional infliction of emotional distress

[36] During discovery in the underlying case, Hyatt refused to disclose his medical records. As a result, he was precluded at trial from presenting any medical evidence of severe emotional distress. Nevertheless, at trial, Hyatt presented evidence designed to demonstrate his emotional distress

in the ****741** form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in Hyatt's behavior and health during the audits. Based on this testimony, the jury found in Hyatt's favor on his intentional infliction of emotional distress (IIED) claim and awarded him $82 million for emotional distress damages.

[37] **[38]** To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or ***854** severe emotional distress; and (4) causation." *Miller v. Jones,* 114 Nev. 1291, 1299–1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.,* 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable indicia" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller,* 114 Nev. at 1300, 970 P.2d at 577.

On appeal, FTB argues that Hyatt failed to establish that he actually suffered severe emotional distress because he failed to provide any medical evidence or other objectively verifiable evidence to establish such a claim. In response, Hyatt contends that the testimony provided by his family and other acquaintances sufficiently established objective proof of the severe and extreme emotional distress he suffered, particularly in light of the facts of this case demonstrating the intentional harmful treatment he endured from FTB. Hyatt asserts that the more severe the harm, the lower the amount of proof necessary to establish that he suffered severe emotional distress. While this court has held that objectively verifiable evidence is necessary in order to establish an IIED claim, *id.,* we have not specifically addressed whether this necessarily requires medical evidence or if other objective evidence is sufficient.

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased severity of the conduct will require less in the way of proof that emotional distress was suffered in order to establish an IIED claim. Restatement (Second) of Torts § 46 cmt. j (1977) ("The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."); Restatement (Second) of Torts § 46 cmt. k (1977) (stating that "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required"). This court has also impliedly recognized this sliding-scale approach, although stated in the reverse. *Nelson v. City of Las Vegas,* 99 Nev. 548, 665 P.2d 1141 (1983), In *Nelson,* this court explained that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Id.* at 555, 665 P.2d at 1145.

Further, other jurisdictions that require objectively verifiable evidence have determined that such a mandate does not always require medical evidence. *See Lyman v. Huber,* 10 A.3d 707 (Me. 2010) (stating that medical testimony is not mandatory to establish an IIED claim, although only in rare, extreme circumstances); *Buckman–Peirson v. Brannon,* 159 Ohio App.3d 12, 822 N.E.2d 830, 840–41 (2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiff's own testimony ***855** was necessary); *see also Dixon v. Denny's, Inc.,* 957 F.Supp. 792, 796 (E.D. Va. 1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus,* 102 Nev. 371, 725 P.2d 234 (1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374–75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. ****742** *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374–75, 725 P.2d at 236. In so holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

[39] Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

Turning to the facts in the present case, Hyatt suffered extreme treatment from FTB. As explained above in discussing the fraud claim, FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of $8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

***856** In support of his IIED claim, Hyatt presented testimony from three different people as to how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional distress. [18]

18 To the extent FTB argues that it was prejudiced by its inability to obtain Hyatt's medical records, we reject this argument as the rulings below on this issue specifically allowed FTB to argue to the jury the lack of any medical treatment or evidence by Hyatt.

Trial errors at district court

FTB also claims that the jury's award should be reversed based on numerous evidentiary and jury instruction errors committed by the trial court.

Early in this case, the district court granted FTB partial summary judgment and dismissed Hyatt's declaratory relief cause of action concerning when he moved from California to Nevada. The district court reached this conclusion because the audits were still under review in California, and therefore, the Nevada court lacked jurisdiction to address whether the audits' conclusions were accurate. The partial summary judgment was not challenged by Hyatt at any point to this court, and thus, the district court's ruling was in effect throughout the trial. Consequently, whether the audits' determinations were correct was not an issue in the Nevada litigation.

[40] On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction that went directly to whether the audits were properly determined. FTB frames this issue as whether the district court exceeded the case's jurisdictional boundaries, but the issue more accurately ****743** involves the admissibility of evidence and whether a jury instruction given by the district court was proper in light of the jurisdictional ruling. We review both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion. *See Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (evidence); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (jury instruction).

Evidence improperly permitted challenging audits' conclusions

[41] FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to ***857** go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's representatives' cooperation during the audits to refute the lack of cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation that Hyatt's actions of living in a low-income

apartment building in Las Vegas and having no security were "implausible behaviors"; and especially, (4) expert testimony of former FTB agent Malcom Jumulet regarding audit procedures, and Jumulet's testimony as to how FTB analyzed and weighed the information obtained throughout the audits as challenging the results of the audits reached by FTB. Further, FTB points to Hyatt's arguments regarding an alleged calculation error as to the amount of taxable income, which FTB argues is an explicit example of Hyatt challenging the conclusions of the audits. Hyatt argues that all the evidence he presented did not challenge the audits, but was proffered to demonstrate that the audits were conducted in bad faith and in an attempt to "trump up a case against Hyatt and extort a settlement."

While much of the evidence presented at trial would not violate the restriction against considering the audits' conclusions, there are several instances in which the evidence does violate this ruling. These instances included evidence challenging whether FTB made a mathematical error in the amount of income that it taxed, whether an auditor improperly gave credibility to certain interviews of estranged family members, whether an auditor appropriately determined that certain information was not credible or not relevant, as well as the testimony outlined above that Hyatt presented, which challenged various aspects of the fraud penalties.

The expert testimony regarding the fraud penalties went to the audits' determinations and had no utility in showing any intentional torts unless it was first concluded that the audits' determinations were incorrect. For example, the expert testimony concerning typical lifestyles of wealthy individuals had relevance only to show that FTB erroneously concluded that Hyatt's conduct, such as renting an apartment in a low-income complex, was fraudulent because he was wealthy and allegedly only rented the apartment to give the appearance of living in Nevada. Whether such a conclusion was a correct determination by FTB is precisely what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was ***858** proven that FTB knew wealthy individuals' tendencies, that they applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen,* 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

[42] FTB also argues that the district court wrongly instructed the jury. Specifically, ****744** it asserts that the jury instruction given at the end of trial demonstrates that the district court allowed the jury to improperly consider FTB's audit determinations. Hyatt counters FTB's argument by relying on an earlier instruction that was given to the jury that he argues shows that the district court did not allow the jury to determine the appropriateness of the audits' results, as it specifically instructed the jury not to consider the audits' conclusions.

As background, before trial began, and at various times during the trial, the district court read an instruction to the jury that they were not to consider whether the audits' conclusions were correct:

> Although this case arises from the residency tax audit conducted by FTB, it is important for you to understand that you will not be asked, nor will you be permitted to make any determinations related to Mr. Hyatt's residency or the correctness of the tax assessments, penalties and interest assessed by FTB against Mr. Hyatt. Thus, although you may hear evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments, you are not permitted to make any determinations regarding Mr. Hyatt's residency such as when he became or did not become a resident of Nevada.

When jury instructions were given, this instruction was intended to be part of the jury instructions, but somehow the instruction was altered and a different version of this

instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted ***859** to make any determinations related to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.
>
> The residency and tax assessment determinations, and all factual and legal issues related thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.
>
> Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions.*

(Emphasis added.) Based on the italicized language, FTB argues that the district court not only allowed, but invited the jury to consider whether the FTB's audit conclusions were correct.

Jury Instruction 24 violated the jurisdictional limit that the district court imposed on this case. The instruction specifically allowed the jury to consider the "appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." As a result, the district court abused its discretion in giving this jury instruction. *Allstate Ins. Co.,* 125 Nev. at 319, 212 P.3d at 331.

****745** *Exclusion of evidence to rebut adverse inference*

[43] **[44]** FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its email server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple emails to its employees, before the change, requesting that they print or otherwise save any emails related to Hyatt's case. Backup ***860** tapes containing several weeks' worth of emails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in email servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an adverse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See*, *e.g.*, *Bass–Davis v. Davis*, 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant emails before the server change. Hyatt challenged this evidence, arguing that it was merely an attempt to reargue the evidence spoliation. The district court agreed with Hyatt and excluded the evidence. FTB does not challenge the jury instruction, but it does challenge the district court's exclusion of evidence that it sought to present at trial to rebut the adverse inference.

On this point, FTB argues that it was entitled to rebut the adverse inference, and therefore, the district court abused its discretion in excluding the rebuttal evidence. Hyatt counters that it is not proper evidence because in order to rebut the inference FTB had to show that the destroyed evidence was not harmful and FTB's excluded evidence did not demonstrate that the destroyed emails did not contain anything harmful.

[45] **[46]** This court has recognized that a district court may impose a rebuttable presumption, under NRS 47.250(3), when evidence was willfully destroyed, or the court may impose a permissible adverse inference when the evidence was negligently destroyed. *Bass–Davis,* 122 Nev. at 447–48, 134 P.3d at 106–07. Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable. 122 Nev. at 448, 134 P.3d at 107. If the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. *Id.* A lesser adverse inference, that does not shift the burden of proof, is permissible. *Id.* at 449, 134 P.3d at 107. The lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. *Id.*

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district court nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant ***861** emails in an effort to demonstrate that none of the destroyed information contained in the emails was damaging to FTB. Because the district court did not allow FTB to explain the steps taken, we are not persuaded by Hyatt's contention that FTB's evidence was actually only an attempt to reargue the spoliation issue. To the contrary, FTB could use the proposed evidence related to its efforts to collect all relevant emails to explain why nothing harmful was destroyed. Therefore, we conclude that the district court abused its discretion in excluding the evidence, and we reverse the district court's ruling in this regard.

Other evidentiary errors

[47] FTB additionally challenges the district court's exclusion of evidence regarding ****746** Hyatt's loss of his patent through a legal challenge to the validity of his patent and his being audited for his federal taxes by the IRS, both of which occurred during the relevant period associated with Hyatt's IIED claim. Hyatt asserts that the district court properly excluded the evidence because it was more prejudicial than probative. Under NRS 48.035(1), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice...." Hyatt argues that this provides a basis for the district court's exclusion of this evidence. We conclude, however, that the district court abused its discretion in excluding the evidence of Hyatt's patent loss and federal tax audit on this basis. Although the evidence may be prejudicial, it is doubtful that it is *unfairly* prejudicial as required under the statute. And in any event, the probative value of this evidence as to Hyatt's IIED claim, in particular in regard to damages caused by FTB as opposed to other events in his life, is more probative than unfairly prejudicial. Accordingly, the district court abused its discretion in excluding this evidence.

Evidentiary and jury instruction errors do not warrant reversal

[48] Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, we must determine whether these errors warrant reversal and remand for a new trial on the IIED claim, or whether the errors were harmless such that the judgment on the IIED claim should be upheld. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC,* 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction "prejudice must be established in order to reverse a district court judgment," which can be done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant ***862** reversal and remand). Based on the sliding-scale approach we adopt today, the increased severity of a defendant's conduct will require less in the way of proof of emotional distress to establish an IIED claim. As noted earlier, the facts of this case are at the more extreme end of the scale. Thus, we conclude that FTB has failed to show that, but for the trial errors, a different result might have been reached, at least as to liability. On the issue of damages, we conclude that a different result would have been reached but for the trial errors. However, as with our determination on FTB's liability on Hyatt's IIED claim, we conclude that the evidence in connection with the severe treatment experienced by Hyatt supports a damages award up to the NRS 41.035(1) $50,000 damages cap. We will not compel the parties to incur the expense of a new trial. *Cf. Newman v. Kane,* 9 Nev. 234, 236 (1874) (holding that "[w]hen ... the court has all the facts before it upon which

it can render the proper judgment, it will not impose upon the parties the expense of a new trial"). We therefore reverse the award of damages on the IIED claim and remand this matter to the district court with instructions to enter a damages award on Hyatt's IIED claim in the amount of $50,000. *Cf. Nev. Indep. Broad. Corp. v. Allen,* 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (concluding that jury award of damages was excessive as a matter of law and reducing damages to "the maximum amount that could be reasonably awarded under the[ ] circumstances"). Because this damages award on the IIED claim is the maximum allowed by NRS 41.035(1), Hyatt is not entitled to prejudgment interest.[19] *See Arnesano v. State, Dep't of Transp.,* 113 Nev. 815, 822, 942 P.2d 139, 143–44 (1997), *abrogated on other grounds by Martinez v. Maruszczak,* 123 Nev. 433, 168 P.3d 720 (2007).

19 As noted above, the statutory cap on damages does not apply to awards for attorney fees and costs.

Punitive damages

[49] The final issue that we must address in FTB's appeal is whether Hyatt can recover punitive damages from FTB. The district court allowed the issue of punitive damages ****747** to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

[50] **[51]** Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries. *Bongiovi v. Sullivan,* 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). But "[t]he general rule is that no punitive damages are allowed against a [government entity] unless *expressly* authorized by statute." *Long v. City of Charlotte,* 306 N.C. 187, 293 S.E.2d 101, 114 (1982) (emphasis added). In Nevada, NRS 41.035(1) provides that "[a]n award for damages [against a government entity] in an action sounding in tort ... may not include any amount as exemplary ***863** or punitive." Thus, Nevada has not waived its sovereign immunity from suit for such damages.

FTB argues that it is entitled to immunity from punitive damages based on comity because, like Nevada, California law has expressly waived such damages against its government entities. California law provides full immunity from punitive damages for their government agencies. Cal. Gov't Code § 818 (West 2012). Hyatt maintains that punitive damages are available against an out-of-state government entity, if provided for by statute, and Nevada has a statute authorizing such damages—NRS 42.005.[20]

20 Hyatt also argues that punitive damages are proper because the IRS is subject to punitive damages for conduct similar to that alleged here under the IRS code, 26 U.S.C. § 7431(c)(1)(B)(ii) (2012), which allows for punitive damages for intentional or grossly negligent disclosure of a private taxpayer's information. Thus, Hyatt maintains that it is reasonable to impose punitive damages against FTB when the federal law permits punitive damages against the IRS for similar conduct. *Id.* But as FTB points out, this argument fails because there is a statute that expressly allows punitive damages against the IRS, and such a statute does not exist here.

NRS 42.005(1) provides that punitive damages may be awarded when a defendant "has been guilty of oppression, fraud or malice, express or implied." Hyatt acknowledges that punitive damages under NRS 42.005 are not applicable to a Nevada government entity based on NRS 41.035(1), but he contends that because FTB is not a Nevada government agency, the protection against punitive damages for Nevada agencies under NRS 41.035(1) does not apply, and thus, FTB comes within NRS 42.005's purview. FTB counters by citing a federal district court holding, *Georgia v. City of East Ridge, Tennessee*, 949 F.Supp. 1571, 1581 (N.D. Ga. 1996), in which the court concluded that a Tennessee government entity could not be held liable for punitive damages under Georgia state law (which applied to the case) because, even though Georgia law had a statute allowing punitive damages, Georgia did not allow such damages against government entities. Therefore, the court gave the Tennessee government entity the protection of this law. *Id.*

The broad allowance for punitive damages under NRS 42.005 does not authorize punitive damages against a government entity. Further, under comity principles, we afford FTB 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). Thus, Hyatt's argument that Nevada law provides for the award of punitive damages against FTB is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. We therefore reverse the portion of the district court's judgment awarding punitive damages against FTB.

***864** *Costs*

Since we reverse Hyatt's judgments on several of his tort causes of action, we must reverse the district court's costs

award and remand the costs issue for the district court to determine which party, if any, is the prevailing party based on our rulings. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494–95, 215 P.3d 709, 726 (2009) (stating that the reversal of costs award is required when this court reverses the underlying judgment); *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (upholding the district court's determination that neither party was a prevailing party because each party won some issues and lost some issues). On remand, if costs are ****748** awarded, the district court should consider the proper amount of costs to award, including allocation of costs as to each cause of action and recovery for only the successful causes of action, if possible. *Cf. Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (holding that the district court should apportion costs award when there are multiple defendants, unless it is "rendered impracticable by the interrelationship of the claims"); *Bergmann v. Boyce*, 109 Nev. 670, 675–76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

[52] Because this issue is remanded to the district court, we also address FTB's challenges on appeal to the procedure used by the district court in awarding costs. Hyatt moved for costs after trial, which FTB opposed. FTB's opposition revolved in part around its contention that Hyatt failed to properly support his request for costs with necessary documentation as to the costs incurred. The district court assigned the costs issue to a special master. During the process, Hyatt supplemented his request for costs on more than one occasion to provide additional documentation to support his claimed costs. After approximately 15 months of discovery, the special master issued a recommendation to award Hyatt approximately $2.5 million in costs. FTB sought to challenge the special master's recommendation, but the district court concluded that FTB could not challenge the recommendation under the process used, and the court ultimately adopted the special master's recommendation.

FTB argues that Hyatt was improperly allowed to submit, under NRS 18.110, documentation to support the costs he sought after the deadline. This court has previously held that the five-day time limit established for filing a memorandum for costs is not jurisdictional because the statute specifically allows for "such further time as the court or judge may grant" to file the costs memorandum. *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). In *Eberle,* this court stated that even if no extension of time was granted by the district court, the fact that it favorably ***865** awarded the costs requested demonstrated that it impliedly granted additional time. *Id.* The *Eberle* court ruled that this was within the district court's discretion and would not be disturbed on appeal. *Id.* Based on the *Eberle* holding, we reject FTB's contention that Hyatt was improperly allowed to supplement his costs memorandum.

[53] FTB also contends that the district court erred when it refused to let FTB file an objection to the master's report and recommendation. The district court concluded that, under NRCP 53(e)(3), no challenge was permitted because there was a jury trial. While the district court could refer the matter to a special master, the district court erroneously determined that FTB was not entitled to file an objection to the special master's recommendation. Although this case was a jury trial, the costs issue was not placed before the jury. Therefore, NRCP 53(e)(2) applied to the costs issue, not NRCP 53(e)(3). NRCP 53(e)(2) specifically provides that "any party may serve written objections" to the master's report. Accordingly, the district court erred when it precluded FTB from filing its objections. On remand, if the district court concludes that Hyatt is still entitled to costs, the court must allow FTB to file its objections to the report before the court enters a cost award. Based on our reversal and remand of the costs award, and our ruling in this appeal, we do not address FTB's specific challenges to the costs awarded to Hyatt, as those issues should be addressed by the district court, if necessary, in the first instance.

Hyatt's cross-appeal

[54] The final issues that we must resolve concern Hyatt's cross-appeal. In his cross-appeal, Hyatt challenges the district court's summary judgment ruling that prevented him from seeking economic damages as part of his recovery for his intentional tort claims.

As background, during the first audit, FTB sent letters to two Japanese companies with whom Hyatt had patent-licensing agreements asking the companies for specific dates when any payments were sent to Hyatt. Both companies responded to the letters and provided ****749** the requested information. In the district court, Hyatt argued that sending these letters to the Japanese companies was improper because they revealed that Hyatt was being audited by FTB and that he had disclosed the licensing agreements to FTB. Hyatt theorized that he suffered economic damages by losing millions of dollars of potential licensing revenue because he alleges that the Japanese market

effectively abandoned him based on the disclosures. FTB moved the district court for summary judgment to preclude Hyatt from seeking economic loss damages, arguing that Hyatt did not have sufficient evidence to present this claim for damages to the jury. The district court agreed and granted FTB summary judgment.

[55] **[56]** **[57]** Damages "cannot be based solely upon possibilities and speculative testimony." ***866** *United Exposition Serv. Co. v. State Indus. Ins. Sys.,* 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). This is true regardless of " 'whether the testimony comes from the mouth of a lay witness or an expert.' " *Gramanz v. T–Shirts & Souvenirs, Inc.,* 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (quoting *Advent Sys. Ltd. v. Unisys Corp.,* 925 F.2d 670, 682 (3d Cir. 1991)). When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." *Morgan v. Indart,* 41 Nev. 228, 231, 168 P. 953, 953 (1917); *see also Frantz v. Johnson,* 116 Nev. 455, 468, 999 P.2d 351, 359 (2000). A party cannot use one inference to support another inference; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. *Morgan,* 41 Nev. at 231, 168 P. at 953. Thus, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed." *Id.*

Here, Hyatt argued that as a result of FTB sending letters to the two Japanese companies inquiring about licensing payments, the companies in turn would have notified the Japanese government about FTB investigating Hyatt. Hyatt theorized that the Japanese government would then notify other Japanese businesses about Hyatt being under investigation, with the end result being that the companies would not conduct any further licensing business with Hyatt. Hyatt's evidence to support this alleged chain of events consisted of the two letters FTB sent to the two companies and the fact that the companies responded to the letters, the fact that his licensing business did not obtain any other licensing agreements after the letters were sent, and expert testimony regarding Japanese business culture that was proffered to establish this potential series of events.

Hyatt claims that the district court erroneously ruled that he had to present direct evidence to support his claim for damages, e.g., evidence that the alleged chain of events actually occurred and that other companies in fact refused to do business with Hyatt as a result. Hyatt insists that he had sufficient circumstantial evidence to support his damages, and in any case, asserts that circumstantial evidence alone is sufficient and that causation requirements are less stringent and can be met through expert testimony under the circumstances at issue here. FTB responds that the district court did not rule that direct evidence was required, but instead concluded that Hyatt's evidence was speculative and insufficient. FTB does not contest that damages can be proven through circumstantial evidence, but argues that Hyatt did not provide such evidence. It also argues that there is no different causation standard under the facts of this case.

The issue we must decide is whether Hyatt set forth sufficient circumstantial evidence to support his economic damages claim, or if the evidence he presented was instead either too speculative or failed to create a sufficient question of material fact as to his economic damages. To begin with, we reject Hyatt's contention that ***867** reversal is necessary because the district court improperly ruled that direct evidence was mandatory. Hyatt's limited view of the district court's ruling is unavailing.

The ultimate fact that Hyatt seeks to establish through circumstantial evidence, that the downfall of his licensing business in Japan resulted from FTB contacting the two Japanese companies, however, cannot be proven through reliance on multiple inferences—the other facts in the chain must be ****750** proven. Here, Hyatt only set forth expert testimony detailing what his experts believed would happen based on the Japanese business culture. No evidence established that any of the hypothetical steps actually occurred. Hyatt provided no proof that the two businesses that received FTB's letters contacted the Japanese government, nor did Hyatt prove that the Japanese government in turn contacted other businesses regarding the investigation of Hyatt. Therefore, Hyatt did not properly support his claim for economic damages with circumstantial evidence. *Wood v. Safeway, Inc.,* 121 Nev. 724, 731, 121 P.3d 1026, 1030–31 (2005) (recognizing that to avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial); *see* NRCP 56(e). Accordingly, summary judgment was proper and we affirm the district court's summary judgment on this issue.

CONCLUSION

Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt's causes of action except for his fraud and IIED claims. As to the fraud claim, we affirm the district court's judgment in Hyatt's favor, and we conclude that the district court's evidentiary and jury instruction errors were harmless. However, we reverse the amount of damages awarded, as we have determined that FTB is entitled to NRS 41.035(1)'s $50,000 statutory cap on damages under comity principles. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability. We also conclude that sufficient evidence supports a damages award up to NRS 41.035(1)'s $50,000 statutory cap and thus determine that the district court should award Hyatt damages in that amount for his IIED claims. We conclude that Hyatt is not entitled to prejudgment interest on these damages awards because an award of prejudgment interest would impermissibly exceed NRS 41.035(1)'s $50,000 statutory cap. We further hold that Hyatt is precluded from recovering punitive damages against FTB. The district court's judgment is therefore affirmed in part and reversed and remanded in part. We also reverse the costs awards and ***868** remand to the district court for a new determination with respect to attorney fees and costs in light of this opinion. Finally, we affirm the district court's prior summary judgment as to Hyatt's claim for economic damages on Hyatt's cross-appeal. Given our resolution of this appeal, we do not need to address the remaining arguments raised by the parties on appeal or cross-appeal, nor do we consider FTB's second request that this court take judicial notice of certain publicly available documents.

We concur:

Cherry, C.J.

Douglas, J.

Gibbons, J.

Pickering, J.

Parraguirre, J.

Stiglich, J.

All Citations

133 Nev. 826, 407 P.3d 717

EXHIBIT 84

No. 17-

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 17-

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

The Franchise Tax Board of the State of California (FTB) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110. The order of the Nevada Supreme Court granting the petition for rehearing (App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (App. 133a-134a, 153a-154a) are unreported. A prior decision of the Nevada Supreme Court is reported at 335 P.3d 125. Another prior decision of the Nevada Supreme Court (App.

139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt is a former 23-year resident of California who earned hundreds of millions of dollars in licensing fees on technology patents he once owned and developed in California. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a Nevada resident, on October 1, 1991. *Hyatt I*, 538 U.S. at 490.

The Franchise Tax Board—the agency responsible for collecting personal income tax in California—became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. App. 5a. Accordingly, the FTB commenced an audit of Hyatt's 1991 return. *Id.* The audit concluded that Hyatt did not move to Nevada until April 1992, and that he had remained a California resident until that time. App. 7a. The FTB accordingly determined that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because it determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, the FTB also opened an audit for that year, which concluded that Hyatt owed an additional $6 mil-

lion in taxes and interest, plus further penalties. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those audit determinations have consumed two decades. The California State Board of Equalization, which hears appeals from the FTB's determinations, denied Hyatt's appeal as to the issues of California-sourced income and interest abatement, affirming the FTB's assessment of taxes for the 1991 tax year, and sustained Hyatt's appeals as to tax fraud and as to California residency for 1992. Administrative proceedings in California are ongoing. The Court of Appeals for the Ninth Circuit also recently affirmed the dismissal of another lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, which sought to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as California's administrative review of the FTB's deficiency assessment was just beginning, Hyatt brought this suit against the FTB in Nevada state court. He alleged that the FTB had committed several torts in the course of auditing his tax returns—negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. App. 8a. He sought compensatory and punitive damages, as well as a declaratory judgment that he resided in Nevada during the periods relevant to the FTB's audits. *Id.*

The FTB moved for summary judgment, arguing that it was entitled to immunity from suit in Nevada, as it would be in California. App. 142a. Under California

law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Full Faith and Credit Clause, together with principles of sovereign immunity and comity, required the Nevada courts to grant the FTB the same immunity. *Hyatt I*, 538 U.S. at 491-492.

The trial court denied that motion, and the FTB petitioned the Nevada Supreme Court for a writ of mandamus, arguing that the FTB was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected the FTB's claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. App. 144a & n.12. The court then ruled that the "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. App. 10a. The Nevada Supreme Court therefore allowed Hyatt's intentional tort claims to proceed.

C. *Hyatt I*

The FTB petitioned for certiorari, arguing that the Full Faith and Credit Clause required Nevada courts to afford it the same immunity that the FTB would receive in California courts. This Court granted certiorari and affirmed, holding that the Full Faith and Credit Clause did not require Nevada to grant the FTB the full immunity that it would have under California law. *Hyatt I*, 538 U.S. at 496.

The Court also noted that in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I*, urging the Court to overrule *Hall* as inconsistent with its other decisions on state sovereign immunity. States Amici Br. 17, No. 02-42 (U.S. Dec. 9, 2002). But because the FTB had not asked for *Hall* to be overruled, the Court declined to consider whether to do so. *Hyatt I*, 538 U.S. at 497.[1]

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties engaged in extensive discovery and pretrial proceedings in state court. Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id.* The trial court added more than $2.5 million in costs and $102 million in prejudgment interest, for a total judgment exceeding $490 million. App. 11a-12a.

---

[1] The Court's decision in *Hall*, which involved a traffic accident, left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. In *Hyatt I*, the Court declined to adopt this suggestion in *Hall*, and in ruling against the FTB, refused to distinguish among state interests in determining whether one State could subject another State to suit in its courts. *See* 538 U.S. at 497-499 (discussing Full Faith and Credit Clause).

The Nevada Supreme Court affirmed in part and reversed in part. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 335 P.3d 125 (Nev. 2014). 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, but affirmed the FTB's liability for fraud and intentional infliction of emotional distress. *Id.* at 130-131. The court also rejected the FTB's argument that it was entitled to the same $50,000 statutory damages cap that Nevada courts apply to Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. Because of several evidentiary errors committed by the trial court, the court remanded for a new trial on the amount of emotional distress damages. *Id.* at 149-153. The court rejected the FTB's contention that it was entitled to the same immunity or protections as a Nevada agency. *Id.* at 145-147. The court did, however, conclude that as a matter of comity the FTB was immune from punitive damages (as Nevada agencies would be). *Id.* at 154.

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). Several States filed amicus briefs at both the petition stage and merits stage in support of overruling *Nevada* v. *Hall*.

The Court divided equally on whether *Hall* should be overruled. *Hyatt II*, 136 S. Ct. at 1279. On the second question, the Court held that the Full Faith and Credit Clause does not "permit[] Nevada to award

damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. "In light of the 'constitutional equality' among the States," the Court explained, "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.

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. It held that the FTB is entitled to the benefit of Nevada's statutory damages cap. App. 70a. The court therefore instructed the trial court to enter a damages award for fraud within the cap of $50,000. App. 107a. In an about-face, the court then held that a new trial was unnecessary on Hyatt's intentional infliction of emotional distress claim because the evidence at trial supported a damages award on that claim at the $50,000 cap. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming evidence it previously determined to be prejudicial as "harmless." *Id.* The court also remanded for consideration of costs and attorneys' fees. App. 124a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, App. 3a n.1, 41a.

As a result of the Nevada Supreme Court's judgment, nothing remains for the trial court to do except enter judgment against the FTB, determine which par-

ty, if any, is the prevailing party, and entertain any requests for costs and attorney's fees. App. 65a-66a.

REASONS FOR GRANTING THE PETITION

This petition presents the Court with the opportunity to answer the question that it agreed to decide in *Hyatt II*: whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled. *Hall* was wrong when it was decided and has become only more clearly wrong in the intervening years. As four Justices have already recognized, *Hall* cannot be squared with the Nation's constitutional structure. This Court should therefore grant certiorari and hold that, under our federal system, an agency of one State may not (absent its consent) be sued in the courts of another State.

I. AS FOUR MEMBERS OF THIS COURT HAVE ALREADY AGREED, *NEVADA* V. *HALL* SHOULD BE OVERRULED

Hall conflicts with the Founding-era understanding of state sovereign immunity and with numerous better reasoned precedents of this Court, which have recognized that the principle of state sovereign immunity is inherent in the federal structure of the Union and is intended to protect the dignity interests of the States and the right of the people of the several States to govern themselves. There are no compelling reasons to preserve *Hall* in the name of stare decisis. It should therefore be overruled.

1.a. In *Hall*, California residents injured in an automobile accident with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-412. A California jury found the state employee negligent and awarded more than $1,000,000 in damages. *Id.* at 413. This Court granted certiorari and held that constitutional principles of sovereign immunity

do not preclude one State from being haled into the courts of another State against its will. *See id.* at 426-427.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably … was a matter of importance in the early days of independence." *Hall*, 440 U.S. at 418. The Court recognized that, at the Framing, one State would have possessed sovereign immunity in the courts of another. *Id.* at 417. And it observed that the debates over ratification of the Constitution, and later decisions of this Court, reflected "widespread acceptance of the view that a sovereign state is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. The Court recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the *federal* courts authorized by the Constitution. *Hall*, 440 U.S. at 418. But, the Court stated, it did not follow that the Framers intended to enshrine any principle of interstate sovereign immunity in the Constitution—perhaps because the notion of one State being sued in the courts of another was too outlandish to contemplate. The Court reasoned that, since the "need for constitutional protection against" the "contingency" of a state defendant being sued in a court of a sister State was "not discussed" during the constitutional debates, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-419.

The Court then ruled that nothing in the Constitution provides "any basis, explicit or implicit," for affording sovereign immunity to a State haled into another State's courts against its will. *Hall*, 440 U.S. at 421. The Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. And it determined that no "federal rule of law implicit in the Constitution … requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, the Court explained, a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

b. Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Hall*, 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, Justice Blackmun wrote, is that it was "too obvious to deserve mention." *Id.* at 431.

Justice Blackmun also pointed to the swift adoption of the Eleventh Amendment after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that citizens of one State could sue another State in federal court without the defendant State's consent. "If the Framers were indeed concerned lest the States be haled before the federal courts," he observed, "how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). He explained

that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist filed a separate dissent, joined by Chief Justice Burger. He explained that the Court's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile … with express holdings of this Court and the logic of the constitutional plan itself." *Hall*, 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist emphasized, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions." *Id.* at 437. Otherwise, they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* In Justice Rehnquist's view, *Hall* "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441.

2. *Hall* stands in sharp conflict with the Founding-era understanding of state sovereign immunity. Before the adoption of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. In *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), for example, a Pennsylvania citizen brought suit in the Pennsylvania courts to attach property belonging to Virginia. The case "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting), claiming

that it was "a violation of the laws of nations," *Nathan*, 1 U.S. at 78. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* The Pennsylvania court agreed and dismissed the case. *Id.* at 80; *see also Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. Ct. 1781) (No. 9697).

The ratification of the Constitution did not abrogate this conception of state sovereignty. The Framing-era debates focused on the question whether States would be subject to suit in federal court. But those debates over the meaning of Article III *assumed* the unquestioned proposition that States would remain immune from suit in the courts of other States. In other words, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 263; *see also id.* at 253 (interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III); Federalist No. 81, at 487 (Hamilton) (Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (emphasis omitted)). The "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

The force of the Founding-era conception of interstate sovereign immunity became clear after this Court held in *Chisholm* that States could be sued in federal court, without their consent, by citizens of another

State. As one historian put it, that decision "fell upon the country with a profound shock." 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926). The furious backlash culminated in the adoption of the Eleventh Amendment, which confirms the Framers' understanding.

The Eleventh Amendment was intended to restore to the States their full "immunity from private suits." *Alden* v. *Maine*, 527 U.S. 706, 724 (1999). Although the Amendment does not explicitly address interstate sovereign immunity, it clearly shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). The federal courts were, after all, created to serve as neutral forums for the resolution of interstate disputes. A State would surely rather be tried in such a neutral forum than before a possibly partisan judge and jury in another State's courts. By precluding suit in federal forum while leaving open the worse possibility of being sued in another State's courts, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

3. *Hall* rested on two fundamental premises, both of which have been repudiated by subsequent decisions of this Court. The first is that any constitutional principle of state sovereign immunity must be located in explicit textual provisions of the Constitution, such as the Eleventh Amendment, and that the "structure of the Constitution" has no bearing on that issue. *See* 440 U.S. at 426. The second is that, beyond those textual

provisions, any question of state sovereign immunity is solely a question of comity and "wise policy." *Id.* But this Court's later decisions make clear that state sovereign immunity is inherent in the federal structure of the Constitution, even beyond the Eleventh Amendment, and that the Constitution protects the dignitary and self-government interests of the States in protecting them from suit in the courts of another sovereign. *Hall* barely acknowledged either principle, but this Court's decisions have made explicit that both are fundamental.[2]

a. This Court's decisions since *Hall* have made clear that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729; *see also Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (state sovereign immunity a "presupposition of our constitutional structure"); *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 253 (2011); *Federal*

[2] *Hall* was also inconsistent with prior decisions of this Court, which recognized that a sovereign State cannot be sued in any court without its consent. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court was equally clear: "[N]either a state nor the United States can be sued as defendant in *any court* in this country without their consent." *Id.* at 451 (emphasis added); *see also Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts, those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them."

Mar. Comm'n v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751-753 (2002); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 54 (1996). Whereas *Hall* effectively limited state sovereign immunity to the words of Article III and the Eleventh Amendment, 440 U.S. at 421, 424-427, subsequent decisions have recognized that the Constitution protects principles of sovereign immunity beyond its literal text. *See, e.g.*, *Federal Mar. Comm'n*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-729; *Blatchford*, 501 U.S. at 779.[3]

Moreover, whereas *Hall* placed the burden on the State to show that its sovereign immunity was affirmatively and explicitly incorporated into the Constitution, *see* 440 U.S. at 421, this Court in *Alden* recognized the opposite—that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today … *except as altered by the plan of the Convention*," 527 U.S. at 713 (emphasis added).[4] And whereas *Hall* casually departed from the Framing-era view of sovereign immunity, subsequent decisions have consistently relied on the Framing-era view, and have interpreted sovereign immunity to prohibit "any proceedings against the States that were 'anoma-

---

[3] Decisions before *Alden*—most notably, *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—had recognized that the constitutional principle of state sovereign immunity is not limited to the scope of the Eleventh Amendment, and is inherent in the federal nature of the Union. *See id.* at 13-15; *see also Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934). *Hall* limited its discussion of *Hans* and *Monaco* to a footnote, 440 U.S. at 420 n.20.

[4] The States did, of course, partially surrender their immunity from suit in the plan of the Convention—to suits by the United States, and to suits by other States in this Court. *See* U.S. Const. art. III, § 2.

lous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 18 (1890)).

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally felt the need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall* and found *Hall* distinguishable. *See* 527 U.S. at 738-739. But nothing in *Alden* suggests *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with *Hall*'s view of the Eleventh Amendment as divorced from broader sovereign immunity principles.

b. *Hall* gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union.[5] But later decisions, especially *Alden*, take a broader view, and recognize the importance of two principles underlying sovereign immunity.

First, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to *sovereign dignity*." *Alden*, 527 U.S. at 715 (emphasis added). The several States had attained the status of independent nations as a consequence of the Revolution, and the Constitution ensured that, except as surrendered in the plan of the Convention, the States would retain their sovereign status, "together

[5] To the extent *Hall* addressed the *reasons* for state sovereign immunity at all, it suggested they concerned the States' financial interests. *See* 440 U.S. at 418 (noting that "[m]any of the States were heavily indebted as a result of the Revolutionary War").

with the dignity and essential attributes inhering in that status." *Id.* at 714; *see id.* at 749. The dignitary interests of the State as sovereign, though given little attention by the decision in *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental aspect of state sovereign immunity. Thus, in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, the Court explained that sovereign immunity "is designed to protect" "the *dignity and respect* afforded a State." 521 U.S. 261, 268 (1997) (emphasis added); *see Federal Mar. Comm'n*, 535 U.S. at 760, 769; *Seminole Tribe*, 517 U.S. at 58; *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).[6]

Second, and equally important, state sovereign immunity promotes self-government by the citizens of the several States. "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'" *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). If that danger was present in *Alden*, where the claim was that the State of Maine's conduct was subject to review in Maine's own courts (as well as jurors who, like the plaintiffs, would have been Maine residents), it is even more manifest in this case, where the actions of a California agency have been litigated before the judges and jurors of Nevada, who have no incentive to consider the cost to California's taxpayers and polity from imposing

---

[6] *See generally* Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 11-28 (2003). Professor Smith, though somewhat critical of the Court's emphasis on dignity in recent decisions, acknowledges that it "is not without some precedential pedigree." *Id.* at 10; *see id.* at 28-38.

a large financial sanction on California. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government"—or another State. *Alden*, 527 U.S. at 751.[7]

Indeed, all of the concerns this Court expressed in *Alden* are present in this case. The State of California has been subjected to an astonishing intrusion on its dignity by being forced to defend the conduct of a core sovereign activity—its assessment of state taxes—in the courts of another State. That litigation required years of discovery and a four-month trial, and resulted in a judgment against the FTB of more than *$490 million* (though the judgment was eventually reduced due to constitutional and comity considerations). *See* App. 11a; *Hyatt II*, 136 S. Ct. at 1280. None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising out of their tax-assessment activities. *See* Cal. Gov't Code § 860.2; *cf.* 28 U.S.C. § 2680(c) (no waiver of federal sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax").

---

[7] It is also difficult to reconcile *Hall* with this Court's jurisprudence recognizing the suit immunity of Indian tribes. A Tribe may not be sued in a state court (absent consent or congressional authorization), *see Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998), even when the State may substantively regulate the tribal activity giving rise to the litigation, *see Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034-2035 (2014). Allowing California to be sued in Nevada courts makes even less sense where, as here, Nevada had no authority to regulate the conduct that gave rise to respondent's lawsuit—the California authorities' conduct of audits of respondent's state tax returns.

4. Although this Court is ordinarily loath to overrule its precedents, "*stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). "This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (internal quotation marks omitted).

In deciding whether to overrule a prior decision, the Court considers "whether the decision is unsound in principle," "whether it is unworkable in practice," and the "reliance interests" at stake. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (internal quotation marks omitted). Stare decisis also does not prevent the Court "from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As four Members of this Court have already recognized, those considerations favor overruling *Hall*; at the very least, they warrant allowing a fully constituted Court to consider *Hall*'s continuing vitality.

As explained above, *supra* pp. 11-13, *Hall*'s reasoning can "no longer withstand[] 'careful analysis'" in light of the Framing Era consensus on sovereign immunity and the Eleventh Amendment experience. *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003)). *Hall*'s rejection of the firmly entrenched principle of interstate sovereign immunity—recognized before, during, and following the ratification of the Constitution, and for almost 200 years afterward—was "'unsound in principle,'" *Allied-Signal*, 504 U.S. at 783 (quoting *Garcia* v.

San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)), and should be reconsidered.[8]

Furthermore, the "development of constitutional law" since *Hall* was decided has "left [*Hall*] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992); *see supra* pp. 13-18. This Court's sovereign immunity decisions since *Hall* recognize "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." *Virginia Office for Prot. & Advocacy*, 563 U.S. at 253 (internal quotation marks omitted). Those decisions have established that States possess sovereign immunity from individual suits in federal court, *see Seminole Tribe*, 517 U.S. at 54, 57-73, federal administrative adjudications, *Federal Mar. Comm'n*, 535 U.S. at 747, and their own courts, *see Alden*, 527 U.S. at 712; and that States may not choose, as a matter of policy, to deny Indian tribes immunity in their courts, *see Kiowa*

[8] Several factors may have contributed to *Hall*'s less-than-robust reasoning. First, the California Supreme Court decision resulting in *Hall* rejected Nevada's claim of sovereign immunity on different grounds from those embraced in *Hall*. That court held that a State does "not exercis[e] sovereign power"—and thus is not entitled to immunity—when it acts beyond its borders. *Hall* v. *University of Nev.*, 503 P.2d 1363, 1364 (Cal. 1972). Second, before this Court, the *Hall* respondents largely advanced that same argument, and barely addressed the constitutional issues. *See* Resp't Br., *Nevada* v. *Hall*, No. 77-1337, 1978 WL 206995, at *12-16 (U.S. Aug. 16, 1978). The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking. *See Penson* v. *Ohio*, 488 U.S. 75, 84 (1988) ("[T]ruth … is best discovered by powerful statements on both sides of the question." (internal quotation marks omitted)).

Tribe of Okla. v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 760 (1998). Thus, *Hall* is a jurisprudential outlier—both in denying States sovereign immunity, and in permitting a forum State to determine the immunity it grants to another sovereign—and can be overruled without threatening other precedents of this Court.

Hall has also proven "unworkable." *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). Under *Hall*, a State has no way of knowing whether, and to what extent, a particular forum State will confer any immunities upon it in any particular suit. And if a State should find itself denied immunity, it may face years—in this case, two decades and counting—of litigation and untold financial and administrative burdens.

This case also demonstrates the bias that a State can face in another State's courts. The Nevada jury below was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to more than $490 million after costs and interest. To the extent a sovereign partially waives its sovereign immunity in its own courts, it can rely on the terms of its waiver and the jury's sense that a large verdict against the sovereign will ultimately be footed by members of the jury as taxpayers. But when a Nevada jury knows that California taxpayers will pay the tab, there is no obvious source of restraint, as the jury's verdict here attests.

Furthermore, by forcing California to defend itself against allegations that its core state function of tax assessment was deployed improperly, the Nevada courts have certainly demeaned California's "dignity and respect," which sovereign immunity is "designed to protect." *Coeur d'Alene Tribe*, 521 U.S. at 268. In short,

Hall has put "severe strains on our system of cooperative federalism," as the dissenters in that case warned it would. *Hall*, 440 U.S. 429-430 (Blackmun, J., dissenting).

Finally, as a constitutional decision regarding immunity, a matter that "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), *Hall* has engendered no reliance interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). No such interests are implicated here; no parties "have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010). This Court can reconsider *Hall* without harming any reasonable reliance interests.

II. THIS CASE REMAINS AN IDEAL VEHICLE TO RECONSIDER *HALL*

1. As the Court must have concluded when it granted certiorari in *Hyatt II*, this case provides an appropriate opportunity to reconsider *Hall*.

a. The federal issue presented here was passed upon by the state courts. In a 2002 decision granting in part and denying in part the FTB's challenge to the district court's denial of its motions for summary judgment or dismissal, the Nevada Supreme Court "reject[ed]" the FTB's "argument[] that the doctrine[] of sovereign immunity … deprive[s] the district court of subject matter jurisdiction over Hyatt's tort claims." App. 144a. Citing *Hall*, the court held that "although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts." App. 144a & n.12 (citing *Hall*).

The FTB raised the issue again after trial. The FTB argued before the Nevada Supreme Court that "*Hall*'s continuing viability is questionable" in light of more recent decisions of the Supreme Court, including *Federal Maritime Commission*, *Alden*, and *Seminole Tribe*. Pet. Nev. S. Ct. Opening Br. 101 n.80 (Aug. 7, 2009). The FTB asked the Nevada Supreme Court to recognize its immunity, explaining that a state court "may evaluate the continuing viability of an old United States Supreme Court opinion, in light of more recent changes in the economy or the law." *Id.* The Nevada Supreme Court rejected that argument by affirming a judgment in favor of Hyatt. Accordingly, the question presented is ripe for this Court's review.

b. The decision of the Nevada Supreme Court is final for purposes of this Court's appellate jurisdiction under 28 U.S.C. § 1257(a) because "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had" in the Nevada district court. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 478 (1975). The only thing left for the Nevada district court to do on remand from the Nevada Supreme Court is enter judgment in favor of Hyatt and entertain any requests for costs or fees. This Court need not "await[] the completion of the[se] additional proceedings" before reviewing the judgment. *Id.* at 477; *see Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003) (remand to consider "scope and basis for awarding attorney's fees" did not interfere with Court's jurisdiction); *Pierce Cty.* v. *Guillen*, 537 U.S. 129, 142 (2003) (reviewing state supreme court decision where "all that remains to be decided on remand … is the amount of attorney's fees to which respondents are entitled"). The remaining "proceedings would not require the decision of other federal

questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' as well as precipitate interference with state litigation." *Cox*, 420 U.S. at 477-478 (citation omitted). Indeed, this case is in essentially the same procedural posture as when the Court granted certiorari in *Hyatt II*.

The judgment of a state high court on a federal issue will be "deemed final" where "the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. The federal issue here is conclusive because if this Court recognizes the FTB's claim of sovereign immunity, the case will be finally dismissed. Furthermore, the outcome of the remaining proceedings in the Nevada district court is preordained. The Nevada Supreme Court has ordered the district court to enter judgment in favor of Hyatt. Postponing consideration of the federal issue "'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.'" *Id.*

2. The affirmance by an equally divided Court in *Hyatt II* does not prevent the Court from again granting certiorari and reconsidering *Hall*. The rule that such an affirmance is "conclusive and binding upon the parties" means only that a judgment resting on such an affirmance, once final, does not lack res judicata effect. *Durant* v. *Essex Co.*, 74 U.S. 107, 109, 113 (1868). But the Court may revisit an issue previously affirmed by an equally divided Court at a later stage of the case, before final judgment has been entered. *Cf. Neil* v.

Biggers, 409 U.S. 188, 189-192 (1972) (affirmance by equally divided Court was not an "actual adjudication by the Supreme Court" barring subsequent consideration of the issue on habeas petition).

Even if the affirmance in *Hyatt II* constituted law of the case, however, that doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see also Castro* v. *United States*, 540 U.S. 375, 384 (2003) (law of the case doctrine "cannot prohibit a court from disregarding an earlier holding in an appropriate case"); 18B Wright et al., *Fed. Prac. & Proc.* § 4478 (2d ed. 2017 Supp.). Moreover, law of the case doctrine is at its weakest when it comes to questions of jurisdiction and justiciability, which are more "likely to be reconsidered" than others "because of their conceptual importance" and the degree to which they are "affected with a public interest." *Fed. Prac. & Proc.* § 4478.5; *see, e.g.*, *Public Interest Research Grp. of N.J., Inc.* v. *Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3d Cir. 1997) ("[W]e conclude that the concerns implicated by the issue of standing—the separation of powers and the limitation of this Court's power to hearing cases or controversies under Article III of the Constitution—trump the prudential goals of preserving judicial economy and finality."); *American Canoe Ass'n* v. *Murphy Farms, Inc.*, 326 F.3d 505, 515-516 (4th Cir. 2003).

The law of the case doctrine also does not prevent a court from "depart[ing] from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona* v. *California*, 460 U.S.

605, 618 n.8 (1983). This Court has found that standard met where the Court concludes that a controlling precedent "would be decided differently under [the Court's] current" jurisprudence. *Agostini*, 521 U.S. at 236. Thus, in *Agostini*, the Court felt free to reconsider its prior decision in the same case because that decision was inconsistent with the Court's current understanding of the relevant constitutional provisions. *Id.* Accordingly, if this Court finds, as it should, that *Nevada* v. *Hall* is inconsistent with more recent cases addressing sovereign immunity, law of the case principles will present no bar to such a holding.

Moreover, by granting certiorari to consider the important question presented, the Court would not be upsetting its decision in *Hyatt II* in any but the most formalist sense; it would be rendering a decision where it previously could not. The considerations traditionally animating law of the case doctrine—judicial economy and finality—do not weigh against review where, as here, the prior decision was not rendered because of a considered judgment on the merits of the question presented, but rather because of the inability of the Court to reach a conclusive determination of the question.

3. The question presented remains as important today as it was when the Court granted certiorari in *Hyatt II*. California has already spent two decades and incurred untold costs defending itself in this suit, and it still faces additional proceedings in the Nevada district court absent this Court's review. But the effects of Hyatt's suit hardly end there. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting that he may bring a subsequent tort action against the FTB in Nevada. *See* Pet. Nev. S. Ct. Req. for Judicial Notice at RJN-094 (Dec. 5, 2016) (Hyatt's brief before California

State Board of Equalization arguing that "[a]ssertion of the 1992 fraud penalties is a continuing bad faith act by FTB"); *id.* at RJN-103 to RJN-134 (describing the FTB's alleged "continuing bad faith conduct").

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation going forward. *See, e.g.*, Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. June 17, 2015) (alleging fraud by California FTB). Those suits are regrettable, yet, given *Hall*, unsurprising. Sovereign governments undertake many sovereign responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions decline to waive their sovereign immunity over tax disputes. *See, e.g.*, Cal. Gov't Code § 860.2; Nev. Rev. Stat. § 372.670; 28 U.S.C. § 2680(c). *Hall* has provided taxpayers with an avenue to skirt that immunity and disrupt the taxing authority. And in case there were any doubt that such suits disrupt a State's execution of its sovereign responsibilities, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." Grant, *Moving from Gold to Silver: Becoming a Nevada Resident*, 23 Nev. Lawyer 22, 25 n.9 (Jan. 2015).

Although this egregious case amply demonstrates *Hall*'s shortcomings, those flaws arise in every case in which a nonconsenting State is haled into the courts of a sister State. Recently, for example, Nevada was haled into the California courts against its will. *See* Pet., *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). In that case, the plaintiff demanded monetary

and equitable relief based on Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally use them to travel to California. *Id.* at i. A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy, both of which sovereign immunity is designed to prevent. *See* Decl. of Kristine Poplawski in Supp. of Joint Request for Approval of Dismissal, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015). Other lawsuits have similarly involved challenges to state sovereign functions. *See, e.g.*, Compl., *Crutchfield Corp.* v. *Harding*, No. CL17001145-00 (Va. Cir. Ct., Albemarle Cty. Oct. 24, 2017) (suit against officials of the Massachusetts Department of Revenue in Virginia state court seeking declaration of invalidity of Massachusetts tax law); *Faulkner* v. *University of Tenn.*, 627 So. 2d 362 (Ala. 1992) (permitting suit in Alabama courts against university operated by Tennessee seeking damages and injunctive relief for decision to revoke a doctoral degree); *Head* v. *Platte Cty.*, 749 P.2d 6 (Kan. 1988) (agreeing to exercise jurisdiction over suit against Missouri county and officer of Missouri alleging a failure to train employees and establish policies concerning the execution of arrest warrants).

More generally, the spectacle of States being sued in each other's courts confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would supplant cooperative federalism with a race to the bottom. *See* 440 U.S. at 429-430 (Blackmun, J., dissenting). Other States should not be put to the burdens the FTB has faced here—two decades of litigation and the need to fight off a verdict in the hundreds of mil-

lions of dollars—before the Court has another chance to decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

MARCH 2018

EXHIBIT 85

No. 17-1299

In The

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, California 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Gilbert P. Hyatt respectfully opposes the Petition for a Writ of Certiorari by the Franchise Tax Board of the State of California in this case.

STATEMENT

This is the continuation of litigation that has been going on for over a quarter of a century and it is back in this Court for the third time. *Franchise Tax Board v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Board v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

The Underlying Facts

This is a state-law tort suit brought in Nevada state courts and is one of several disputes between Gilbert P. Hyatt and petitioner California Franchise Tax Board ("the Board"). The original dispute arose out of a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that Hyatt, a former California resident, became a permanent resident of Nevada. Hyatt 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 Hyatt became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California. *See, e.g.*, *Hyatt v. Yee*, 871 F.3d 1067 (9th Cir. 2017) (holding that Hyatt could not

enjoin Franchise Tax Board proceedings based on constitutional violations and the lengthy delay in the proceedings).[1]

This lawsuit concerns tortious acts committed by the Board and its employees against Hyatt. 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 Hyatt. Referring to Hyatt, the auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. According to testimony from a former Board employee, the auditor freely discussed personal information about Hyatt – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After Cox had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (filed Dec. 21, 2009). The auditor's

---

[1] At a final hearing in August 2017, the California State Board of Equalization found five out of six tax issues in favor of Hyatt including that his Nevada residency began on October 20, 1991. The Franchise Tax Board has petitioned for rehearing with the California Office of Tax Appeals, a matter which is still pending. In the Matter of the Appeals of Gilbert P. Hyatt, California Office of Tax Appeals Case Nos. 435770 and 446509.

incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. *See* 4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, Ms. Cox pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and estranged members of Hyatt's family against him. *See, e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. Cox often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Franchise Tax Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with information "[d]emand[s]" about Hyatt and disclosed his home address and social security number to third parties, including California and Nevada newspapers. *See, e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his places of worship. *See* 83 RA at 020653-54, 020668-69, 020735-36. The Board also disclosed its investigation of Hyatt to Hyatt's patent licensees in Japan. *See* 84 RA at 020788, 020791. The Board knew that Hyatt, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, an attorney representing Hyatt, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." *See* 5/22/08 RT at 80:3-81:2. Both Cowan and Hyatt understood the Board employee to be pushing for tax payments as the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74:23.2.

The Initial Litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although it is clearly established that a state does not have sovereign immunity when sued in the courts of another state, *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 would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," *Franchise Tax Board of California v.*

Hyatt, Nos. 35549 and 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Id. The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Id.

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Id. at *8. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Id. at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Id. (citation omitted). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Id.

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003) ("*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." Id. at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." Id. The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." Id. at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The Trial, Verdict, and Review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional

torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Board of California v. Hyatt*, 335 P.2d 125 (Nevada 2014). In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim). Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that Hyatt had not established the necessary elements for various torts under Nevada law.

The Nevada Supreme 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 144. 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. at 145. The court thus determined "that substantial evidence supports each of the fraud elements." Id.

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." 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 147 (citation omitted). 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. (citation omitted).

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 Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that Hyatt had "suffered extreme treatment" at the hands of the Board (id. at 148) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the

Board was entitled to a new trial to determine the proper level of damages. Id. at 159-63.

The court 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 153. 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.

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277, 1280 (2016).

After briefing and oral argument, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against

California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." Id. at 1281. The Court concluded that "[d]oing 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."

The Case on Remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of Nevada's statutory damages cap. The Nevada Supreme Court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. Id. at 121a-22a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also said that the statutory damages cap includes prejudgment interest.

REASON FOR DENYING THE WRIT

THERE IS NO COMPELLING JUSTIFICATION FOR OVERRULING *NEVADA V. HALL*

The sole issue presented in this case is whether this Court should overrule its almost 30-year-old precedent in *Nevada v. Hall*.

"The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citations omitted). The Court has emphasized "that *stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. . . . *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). Stare decisis "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).

Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Petitioner and its *amici* offer no such compelling justification for overruling *Nevada v. Hall*. The decision is almost 30 years old and yet Petitioner and its *amici* point to only a relatively small number of cases against state governments in the courts of other states and document little burden on state governments from such litigation. *See* Brief of Indiana and 44 Other States as *Amici Curiae* in Support of Petitioner, pp. 8-10. Suits against states in state court – rare before the decision in *Nevada v. Hall* – are still rare today. *See* Jeffrey W. Stempel, "*Hyatt v. Franchise Tax Board of California*: Perils of Undue Disputing Zeal and Undue Immunity for Government Inflicted Injury," 18 Nev. L.J. 61, 83 (2018) ("According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states. But the empirical burden of such litigation is far from clear and hardly seems oppressive."). Furthermore, in those infrequent instances when such suits have been filed, state courts have typically relied on the voluntary doctrine of comity to extend broad protections to their sister states, as the Nevada Supreme Court did here. *See, e.g., Cox v. Roach*, 723 S.E.2d 340 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006).

The primary argument advanced by Petitioner and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Petition for a Writ of Certiorari at 11-19. But Petitioner ignores the key distinction that has been drawn from the earliest days of American history and that underlies *Nevada v.*

Hall: the difference between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign. To reach the conclusion that *Nevada v. Hall* was wrongly decided, this Court would not only have to eliminate this distinction, but it would have to revisit the myriad precedents that depend upon it.

Nevada v. Hall was the mirror image of this case. Nevada plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada.

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. The Court reviewed the history of sovereign immunity and concluded that it protects a state from being sued in its own courts without its consent. The Court explained that sovereign immunity means that "no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Nevada v. Hall*, 440 U.S. at 416.

Relying on precedent from the earliest days of American history – Chief Justice John Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S.

(7 Cranch) 116 (1812) – the Court in *Nevada v. Hall* concluded that sovereign immunity was never meant to protect a state from suits in another state's court. Id. *The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. Simply put, a state's sovereign immunity in its own courts is a function of its sovereignty there; but that does not give it sovereign immunity when it is sued in the courts of another sovereign. *See, e.g., The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822). *See* William Baude, "Sovereign Immunity and the Constitutional Text," 103 Virginia L. Rev. 1, 23-24 (2017) ("Immunity in one's own courts, the Court wrote, 'has been enjoyed as a matter of absolute right for centuries,' while immunity in another sovereign's courts was a matter of mutual agreement or comity.").

Nevada v. Hall was based on three basic and unassailable premises. First, 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 founding of the United States (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. 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.

This is why Petitioner is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Petition for a Writ of Certiorari at 13-19. *Alden v. Maine* is about the ability of a state to be sued in its own state courts, something this Court said was precluded by an immunity that has existed throughout American history. But a state's sovereignty in its own courts tells nothing about its immunity in the courts of another state. In fact, as this Court noted in *Alden v. Maine*, "*the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another*." 527 U.S. at 738 (emphasis added).

In *Alden v. Maine*, the Court reaffirmed the basic distinction between suing a state in its own state courts and suing a state in the courts of another state. The Court stated: "In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here – that the Constitution reserves to the states a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress." Id. at 739-40.

Petitioner and its *amici* stress state sovereignty, but they ignore that keeping a state from hearing suits is itself a significant limit on state prerogatives. Indeed, in *Nevada v. Hall*, this Court stressed that preventing a state court from hearing suits against other states would be inconsistent with a concern for state

sovereignty. The Court declared: "It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States – and the power of the people – in our Union." *Nevada v. Hall*, 440 U.S. at 426-27.

Petitioner and its *amici* do not cite a single word showing that, at the time of the writing and ratification of the Constitution, either the Framers or representatives of the states addressed a state's immunity from suit in another state's courts. Nothing in the text of the Constitution or its history supports giving a state sovereign immunity protection when it is sued in another state's courts. To be sure, there were many declarations about the immunity of a state government from suit, but none said that this includes *constitutional* protection from suit in the courts of another state.

This does not mean that states are without protection from suit in other state courts. As this Court held when this case was last before the Court, the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. This matters in protecting state governments. In this case, the jury's award of $139 million in

compensatory damages and $250 million in punitive damages now has been reduced to $100,000.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that punitive damages are not available against the Board because of considerations of comity.

Moreover, the states need not rely exclusively on the doctrine of comity in their quest for greater immunity in other states' courts. If both California and Nevada believe that expanded immunity is appropriate, the two states are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all states sharing similar views. 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).

Thus, this Court should deny the Petition for a Writ of Certiorari that asks it to reconsider an almost 30-year-old precedent that was based on decisions from the earliest days of American history. As this Court has noted: "[A]n argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015). 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.'"

Id. (citations omitted). No such "special justification" exists to warrant reconsideration of *Nevada v. Hall*.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, California 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

EXHIBIT 86

No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 17-1299

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

This Court has already once granted certiorari to consider whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled, and four Members of an equally divided Court voted to answer that question in the affirmative. The question remains as worthy of review as it was two Terms ago. And this case remains an ideal vehicle for addressing it, as Hyatt does not dispute.

Instead of raising any vehicle concern, Hyatt tries to minimize the importance of the question presented. But an extraordinary 45 States have filed an amicus brief explaining *Hall*'s "sustained nationwide impact" and the extent to which it "insult[s] ... the most fundamental notions of State sovereignty." States Br. 11. Hyatt's other arguments against certiorari are that *Hall* was correctly decided and that it should be pre-

served by stare decisis. But even if those arguments had force—which they do not—they are properly addressed at the merits stage. They supply no reason to deny certiorari, particularly when four Justices have already disagreed with them.

The Court should not pass up this opportunity to resolve, at last, a question implicating fundamental principles of state sovereignty and our constitutional structure.

I. THE QUESTION PRESENTED IS DEEPLY IMPORTANT

Hyatt attempts (at 12, 16-17) to diminish the importance of the question presented by suggesting that States are only rarely sued in other States' courts, that allowing such suits imposes minimal burdens on the defendant States, and that comity or interstate compacts are adequate substitutes for interstate sovereign immunity. Those arguments are incorrect.

1. As the amici States explain, "[a]s a result of *Hall*, State courts commonly exercise jurisdiction over officials and agencies of other States." States Br. 8. They identify four cases challenging state taxation that were pending in other States' courts in the first few months of 2018 alone—suits brought against Massachusetts in Virginia, against Ohio in Kentucky, and against South Dakota in both North Dakota and Minnesota—as well as a 2013 case brought against Connecticut in Texas. *Id.* at 9-10. Outside the tax context, amici point to suits against Ohio in Indiana, against North Dakota in Minnesota, against Rhode Island in Connecticut, and against Texas in New Mexico—each of which has been pending in the past two years alone. *Id.* at 10. The petition provides additional examples, as does the States' amicus brief in *Hyatt II*. Pet. 27-28; States Br. 23-26,

Franchise Tax Bd. of Cal. v. *Hyatt*, No. 14-1175 (U.S. Sept. 10, 2015). Indeed, this petition is not even the only one currently asking the Court to reconsider *Hall*. *See* Pet. for Cert., *Nevada Dep't of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018). And, of course, the very fact that 45 States have joined California in asking the Court to overrule *Hall*—including Nevada, whose courts exercised jurisdiction in this case—suggests that this is an important and recurring issue.

Hyatt's contention (at 12) that petitioner and amici have identified "little burden on state governments from such litigation" also rings hollow. In fact, petitioner and amici have explained the serious harms caused by suits brought under *Hall*. Such suits impose on defendant States the financial and administrative costs of litigation and the cost of any judgment. This case—having dragged on for 20 years, through a four-month trial, with costs in the millions of dollars, Pet. App. 11a-12a—well illustrates the kinds of "staggering burdens," *Alden* v. *Maine*, 527 U.S. 706, 750 (1999), that litigation of this nature can create. *See* Pet. 21. Aside from their pecuniary burdens, suits under *Hall* demean defendant States' dignity by forcing them to justify their core sovereign functions to the courts and juries of another State, rather than to their own citizens in the exercise of self-government. *See id.*; States Br. 2. And they permit state courts to inject themselves into the sovereign functions of other States, interfering with or even altering the defendant State's policies. *See* Pet. 27-28 (because of a case brought in California's courts, Nevada was forced to alter its policy of providing bus vouchers to indigent patients discharged from state-run medical facilities); States Br. 6-7. In some cases, such as in the tax context, suits brought under *Hall* can also undermine the administrative processes

States have created as conditions for waiving sovereign immunity. States Br. 3-7. Those are exactly the types of burdens that sovereign immunity is meant to prevent. *See, e.g.*, *Alden*, 527 U.S. at 750.[1]

2. Hyatt contends (at 12, 17) that the voluntary doctrine of comity is an adequate substitute for sovereign immunity, but this case—which, ironically, Hyatt cites as an example—exposes the fallacy of that argument. Petitioner has been litigating this case for more than 20 years and, unless this Court intervenes, faces a monetary judgment to be entered on remand from the decision below. Even though that judgment would be substantially less than the initial award imposed by the trial court, it remains significant. And the monetary judgment is dwarfed by the time and money that petitioner has spent litigating this case, to say nothing of the distraction from its core tax functions and the harm to California's dignity from being haled before a Nevada court and jury.

Moreover, even where a state court decides to grant protection to another State on comity grounds, that protection may take years of litigation to obtain and is often less than what the State would have in its own courts. For example, in *Sam* v. *Sam*, 134 P.3d 761 (N.M. 2006), which Hyatt cites (at 12), the defendant—an Arizona governmental trust—had to litigate for

---

[1] Professor Stempel's contrary conclusion that "'the empirical burden of such litigation is far from clear and hardly seems oppressive,'" cited by Hyatt (at 12), is unsupported and should be taken with a healthy dose of skepticism given that Professor Stempel was a retained expert for Hyatt in this case. *See* Stempel, Hyatt v. Franchise Tax Board of California*: Perils of Undue Disputing Zeal and Undue Immunity for Government-Inflicted Injury*, 18 Nev. L.J. 61, 61 n.* (2017).

nearly five years before the New Mexico Supreme Court decided that it was entitled to the two-year statute of limitations afforded to New Mexico's government entities, though not the one-year statute of limitations that Arizona courts would have applied. Comity is no substitute for a clear rule of sovereign immunity, which should allow a defendant State to terminate litigation quickly and at the initial stage of a case, without incurring the extraordinary costs seen in this case and in *Sam*.

3. Hyatt also contends (at 17) that the States could enter into an agreement to provide immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely, the United States Constitution. Interstate compacts "can take decades, or longer, to hammer out," Multistate Tax Comm'n Br. 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

II. *HALL* WAS WRONGLY DECIDED, AND STARE DECISIS IS NO REASON TO PRESERVE IT

Hyatt devotes most of his brief in opposition to the merits of the question presented, arguing that *Hall* was correctly decided and that stare decisis counsels against overruling it. Those arguments are properly considered at the merits stage, not in deciding whether to grant certiorari. In any event, both are meritless.

A. Hyatt's Defense Of *Hall* Relies On A Selective And Incorrect Reading Of Precedents

1. Hyatt attempts to defend *Hall* by recapitulating *Hall*'s reasoning—particularly its reliance on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch)

116 (1812). That reasoning is as unpersuasive now as it was in *Hall*.

The Schooner Exchange addressed whether a federal court in Pennsylvania could exercise jurisdiction over a ship in which Napoleon, the French emperor, claimed ownership. The plaintiffs, two Americans, alleged that the ship belonged to them and had been wrongfully seized by Napoleon's forces after it sailed from Baltimore to Spain; they sued to recover it once it had sailed back to Philadelphia. 11 U.S. at 117. This Court held that a nation's courts possess "exclusive and absolute" jurisdiction "within its own territory" and that "[a]ll exceptions" to that jurisdiction "must be traced up to the consent of the nation itself." *Id.* at 136. But it recognized "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction," *id.* at 137, and held that the disputed ownership of the vessel in question fell within that class, so that the federal court lacked jurisdiction, *id.* at 146-147.

Hyatt relies on *The Schooner Exchange* for the supposedly "basic and unassailable premise[]" (Opp. 14) that States, like sovereign nations, cannot assert sovereign immunity in the courts of other sovereigns. But that premise is far from "basic and unassailable"; to the contrary, it conflicts with the view that prevailed from the Founding until *Hall*.

As the petition explains (at 11-12), it was widely understood in the Founding era that the States enjoyed sovereign immunity from suit in each other's courts. For example, when a Pennsylvania court exercised jurisdiction over property belonging to Virginia, *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), the episode "raised such concerns throughout the

States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). The strength of national consensus on this issue became even clearer with the backlash to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), that culminated in the Eleventh Amendment—which showed that the States, horrified at the notion of being subjected to suit in federal court, must even more strongly "have reprehended the notion of ... being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

In the decades that followed, numerous decisions of this Court expressed the view that States were not, as Hyatt suggests, free to entertain suits against sister States. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1858), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Id.* at 529 (emphasis added); *see also Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961); *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883); Pet. 14 n.2. State courts shared that understanding. *See, e.g.*, *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929). None of those decisions so much as mentioned *The Schooner Exchange*.

Hyatt makes no attempt to reconcile his reliance on *The Schooner Exchange* with this long history, or even to address it at all.

Hyatt does cite *Alden* for the proposition that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." 527 U.S. at 738; *see* Opp. 15. But that is simply the *Alden* Court's characterization of what *Hall* held;

Alden did not reaffirm *Hall*'s erroneous reasoning. Nor is Hyatt correct to say (at 13), presumably with *Alden* in mind, that overruling *Hall* would require this Court to "revisit the myriad precedents that depend upon it." *Alden* does not "depend upon" *Hall* any more than it reaffirms *Hall*'s erroneous reasoning. Rather, the *Alden* Court felt the need to distinguish *Hall* (while noting that *Hall* in some respects could be read as "consistent with, and even support[ing]," the holding the Court ultimately reached). And Hyatt does not identify any other precedents of the supposed "myriad" that "depend upon" *Hall*.

2. Aside from his reliance on *The Schooner Exchange*, Hyatt invokes (at 16) two further elements of *Hall*'s erroneous reasoning: first, that the immunity of States in each other's courts was not discussed during the drafting or ratification of the Constitution; and second, that the constitutional text does not explicitly recognize interstate sovereign immunity.

As the petition explains, those premises were flawed at the time of *Hall* and have grown only weaker since. As the *Hall* dissenters recognized, the "only reason" interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting); *see also* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 253, 263; Pet. 12. And this Court's decisions since *Hall* have made clear that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729; *see* Pet. 14-15 (collecting others). Hyatt offers no response. Nor does he address *Hall*'s inconsistency with the constitutional values of dignity and self-

government that are protected by state sovereign immunity, as this Court's subsequent decisions have made clear. *See, e.g.*, *Alden*, 527 U.S. at 715, 750; Pet. 16-18. Those values are particularly acute in the context of suits, like this one, that challenge a State's exercise of the core sovereign function of taxation. Pet. 18.

B. Stare Decisis Considerations Are At Their Weakest Here

As the petition explains (at 19-22), moreover, stare decisis considerations do not stand in the way of overruling *Hall*, and certainly provide no basis for refusing to consider doing so. "*Stare decisis* is not an inexorable command" and is weakest in a case—such as this one—involving a constitutional issue that has not engendered reliance interests. *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In such a case, stare decisis cannot justify adherence to a decision that is "unworkable or ... badly reasoned," *id.*, as *Hall* was.

Citing this Court's decisions in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), Hyatt notes that stare decisis "is of fundamental importance to the rule of law." Opp. 11 (internal quotation marks omitted) (quoting *Patterson*, 491 U.S. at 172); *see* Opp. 17. That is certainly true. But the Court has also explained that stare decisis has "special force in the area of statutory interpretation"—at issue in both *Patterson* and *Kimble*—because, "unlike in the context of constitutional interpretation, ... Congress remains free to alter" this Court's rulings. *Patterson*, 491 U.S. at 172-173; *see also Kimble*, 135 S. Ct. at 2409. In constitutional cases, like this one, stare decisis carries less force because "'correction through legislative

action is practically impossible.'" *Payne*, 501 U.S. at 828.

Stare decisis also carries less force in this context because, as a constitutional decision regarding sovereign immunity—a matter that "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998)—*Hall* has not engendered reliance interests. Pet. 22. That too distinguishes this case from *Kimble* and *Patterson*, which involved the kinds of "property and contract" interests for which reliance is a serious concern and "[c]onsiderations in favor of *stare decisis* are at their acme," *Payne*, 501 U.S. at 828. *See Kimble*, 135 S. Ct. at 2410; *Patterson*, 491 U.S. at 174.

In any event, as the petition explains (at 11-13, 19-22), this case presents all of the considerations that justify overcoming stare decisis. *Hall*'s reasoning is inconsistent with the Framing-era conception of sovereign immunity and the history of the Eleventh Amendment, and thus was "unsound in principle" when it was decided, *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (internal quotation marks omitted). And cases since *Hall* have "left [it] behind as a mere survivor of obsolete constitutional thinking," *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). *See supra* pp. 8-9; Pet. 13-18.

The petition also explains (at 21-22) that *Hall* has proven "unworkable," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). *Hall* denies States the "dignity and respect" that sovereign immunity is "designed to protect," *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997); interferes with their ability to govern by diverting their resources to defend suits across the country; subjects them to bias in other States' courts; and leaves them in the dark as to what protection—if any—they

will receive when they are haled into another State's courts. The considerations that favor overruling such a misguided precedent far outweigh those that favor retaining it simply for the sake of consistency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

JUNE 2018

EXHIBIT 87

(ORDER LIST: 585 U.S.)

THURSDAY, JUNE 28, 2018

APPEAL -- SUMMARY DISPOSITION

16-166 HARRIS, DAVID, ET AL. V. COOPER, GOV. OF NC, ET AL.

The judgment is affirmed.

CERTIORARI -- SUMMARY DISPOSITIONS

16-1146 WOMAN'S FRIEND CLINIC, ET AL. V. BECERRA, ATT'Y GEN. OF CA

16-1153 LIVINGWELL MEDICAL CLINIC, ET AL V. BECERRA, ATT'Y GEN OF CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

16-9187 SOLANO-HERNANDEZ, SANTIAGO V. UNITED STATES

16-9587 VILLARREAL-GARCIA, AURELIANO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Rosales-Mireles* v. *United States*, 585 U. S. ____ (2018), and for consideration of the question whether the cases are moot.

17-166 ZANDERS, MARCUS V. INDIANA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme

Court of Indiana for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-211 MOUNTAIN RIGHT TO LIFE, ET AL. V. BECERRA, ATT'Y GEN. OF CA

17-976 CTIA - THE WIRELESS ASSOCIATION V. BERKELEY, CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

17-981 RIFFEY, THERESA, ET AL. V. RAUNER, GOV. OF IL, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ____ (2018).

17-1050 SALDANA CASTILLO, NOEL A. V. SESSIONS, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Pereira* v. *Sessions*, 585 U. S. ____ (2018).

17-1194) INT'L REFUGEE ASSISTANCE, ET AL. V. TRUMP, PRESIDENT OF U.S., ET AL.
)
17-1270) TRUMP, PRESIDENT OF U.S., ET AL. V. INT'L REFUGEE ASSISTANCE, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Trump* v. *Hawaii*, 585 U. S. ____ (2018).

17-5402 REED, TOBIAS O. V. VIRGINIA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5692 CHAMBERS, ANTOINE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5964 THOMPSON, ANTHONY C. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018). Justice Gorsuch took no part in the consideration or decision of this motion and this petition.

17-6213 HANKSTON, GAREIC J. V. TEXAS

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

(ORDER LIST: 585 U.S.)

THURSDAY, JUNE 28, 2018

APPEAL -- SUMMARY DISPOSITION

16-166 HARRIS, DAVID, ET AL. V. COOPER, GOV. OF NC, ET AL.

The judgment is affirmed.

CERTIORARI -- SUMMARY DISPOSITIONS

16-1146 WOMAN'S FRIEND CLINIC, ET AL. V. BECERRA, ATT'Y GEN. OF CA

16-1153 LIVINGWELL MEDICAL CLINIC, ET AL V. BECERRA, ATT'Y GEN OF CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

16-9187 SOLANO-HERNANDEZ, SANTIAGO V. UNITED STATES

16-9587 VILLARREAL-GARCIA, AURELIANO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Rosales-Mireles* v. *United States*, 585 U. S. ____ (2018), and for consideration of the question whether the cases are moot.

17-166 ZANDERS, MARCUS V. INDIANA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme

Court of Indiana for further consideration in light of *Carpenter* v. *United States*, 585 U. S. _____ (2018).

17-211 MOUNTAIN RIGHT TO LIFE, ET AL. V. BECERRA, ATT'Y GEN. OF CA

17-976 CTIA - THE WIRELESS ASSOCIATION V. BERKELEY, CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. _____ (2018).

17-981 RIFFEY, THERESA, ET AL. V. RAUNER, GOV. OF IL, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, 585 U. S. _____ (2018).

17-1050 SALDANA CASTILLO, NOEL A. V. SESSIONS, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Pereira* v. *Sessions*, 585 U. S. _____ (2018).

17-1194) INT'L REFUGEE ASSISTANCE, ET AL. V. TRUMP, PRESIDENT OF U.S., ET AL.
)
17-1270) TRUMP, PRESIDENT OF U.S., ET AL. V. INT'L REFUGEE ASSISTANCE, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Trump* v. *Hawaii*, 585 U. S. _____ (2018).

17-5402 REED, TOBIAS O. V. VIRGINIA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5692 CHAMBERS, ANTOINE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5964 THOMPSON, ANTHONY C. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018). Justice Gorsuch took no part in the consideration or decision of this motion and this petition.

17-6213 HANKSTON, GAREIC J. V. TEXAS

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-6704 BANKS, ALBERT D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

CERTIORARI GRANTED

17-532 HERRERA, CLAYVIN V. WYOMING

17-571 FOURTH ESTATE PUB. BENEFIT CORP. V. WALL-STREET.COM, LLC, ET AL.

17-646 GAMBLE, TERANCE M. V. UNITED STATES

17-1174 NIEVES, LUIS A., ET AL. V. BARTLETT, RUSSELL P.

17-1299 CA FRANCHISE TAX BOARD V. HYATT, GILBERT P.

17-1307 OBDUSKEY, DENNIS V. McCARTHY & HOLTHUS LLP, ET AL.

The petitions for writs of certiorari are granted.

17-290 MERCK SHARP & DOHME CORP. V. ALBRECHT, DORIS, ET AL.

The petition for a writ of certiorari is granted. Justice Alito took no part in the consideration or decision of this petition.

CERTIORARI DENIED

16-6308 GRAHAM, AARON V. UNITED STATES

16-6761 CAIRA, FRANK V. UNITED STATES

16-7314 RIOS, ANTONIO V. UNITED STATES

16-9536 ALEXANDER, TYRAN M. V. UNITED STATES

17-243 ABDIRAHMAN, LIBAN H. V. UNITED STATES

17-425 WASS, SHAWN W. V. IDAHO

17-701 RICHARDS, JAMES W. V. UNITED STATES

17-840 CASH, TORIE A. V. UNITED STATES

17-6704 BANKS, ALBERT D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

CERTIORARI GRANTED

17-532 HERRERA, CLAYVIN V. WYOMING

17-571 FOURTH ESTATE PUB. BENEFIT CORP. V. WALL-STREET.COM, LLC, ET AL.

17-646 GAMBLE, TERANCE M. V. UNITED STATES

17-1174 NIEVES, LUIS A., ET AL. V. BARTLETT, RUSSELL P.

17-1299 CA FRANCHISE TAX BOARD V. HYATT, GILBERT P.

17-1307 OBDUSKEY, DENNIS V. McCARTHY & HOLTHUS LLP, ET AL.

The petitions for writs of certiorari are granted.

17-290 MERCK SHARP & DOHME CORP. V. ALBRECHT, DORIS, ET AL.

The petition for a writ of certiorari is granted. Justice Alito took no part in the consideration or decision of this petition.

CERTIORARI DENIED

16-6308 GRAHAM, AARON V. UNITED STATES

16-6761 CAIRA, FRANK V. UNITED STATES

16-7314 RIOS, ANTONIO V. UNITED STATES

16-9536 ALEXANDER, TYRAN M. V. UNITED STATES

17-243 ABDIRAHMAN, LIBAN H. V. UNITED STATES

17-425 WASS, SHAWN W. V. IDAHO

17-701 RICHARDS, JAMES W. V. UNITED STATES

17-840 CASH, TORIE A. V. UNITED STATES

17-950 ULBRICHT, ROSS W. V. UNITED STATES

17-1002 UNITED STATES V. UNION PACIFIC RAILROAD CO.

17-1087 FIRST RESORT, INC. V. HERRERA, DENNIS J., ET AL.

17-1369 MAYOR AND CITY COUNCIL, ET AL. V. GREATER BALTIMORE CENTER

17-5943 RILEY, MONTAI V. UNITED STATES

17-6256 PATRICK, DAMIAN V. UNITED STATES

17-6892 WILFORD, RICHARD A. V. UNITED STATES

17-7220 BORMUTH, PETER C. V. JACKSON COUNTY, MI

17-7769 GRAY, RONALD V. UNITED STATES

The petitions for writs of certiorari are denied.

16-6694 JORDAN, ERIC V. UNITED STATES

The motion of respondent for leave to file a brief in opposition under seal with redacted copies for the public record is granted. The petition for a writ of certiorari is denied.

17-475 SEC V. BANDIMERE, DAVID F.

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

EXHIBIT 88

No. 17-1299

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 PETITIONER

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 17-1299

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 PETITIONER

INTRODUCTION

This case arises from a protracted dispute between the Franchise Tax Board of the State of California (FTB) and an aggrieved taxpayer named Gilbert P. Hyatt. More than two decades ago, the FTB audited Hyatt's income tax returns and found that he had moved to Nevada later than he had claimed, creating a tax deficiency. Not satisfied with challenging the FTB's findings through California's administrative processes, Hyatt brought this suit against the FTB in Nevada state court, alleging that the FTB had committed numerous torts in the course of auditing his tax returns. After more than ten years of pretrial litigation, including a trip to this Court, Hyatt's suit proceeded to a four-month trial. The Nevada jury awarded Hyatt

more than $138 million in compensatory damages and $250 million in punitive damages—yielding, with costs and interest, a total judgment approaching half a billion dollars.

After an additional decade's worth of appeals, including a second trip to this Court, the monetary judgment against the FTB has been whittled down. But the burdens this litigation has imposed on the FTB—an agency of the State of California that is supposed to spend its time performing one of California's core sovereign functions—remain extraordinary. The litigation has cost California taxpayers millions of dollars, and even after the various appeals, the FTB *still* faces a judgment of $100,000, with Hyatt likely to seek costs in a further proceeding that could itself spawn additional appeals.

The Framers would have been horrified by this spectacle. When the Constitution was ratified, and for nearly two centuries after, it was universally understood that States could not be sued by individuals, without their consent, in the courts of other States. Yet this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), interpreted the Constitution to permit exactly that unintended result, on the theory that the Constitution did not explicitly address States' immunity in the courts of other States.

This Court's subsequent decisions make clear that *Hall* was wrongly decided. Although the *Hall* majority believed that any constitutional principle of state sovereign immunity had to be explicitly located in the constitutional text, the Court has since repeatedly held that "the scope of the States' immunity from suit is demarcated not by the text ... alone but by fundamental postulates implicit in the constitutional design." *Alden*

v. *Maine*, 527 U.S. 706, 729 (1999). To discern those "fundamental postulates," the Court has held, one must examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726-727. The relevant question, then, is not whether the Constitution explicitly recognized interstate sovereign immunity—the question on which the *Hall* majority focused—but rather whether the Framers intended to abrogate the States' pre-ratification immunity from suit in the courts of other States. The historical record makes clear they did not. *Hall* also gave short shrift to the values protected by state sovereign immunity, including dignity and self-government, that are undermined by allowing States to be haled into the potentially hostile home-state courts of individual plaintiffs.

Although this Court is ordinarily and rightly reluctant to overrule its precedents, the considerations favoring stare decisis are at their weakest here. Not only does this case involve a constitutional rule rather than a statute, but it is a constitutional rule that does not govern primary conduct and that has therefore engendered no reliance interests. Unlike in most cases, even in most constitutional cases, there is no reason here for the Court to perpetuate an erroneous interpretation of the Constitution merely for the sake of consistency. Indeed, *Hall* is a doctrinal outlier, in deep tension not only with this Court's later statements about constitutional interpretation but also with the Court's recognition of state and tribal sovereign immunity in numerous other contexts. The Court should overrule *Hall* and restore interstate sovereign immunity to its intended place in our constitutional structure.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (Pet. App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110. The order of the Nevada Supreme Court granting the petition for rehearing (Pet. App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (Pet. App. 133a-134a, 153a-154a) are unreported. A prior decision of the Nevada Supreme Court is reported at 335 P.3d 125. Another prior decision of the Nevada Supreme Court (Pet. App. 139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. Pet. App. 1a. The petition for certiorari was timely filed on March 12, 2018 and granted on June 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt resided in California for decades and earned hundreds of millions of dollars from technology patents he developed in California. Pet. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a resident of Nevada (which has no personal income tax), on October 1, 1991, shortly before he received substantial licensing fees. 538 U.S. at 490-491.

Petitioner, the Franchise Tax Board of the State of California, is the agency responsible for assessing personal income tax in California. In 1993, the FTB became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. Pet. App. 5a. The FTB therefore commenced an audit of Hyatt's 1991 return. *Id.* The audit determined that Hyatt did not move to Nevada until April 1992 and remained a California resident until that time. Pet. App. 7a. The FTB accordingly found that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because the FTB determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, it also opened an audit for that year, which concluded that Hyatt owed an additional $6 million in taxes and interest plus further penalties. Pet. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those determinations have consumed two decades. The California State Board of Equalization, which until recently heard administrative appeals from the FTB's determinations, affirmed the FTB's assessment of taxes for the 1991 tax year but sustained Hyatt's appeals for 1992. *See* Minutes of the State Bd. of Equalization (Aug. 29, 2017), https://tinyurl.com/yb3lhhcq. Those decisions remain under review by the Office of Tax Appeals, which assumed the Board of Equalization's appellate function.[1] The U.S. Court of Appeals for the Ninth Circuit recently affirmed the dismissal of a lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, seek-

[1] *See* Taxpayer Transparency and Fairness Act, 2017 Cal. Legis. Serv. ch. 16 (A.B. 102) (West).

ing to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as the administrative review of the FTB's deficiency assessment was just beginning, Hyatt brought this suit against the FTB in Nevada state court. He alleged that the FTB had committed various torts in the course of auditing his tax returns: negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. Pet. App. 8a. Hyatt sought compensatory and punitive damages, as well as a declaratory judgment that he had resided in Nevada during the periods relevant to the FTB's audits. Pet. App. 3a, 8a.

The parties engaged in a long series of discovery battles, ranging from disagreements over the FTB's invocation of the deliberative-process privilege to challenges over the trial court's protective order. Pet. App. 147a-148a. The parties pressed their arguments before a discovery commissioner, the trial court, and, ultimately, the Nevada Supreme Court, which performed a document-by-document assessment to resolve the parties' disputes. Pet. App. 142a, 147a-148a.

The parties also engaged in extensive motion practice. The FTB sought summary judgment on multiple grounds, *see* Pet. App. 9a-10a, including that it was entitled to immunity from suit in Nevada as it would be in California, Pet. App. 142a. Under California law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application

of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Nevada courts were required to grant it the same immunity under the Full Faith and Credit Clause and under principles of sovereign immunity and comity. *Hyatt I*, 538 U.S. at 491-492. The trial court denied that motion. *Id.* at 492.

The FTB then petitioned the Nevada Supreme Court for a writ of mandamus, arguing that it was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected that claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court had held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. Pet. App. 144a & n.12. The Nevada Supreme Court then ruled that the "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. Pet. App. 10a.

C. *Hyatt I*

The FTB petitioned for certiorari, arguing that the Full Faith and Credit Clause required Nevada courts to afford it the same immunity that it would have received in California courts. This Court granted certiorari and affirmed, holding that the Full Faith and Credit Clause did not require Nevada to grant the FTB the full immunity that it would have had under California law. *Hyatt I*, 538 U.S. at 496-497.

The Court noted that, in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Although *Hall*—which involved tort damages flowing from a traffic accident in California be-

tween a Nevada state employee and residents of California—had left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities," 440 U.S. at 424 n.24, the Court in *Hyatt I* declined to draw such a distinction, *see* 538 U.S. at 497-499.

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties spent the next half decade engaged in extensive discovery and pretrial proceedings in state court. During that time, the parties filed thousands of pages of briefing on challenges to the scope of discovery, the appropriateness of in camera review, and other issues. In addition, the parties took 155 depositions and exchanged more than 168,000 documents.[2]

Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. Pet. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $85 million in damages for emotional distress, $52 million in damages for invasion of privacy, $1 million in damages for fraud, and $250 million in punitive damages. *Id.* The trial court later added $102 million in prejudgment interest, and after appointing a special master to rule on Hyatt's motion for costs—a process that required an additional fifteen months of discovery and even more motion practice—the trial court tacked on an additional $2.5 million to

---

[2] *See* Appellants' Br. 26 n.22, *Franchise Tax Board* v. *Hyatt*, No. 53264 (Nev. Aug. 7, 2009), 2009 NV S. Ct. Briefs LEXIS 153.

Hyatt's award, Pet. App. 11a-12a. In total, the judgment against the FTB exceeded $490 million.

The Nevada Supreme Court affirmed in part and reversed in part. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 335 P.3d 125 (Nev. 2014). 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, but it affirmed the FTB's liability for fraud and intentional infliction of emotional distress. *Id.* at 130-131. The court also rejected the FTB's argument that it was entitled to the $50,000 statutory damages cap that Nevada law creates for Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. The court did, however, conclude as a matter of comity that the FTB was immune from punitive damages (as Nevada agencies are). *Id.* at 154. Because of evidentiary errors committed by the trial court, the court remanded for a new trial on the amount of emotional distress damages. *Id.* at 149-153.

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016).

On the first question, the Court held that the Nevada Supreme Court had erred. *Hyatt II*, 136 S. Ct. at 1279. The Court divided equally on whether *Hall* should be overruled. *Id.*

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. Consistent with this Court's opinion, the Nevada Supreme Court instructed the trial court to enter a damages award for fraud within the statutory cap of $50,000. Pet. App. 107a. The court also held—in a reversal of its prior decision—that a new trial on the amount of damages for intentional infliction of emotional distress was no longer required, because the evidence at trial supported damages on that claim up to the $50,000 cap. Pet. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming "harmless" evidentiary errors it had previously determined to be prejudicial. *Id.* The court also remanded for consideration of costs. Pet. App. 124a-125a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, Pet. App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, Pet. App. 3a n.1, 41a, 56a.

SUMMARY OF ARGUMENT

I. *Hall* was wrongly decided. This Court's subsequent precedents make that clear in two ways.

First, whereas the *Hall* majority asked whether the Constitution expressly codified interstate sovereign immunity, this Court has since recognized that is the wrong question. The States retain the degree of sovereign immunity they enjoyed *before* the ratification of the Constitution, unless the Constitution *abrogates* their immunity. The relevant question, then, is whether States enjoyed immunity in each other's courts be-

fore the ratification of the Constitution—and, if so, whether the Framers intended to alter that state of affairs and allow States to be sued in other States' courts.

The historical record shows beyond doubt that the States *did* enjoy immunity in each other's courts in the pre-ratification era and that the Framers had no intention of abrogating that immunity. Rather, participants on all sides of the ratification debates—in the course of discussing whether Article III allowed States to be sued in the new federal courts—assumed without hesitation that States could not be sued in other States' courts. That understanding was confirmed by the outraged reaction to this Court's decision in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), allowing States to be sued in the neutral federal courts—a reaction that would have made little sense had anyone thought States could be sued in the potentially more hostile courts of other States. And the Framing-era consensus was further confirmed by decisions of this Court and state courts for nearly two centuries preceding *Hall*.

Hyatt has argued that in the Framing era, sovereigns were understood to possess enforceable immunity only in their own courts, not in the courts of other sovereigns. He bases that view on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which dealt with one nation's amenability to suit in the courts of another nation. But the relevant holding of *The Schooner Exchange*—that a forum nation may choose whether to recognize another nation's sovereign immunity in its courts—says nothing about whether states in a federal union are required to recognize each other's sovereign immunity in their courts. Rather, it reflects the absence of any supranational tribunal that could *force* one nation to respect another's sovereign immunity. The Constitution, by contrast, created a tri-

bunal—this Court—with the power to require one State to respect another's sovereign immunity. *The Schooner Exchange* thus sheds no light on the question presented here.

Second, *Hall* gave little consideration to the constitutional values that are protected by sovereign immunity. As articulated in this Court's subsequent decisions, those values, including States' dignity interests and their citizens' interests in self-government, are inconsistent with the holding of *Hall*. This suit—in which a California state agency has been subjected to astonishing burdens for two decades, and in which a Nevada judge and jury have passed judgment on California's conduct of one of its core sovereign functions—exemplifies why *Hall* cannot be squared with the values the Court has recognized in later decisions.

II. Although this Court is ordinarily and rightly loath to overrule its precedents, the presumption in favor of stare decisis should be overcome here for several reasons.

First, *Hall* is a poorly reasoned decision that is inconsistent with this Court's subsequent precedents in numerous respects. In addition to *Hall*'s inconsistency with the Court's subsequent statements about constitutional interpretation and the values protected by sovereign immunity, *Hall* stands in tension with numerous decisions in which this Court has recognized States' sovereign immunity in forums less potentially hostile to their sovereignty than state courts are to the interests of other States. Since *Hall*, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court; that state sovereign immunity extends to federal agency adjudications; and that

States are immune from suit on federal claims in the States' *own* courts. The Court has also held that Indian Tribes are immune from suit in state courts, even suits arising from a Tribe's commercial activities. *Hall* is an extreme outlier in the Court's sovereign immunity jurisprudence.

The Court has recognized that, when one of its prior decisions has come to stand out as an outlier, overruling that decision can promote rather than undermine the consistency of this Court's jurisprudence. That is the case here. As a jurisprudential anomaly, *Hall* also has not given rise to a broader line of precedents that would have to be overruled along with it.

Second, the considerations favoring stare decisis are at their lowest ebb here. *Hall* is a constitutional decision, not a statutory one. And because *Hall* addresses a question of sovereign immunity, which does not affect primary conduct, it has given rise to no reliance interests that would be disturbed by overruling it.

Third, *Hall* has had significant harmful effects. This case, for example, has cost the taxpayers of California millions of dollars and has put the State's tax-collection agency through two decades' worth of distractions from its primary mission—a core sovereign function. It has also encouraged copycat complaints by other plaintiffs outside California. And it is just one of many cases in which States have been haled into other States' courts without their consent, often in circumstances presenting serious threats to their dignity and self-government interests. Neither the doctrine of comity nor the possibility of an interstate compact can adequately mitigate those harms.

ARGUMENT

Hall conflicts with the Framing-era understanding of state sovereign immunity and with numerous better reasoned precedents of this Court, which have recognized that state sovereign immunity is inherent in the federal structure of the Union and protects the dignity of the States and the right of the people of the States to govern themselves. There are no compelling reasons to preserve *Hall* in the name of stare decisis. It should be overruled.

I. States Are Constitutionally Immune From Suit In Each Other's Courts

Nevada v. *Hall* arose from a collision in which California residents were injured by a car owned by the State of Nevada, which was being driven by an employee of the University of Nevada on official state business. 440 U.S. 410, 411 (1979). The California residents filed suit in California against the State of Nevada and the university, as well as the driver's estate. *Id.* at 411-412. A California jury awarded the plaintiffs more than $1 million. *Id.* at 413. The State of Nevada and the university petitioned for certiorari, arguing that they were immune from suit in California's courts. This Court held, however, that constitutional principles of sovereign immunity did not preclude one State from being haled into the courts of another against its will. *See id.* at 426-427.

The Court acknowledged that sovereign immunity "[u]nquestionably ... was a matter of importance in the early days of independence." 440 U.S. at 418. It recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the new federal courts. *Id.* And it observed that the debates over ratification, as well as later deci-

sions of this Court, reflected "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. It reasoned that, because the "need for constitutional protection against" the "contingency" of a state defendant's being sued in a court of a sister State was "not discussed" during the constitutional debates, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-419. And it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court thus determined that no "federal rule of law implicit in the Constitution ... requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, the Court explained that a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that flows not from "an express provision of the Constitution" but rather from "a guarantee that is implied as an essential component of federalism." 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, in the

dissenters' view, was that it was "too obvious to deserve mention." *Id.* at 431.

Justice Blackmun also pointed to the swift adoption of the Eleventh Amendment after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that citizens of one State could sue another State in federal court without the defendant State's consent. "If the Framers were indeed concerned lest the States be haled before the federal courts," he observed, "how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." 440 U.S. at 431 (Blackmun, J., dissenting). He explained that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist, joined by Chief Justice Burger, likewise wrote that "when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." 440 U.S. at 433 (Rehnquist, J., dissenting). "The tacit postulates yielded by that ordering," Justice Rehnquist wrote, "are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." *Id.* He found support for that view in no less foundational a precedent than *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court recognized the doctrine of intergovernmental tax immunity notwithstanding the absence of any express provision creating it.

Justice Rehnquist explained that the majority's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile ... with express holdings of this Court and the logic of the constitutional plan itself." 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist wrote, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions," but under the majority's decision they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437.

Hall is inconsistent with this Court's subsequent sovereign-immunity precedents, which repudiated two of *Hall*'s foundational premises. First, the Court has rejected *Hall*'s view that any protection for interstate sovereign immunity must be explicitly located in the constitutional text. To the contrary, the Court has repeatedly recognized that States continue to enjoy the immunity they possessed before the ratification of the Constitution, unless the Constitution abrogated that immunity, and thus that the scope of States' immunity must be discerned not just by the constitutional text but by the historical record and the intent of the Framers. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Second, the Court has emphasized the importance of state sovereign immunity in safeguarding the dignity and self-government interests of the States—interests neither recognized nor accounted for in *Hall*. *Id.* at 714-715; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996).

A. *Hall* Ignored The Framing-Era Understanding Of Interstate Sovereign Immunity

In *Hall*, as discussed above, the Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. 440 U.S. at 421, 426. The dissenting Justices criticized the majority for its undue focus on the constitutional text to the exclusion of other modes of constitutional interpretation. Subsequent decisions of this Court have made clear that the *Hall* dissenters, and not the majority, employed the correct mode of constitutional interpretation.

First, whereas *Hall* reasoned that neither Article III nor the Eleventh Amendment expressly codified interstate sovereign immunity, 440 U.S. at 421—and refused to "infer[]" such a doctrine "from the structure of our Constitution," *id.* at 426—this Court's decisions have since made clear that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design," *Alden*, 527 U.S. at 729. In *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), for example, the Court observed that "the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment." *Id.* at 446. In *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court described the Eleventh Amendment as just "one particular exemplification of [States' sovereign] immunity." *Id.* at 753. And in *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247 (2011), the Court observed that the Eleventh Amendment merely "confirm[s] the structural understanding that States entered the Union with their sovereign immunity in-

tact." *Id.* at 253; *see also Seminole Tribe*, 517 U.S. at 54; *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).[3]

It is necessary to look beyond the constitutional text, the Court has explained, because neither the original Constitution nor the Eleventh Amendment "explicitly memorializ[es] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified." *Federal Mar. Comm'n*, 535 U.S. at 753. Indeed, "[t]he Constitution never would have been ratified if the States ... were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239 n.2 (1985).

Second, and relatedly, the Court's post-*Hall* decisions recognize that the way to determine the principles of state sovereign immunity implicit in the constitutional structure is to examine "'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 726-727 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890)). Whereas *Hall* placed the burden on the State to show that its sovereign immunity was affirmatively and explicitly incorporated into the Constitution, *see* 440 U.S. at 421, the Court has since taken the opposite approach. It has recognized that "the States' immunity from suit is a fundamental aspect of the sovereignty which the

[3] Even decisions before *Hall*—most notably *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—recognized that the constitutional principle of state sovereign immunity is not limited to the express terms of the Eleventh Amendment and is inherent in the federal nature of the Union. *See id.* at 13-15; *see also Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934). *Hall* limited its discussion of *Hans* and *Monaco* to brief citations in footnotes. 440 U.S. at 420 nn.18, 20.

States enjoyed before the ratification of the Constitution," and that the States "retain" the same degree of sovereignty "today ... *except as altered by the plan of the Convention.*" *Alden*, 527 U.S. at 713 (emphasis added). The Court has thus "presum[ed]" that sovereign immunity prohibits "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755.

The Court's more recent precedents thus explain why *Hall* reached the wrong answer: It asked the wrong question. The relevant question is not whether the Constitution explicitly codified interstate sovereign immunity but, rather, whether it abrogated the immunity that States had previously enjoyed in each other's courts.

As discussed below, a considerable body of historical evidence establishes that the Framers did not intend to abrogate States' immunity in the courts of other States. First, States were immune from suit in each other's courts during the pre-ratification era. Second, participants on all sides of the ratification debates agreed that the Constitution did not render States more amenable to suit in the courts of other States than they had been before. Third, the backlash to this Court's decision in *Chisholm*—culminating in the enactment of the Eleventh Amendment—confirmed the consensus that States were immune from suit in other States' courts as well as in the new federal courts. That consensus is further confirmed by pre-*Hall* decisions of this Court and state courts. *Hall* barely engaged with any of this history. *See, e.g.*, Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70

Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due.").[4]

1. Before the Constitution, States were immune from suit in each other's courts

Before the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. That was clear from the reaction to *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), in which a Pennsylvania citizen sued in the Pennsylvania courts to attach property belonging to Virginia. The suit "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order." *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). Virginia "applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general, William Bradford, to secure the action's dismissal." Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994). And

[4] In addition to reflecting a mode of analysis that has been repudiated by this Court's later decisions, the *Hall* Court's inattention to history can at least partly be explained by the manner in which that case was presented to the Court. First, the state-court decision reviewed in *Hall* rejected Nevada's claim of sovereign immunity on grounds different from those embraced by this Court. The California Supreme Court held that a State does "not exercis[e] sovereign power"—and thus is not entitled to immunity—when it acts beyond its borders. *Hall* v. *University of Nevada*, 503 P.2d 1363, 1364 (Cal. 1972). Second, the respondents before this Court largely advanced the argument on which the California Supreme Court had relied and barely addressed the constitutional issues. *See* Resp. Br., *Nevada* v. *Hall*, No. 77-1337, 1978 WL 206995, at *12-16 (U.S. Aug. 16, 1978). The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking, *see, e.g.*, *Penson* v. *Ohio*, 488 U.S. 75, 84 (1988).

Bradford—who later became Attorney General of the United States under President Washington—urged that the case be dismissed on the ground that each State is a sovereign and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Nathan*, 1 U.S. at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan marked "a decisive rejection of state suability in the courts of other states," Pfander, 82 Calif. L. Rev. at 587, one with which the Framers were intimately familiar. Not only was the case highly publicized at the time, but James Madison was one of the Virginia delegates who sought its dismissal, and Thomas Jefferson—then Governor of Virginia—took a particular interest in the case as well. *See id.* at 586-587.

Another decision from the same time period—*Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697)—reflects the same understanding of state sovereign immunity. In that case, the crew of a South Carolina ship sued the vessel in admiralty to recover wages they were allegedly due. As in *Nathan*, the Pennsylvania admiralty court dismissed the action because the attached vessel was owned by the "sovereign independent state" of South Carolina. *Id.* at 574; *see* Pfander, 82 Calif. L. Rev. at 587 n.127; *see also National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955) (*Moitez* recognized "[t]he freedom of a foreign sovereign from being haled into court as a defendant").

Thus, it was widely accepted before the ratification of the Constitution that States' sovereign immunity from suit extended to proceedings in the courts of other States.

2. The Constitution did not abrogate States' immunity from suit in each other's courts

As discussed above, the relevant question under this Court's post-*Hall* decisions is whether the "the plan of the Convention" "*altered*" the immunity that States enjoyed before ratification, *Alden*, 527 U.S. at 713 (emphasis added)—not whether the Constitution explicitly codified that immunity. The historical evidence from the ratification debates makes clear that the Framers had no desire to strip States of their pre-ratification immunity from suit in the courts of other States. To the contrary, the ratification debates reinforced the pre-ratification understanding of state sovereign immunity.

The question of States' sovereign immunity in the new federal courts was central to the debate over Article III's proposed extension of the "Judicial Power" of the United States to cases "between a State and Citizens of another State," U.S. Const. art. III, § 2, cl. 1. Antifederalists, who assailed that provision of the draft Constitution, based their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without their consent. For example, the Federal Farmer contrasted Article III's requirement that a State "answer to an individual in a court of law" with the fact that "the states are now subject to no such actions." *Federal Farmer No. 3* (Oct. 10, 1787), *in* 4 *The Founders' Constitution* 227 (Kurland & Lerner eds., 1987). The Antifederalist Brutus similarly attacked Article III for requiring States to "answer in a court of law, to the suit of an individual," noting that "[t]he states are now subject to no such actions." Brutus No. 13 (Feb. 21, 1788), *in* 4 *The Founders' Constitution* 237, 238.

Proponents of ratification offered two conflicting responses, but neither response disputed the premise that suits by a citizen of one State against a different nonconsenting State were unprecedented. One response was offered by Federalists who contended that Article III *did* abrogate state sovereign immunity in such suits in federal court, and who viewed that as a virtue of the new federal courts, for those courts would provide a forum for suits that could not otherwise be brought. Those Federalists argued that Article III provided federal jurisdiction over suits by individuals against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Pendleton, *Speech to the Virginia Ratifying Convention*, *in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Elliot ed., 1836) (hereinafter *Elliot's Debates*).

An alternative response was offered by Federalists who argued, contrary to the Antifederalists' interpretation, that Article III did *not* abrogate state sovereign immunity in suits brought by individuals. But although those leading proponents of ratification took issue with the Antifederalist view of what Article III accomplished, they embraced the premise that a suit by a private individual against a nonconsenting State would be an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part of the reason Article III did not authorize them in federal court. Alexander Hamilton, for example, wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," an immunity he characterized as "now enjoyed by the government of every State in the Union." *The Federalist* No. 81, at 511 (Rossiter ed., 1961) (Hamilton). Hamilton added

that such immunity would "remain with the States" absent a "surrender" of it in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued that "[i]t is not in the power of individuals to call any state into court," 3 *Elliot's Debates* 533, and John Marshall claimed that "[i]t is not rational to suppose that the sovereign power should be dragged before a court," *id.* at 555. Although those remarks concerned the jurisdiction of the federal courts to be established under Article III, their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns "most plausibly included suits in the courts of another state" as well. Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 256-257.

In short, although the ratification debates focused on whether States would be subject to suit in federal court, the tenor of the debates made clear that the Framers fully intended for States to remain immune from suit in the courts of other States. Article III was thus "enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, 2006 Sup. Ct. Rev. at 263; *see also id.* at 253 (interstate sovereign immunity was a "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III). As Justice Blackmun recognized in his dissent from *Hall*, the "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting).

3. The history of the Eleventh Amendment confirms the understanding that States were immune in each other's courts

The Framing-era understanding of interstate sovereign immunity was confirmed by the reaction to this Court's decision in *Chisholm* v. *Georgia* that States could be sued in federal court, without their consent, by citizens of another State. As one historian put it, that decision "fell upon the country with a profound shock." 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926). That description was if anything an understatement of the reaction within state capitols. The Massachusetts Legislature denounced *Chisholm* as "repugnant to the first principles of a federal government," while the Georgia House of Representatives made any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden*, 527 U.S. at 720-721. The backlash culminated in the enactment of the Eleventh Amendment, which provided that the federal judicial power did not extend to suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The uprising against *Chisholm* confirmed the depth and breadth of the understanding that States could not be sued by individuals, without their consent, in *any* courts—not their own, not the federal courts, and certainly not another State's courts. The Connecticut legislature, for example, pronounced its desire that "speedy and effectual measures be adopted to procure an alteration" of the Constitution to make clear that "no State can on any Construction be held liable ... to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever." *Resolution of the Connecticut General Assembly* (Oct. 29, 1793), *in* 5 *The Docu-*

mentary History of the Supreme Court of the United States, 1789-1800, at 609 (Marcus ed., 1994) (hereinafter *Documentary History*). The Virginia legislature declared that "a state cannot ... be made a defendant at the suit of any individual or individuals." *Proceedings of the Virginia House of Delegates* (Nov. 28, 1793), *in* 5 *Documentary History* 338, 339 n.1. The South Carolina Senate stated that "the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence of the respective States." *Proceedings of the South Carolina Senate* (Dec. 17, 1793), *in* 5 *Documentary History* 610-611. And John Hancock, in a speech to the Massachusetts General Court, rejected the idea that "each State should be held liable to answer ... to every individual resident in another State or in a foreign kingdom." *John Hancock's Address to the Massachusetts General Court* (Sept. 18, 1793), *in* 5 *Documentary History* 416.

The notion that the Framing generation would so strongly and universally condemn suits brought by citizens of one State against another State in the neutral federal courts, while tolerating such suits in the plaintiffs' home-state courts, strains credulity. As the *Hall* dissenters emphasized, the objectors to *Chisholm* were hardly embracing the view that Georgia could not be sued by Chisholm in federal court but *could* be sued by Chisholm in South Carolina state court. Although the Eleventh Amendment does not explicitly address interstate sovereign immunity, it shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State."

Hall, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). By immunizing States from suit in the neutral forum of the federal courts, while leaving open the possibility of their being sued in the potentially hostile courts of another State, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

4. Pre-*Hall* decisions of this Court and other courts reflect the Framing-era consensus

This Court's pre-*Hall* decisions reflect the Framing-era understanding that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1857), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Id.* at 529 (emphasis added). In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court stated with equal clarity that "neither a state nor the United States can be sued as defendant in any court in this country without their consent." *Id.* at 451. In *Hans* v. *Louisiana*, the Court observed that "[t]he suability of a State without its consent was a thing unknown to the law" at the time the Constitution was ratified, and that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15-16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts,

those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them." *Id.* at 80.

States recognized the same principle. In *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929), for example, the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. "[S]o carefully ha[d] the sovereign prerogatives of a state been safeguarded in the Federal Constitution," it held, that "no state could be brought into the courts of the United States at the suit of a citizen of another state." *Id.* at 54-55. It added that involuntarily haling one State into the courts of a sister State would be inconsistent "with any sound conception of sovereignty." *Id.* at 55. Likewise, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to entertain suits against sister States in its own courts; rather, it enacted a statute allowing citizens to assign to the State claims that the State would then pursue in original actions before this Court. *See New Hampshire* v. *Louisiana*, 108 U.S. 76, 88-89 (1883).

That pre-*Hall* understanding of interstate sovereign immunity is confirmed by the surprised reaction of state supreme courts to the decision in *Hall*. The New York Court of Appeals remarked, a year after *Hall*, that it had been "long thought that a State could not be sued by the citizens of a sister State except in its own courts." *Ehrlich-Bober & Co.* v. *University of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise noted that "[f]or the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state to be sued in the courts of another state," because "this immunity was an attribute of state sovereignty that was preserved in the Constitution."

Struebin v. *State*, 322 N.W.2d 84, 85 (Iowa 1982). And the Delaware Supreme Court later observed that "[f]or almost two hundred years, it had been assumed that the United States Constitution implicitly prohibited one state from being sued in the courts of another state—just as the Eleventh Amendment explicitly prohibited states from being sued in federal courts." *Kent Cty.* v. *Shepherd*, 713 A.2d 290, 297 (Del. 1998).

5. Hyatt's reliance on *The Schooner Exchange* is unavailing

1. Hyatt's brief in opposition to certiorari argued (at 12-14) that the pre-ratification understanding of state sovereign immunity does *not* support the conclusion that States are immune from suit in each other's courts, because it distinguished "between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign." The latter, Hyatt argued, was purely a matter of comity and not a legal right. Hyatt based that argument on this Court's decision in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Hyatt's argument misinterprets *The Schooner Exchange*, which addresses relations among independent nations and sheds no light on the distinct question of interstate sovereign immunity under our constitutional structure.

The Schooner Exchange addressed whether a federal court in Pennsylvania could exercise jurisdiction over a ship in which Napoleon, the French emperor, claimed ownership. The plaintiffs, two Americans, alleged that the ship belonged to them and had been wrongfully seized by Napoleon's forces after it sailed from Baltimore to Spain; they sued to recover it once it had sailed back to Philadelphia. 11 U.S. at 117. This Court held that a nation possesses "exclusive and abso-

lute" jurisdiction "within its own territory" and that "[a]ll exceptions" to that jurisdiction "must be traced up to the consent of the nation itself." *Id.* at 136. But it recognized "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction," *id.* at 137, and held that the disputed ownership of the vessel in question fell within that class, so that the federal court lacked jurisdiction, *id.* at 146-147.

The Schooner Exchange supports the view that nations lack any judicially enforceable obligation to respect the sovereign immunity of other nations that are sued in their courts. But that proposition simply reflects the absence of any supranational tribunal that could enforce one nation's rights against another. Because a forum nation cannot be forced to recognize a defendant nation's sovereign immunity, its choice whether to do so depends on a set of considerations sometimes referred to as comity—"standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *National City Bank*, 348 U.S. at 362. Nor, conversely, are defendant nations limited to legal recourses if the nation in whose courts they are sued chooses not to respect their sovereign immunity. Rather, the defendant nation may avail itself of recourses like "the negotiation of treaties, the exchange of ambassadors, and, if necessary, ... war." Pfander, 82 Calif. L. Rev. at 583; *see also* Vattel, *The Law of Nations or the Principles of Natural Law*, bk. IV, ch. VII § 102 (1758) (Fenwick trans., 1916) (the "proper course" to punish a "State which had violated the Law of Nations" was "public war").

In the pre-ratification era, the relationship among States was similar to that among independent nations:

No State could be required to respect another's sovereign immunity in its courts.[5] But in that respect, the Constitution *did* change the pre-ratification relationship among the States, by creating exactly the sort of neutral tribunal among the States that is lacking among nations—this Court. If the courts of one State entertain a suit against another State, the defendant State now has recourse to this Court to vindicate its sovereign immunity. And just as the Constitution created that judicial enforcement mechanism, it withdrew from States the extrajudicial recourses available to nations, as well as the ability to refuse to recognize the judgment of another State. *See* U.S. Const. art. I, § 10 (prohibiting States from entering into treaties, imposing import duties, or waging war); *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the ... judicial Proceedings of every other State."); *Kansas* v. *Colorado*, 185 U.S. 125, 141 (1902) (traditional "remedies resorted to by independent states for the determination of controversies raised by collision between them" were "withdrawn from the states by the Constitution"); Smith, *States As Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 92 (2003) (the Constitution "specifically divested the states of the traditional sovereign powers of diplomacy"). The Constitution thus substituted a judicial means of enforcing interstate sovereign immunity for the extrajudicial options available to independent nations. *See* Rogers,

---

[5] That is why, when Virginia was sued in Pennsylvania's courts before the ratification of the Constitution (*see supra* pp. 21-22), it "followed the usual diplomatic course" in seeking the dismissal of the suit: "[I]t applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general ... to secure the action's dismissal," on the ground that it "violated the law of nations." Pfander, 82 Calif. L. Rev. at 585-586.

Applying the International Law of Sovereign Immunity to the States of the Union, 1981 Duke L.J. 449, 468 (this Court was envisioned as a "substitute" for the "methods that sovereign states use to enforce their rights under international law," such as "diplomacy and war").

Because the Constitution allows States to vindicate their sovereign immunity against other States in a way that independent nations cannot, *The Schooner Exchange*—which reflected the absence of an enforcement mechanism in the international context—has no bearing on the issue of interstate sovereign immunity. That is why, in the 167 years between *The Schooner Exchange* and *Hall*, no federal or state court cited *The Schooner Exchange* as even tangentially relevant to the question whether States are immune from suit in the courts of other States.

If *The Schooner Exchange* were read to mean that States may freely choose to entertain suits against other States, it would be inconsistent with the long historical understanding to the contrary, discussed above. And such an interpretation would run perversely counter to the constitutional plan, by undermining the Framers' effort to calm the interstate tensions that prevailed under the Articles of Confederation. *See, e.g.*, Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1873-1874 (2010) (the Framers drafted Article III with an eye toward resolving interstate disputes peacefully). If Hyatt were correct that States could choose to entertain suits brought by their citizens against other States, then a decision by one State's courts to hear a dispute involving another State could give rise to exactly the kind of simmering resentment, or reprisal, that the Framers hoped to avoid.

2. Hyatt further argues (Opp. 15-16) that States have a sovereignty interest in hearing disputes that arise within their borders, including disputes against other States. That is true. But in a federal union, that sovereignty interest is not unqualified, and it must be reconciled with another weighty sovereignty interest: each State's immunity from suit in the courts of other States. There is little question which of those competing interests carried greater weight at the time the Constitution was ratified, and equally little question which interest the States prefer to protect today.

As discussed above, the Framing generation thought it anathema that one State might be subjected to suit in another's courts—hence the reaction to *Nathan* v. *Virginia*, in which a Pennsylvania citizen sought to attach Virginia's property in the Pennsylvania courts. *See supra* pp. 21-22. Virginia was not the only State with sovereignty interests at stake in *Nathan*; Pennsylvania had an interest in adjudicating a suit arising within its borders. But no one thought that interest should outweigh Virginia's. To the contrary, Pennsylvania's own attorney general, at the direction of the State's Supreme Executive Council, urged the dismissal of the suit. *Id.* The Framers' purpose was to knit the States together into a federal union that would protect each State's sovereignty while permitting the States to resolve disputes amicably. *See* Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. Rev. 485, 582-583 (2001). That goal is advanced by recognizing Virginia's immunity from suit in Pennsylvania; it would be considerably threatened by prioritizing Pennsylvania's ability to hear a suit against Virginia.

Furthermore, the States' overwhelming support for overruling *Hall*—as evidenced by the amicus brief in support of certiorari filed by 45 States—makes clear

which sovereignty interest States prefer to vindicate today. Given the extraordinary burdens that States face when haled into the courts of another State, it is little surprise that States care more about avoiding those burdens than they do about allowing their courts to adjudicate each and every dispute that arises within their borders.

This compromise of one sovereignty interest in favor of another was not thrust upon the States; it was part and parcel of every State's choice to ratify the Constitution. As the Court recognized in *The Schooner Exchange*, a nation can "consent" to "exceptions ... to the full and complete power" of its courts within its borders. 11 U.S. at 136. By entering into the federal compact, the States chose to give up a part of their sovereign power to adjudicate disputes. In particular, the States relinquished jurisdiction (or allowed Congress to limit their jurisdiction) where adjudication in state court would be inconsistent with the federal structure. Thus, for example, the States accepted that only this Court may adjudicate disputes between States, U.S. Const. art. III, § 2, cl. 1, and that Congress may channel suits against the federal government, federal officers, foreign states, and ambassadors into the federal courts (as it ultimately chose to do, *see, e.g.*, 28 U.S.C. §§ 1251, 1346, 1441, 1442, 2409a).[6] It is likewise inconsistent with the federal structure of the Union for a State's courts to exercise jurisdiction over another State with-

[6] Similarly, when the States ratified the Fourteenth Amendment, they accepted that the Due Process Clause limits their authority to exercise jurisdiction over cases lacking a territorial connection to the State. *See, e.g., J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 879-881 (2011) (plurality opinion); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-292, 294 (1980).

out the defendant State's consent, and the States thus impliedly agreed to cede jurisdiction over such suits.

In sum, *Hall* was wrongly decided because it ignored the Framing-era understanding of interstate sovereign immunity. *Hall* focused on the question whether the Constitution expressly codified that immunity, whereas this Court's later precedents have made clear that the relevant question is whether the Framers intended to *abrogate* the immunity the States enjoyed before ratification. The historical evidence clearly shows they did not.

B. Post-*Hall* Decisions Have Clarified The Constitutional Values That *Hall* Flouts

Aside from its failure to consider the Framing-era consensus regarding interstate sovereign immunity, *Hall* also gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union. To the extent *Hall* addressed the reasons for state sovereign immunity at all, it suggested incorrectly that they were limited to the protection of States' financial interests. *See* 440 U.S. at 418 (noting that "[m]any of the States were heavily indebted as a result of the Revolutionary War"). Although the States' financial integrity is certainly one reason for state sovereign immunity, later decisions, especially *Alden*, have underscored the importance of two additional principles underlying sovereign immunity that are inconsistent with *Hall*.

First, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715; *cf. Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) ("Sovereignty implies immunity from

lawsuits."). The States had attained the status of independent nations as a consequence of the Revolution, and the Constitution ensured that, except as surrendered in the plan of the Convention, the States would retain their sovereignty "together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714; *see id.* at 749.

The States' dignity interests as sovereigns, though given little attention by *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental feature of state sovereign immunity. In *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), for example, the Court explained that sovereign immunity "is designed to protect" "the dignity and respect afforded a State." *Id.* at 268; *see also Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment ... serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.]'"); *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (the Eleventh Amendment "accords the States the respect owed them as members of the federation"). Indeed, the Court has characterized the protection of States' "dignity[,] ... consistent with their status as sovereign entities," as "[t]he *preeminent* purpose of state sovereign immunity." *Federal Mar. Comm'n*, 535 U.S. at 760 (emphasis added).

Second, and equally important, is the Court's recognition that state sovereign immunity promotes self-government by the citizens of the States. "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'"

Alden, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The Court has recognized since *Hall* that, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government"—and certainly not by judicial decree of another State. *Alden*, 527 U.S. at 751.

This case well illustrates how *Hall* disserves the interests that state sovereign immunity is supposed to protect. California has been subjected to an astonishing intrusion on its dignity, as well as the concrete burdens of litigation, by being forced to defend the conduct of a state agency in the courts of another State. This litigation required years of discovery and a four-month trial, and it resulted in a judgment against the FTB of nearly $500 million. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). The judgment was eventually reduced by the Nevada Supreme Court and this Court on the basis of constitutional and comity concerns, *see id.* at 1280, 1282-1283—but the FTB *still* faces a judgment of $100,000, with the potential for Hyatt to seek costs in a remand proceeding that could itself spawn further appeals, Pet. App. 65a-66a.

California has also suffered harm to its citizens' interest in self-government. In *Alden*, as noted above, the Court recognized a State's immunity in its own courts, partly on the basis that a State's "'administration of [its] public affairs'" could otherwise "become 'subject to and controlled by the mandates of judicial tribunals ... and in favor of individual interests.'" 527 U.S. at 750. If that danger was present where Maine's conduct was subject to review in its own courts, it is even clearer here, where the actions of a California

agency have been litigated before Nevada judges and jurors who lacked any incentive to consider the burden that a large financial sanction would impose on California's taxpayers.

None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising from their tax-assessment activities. *See* Cal. Gov't Code § 860.2; *cf.* 28 U.S.C. § 2680(c) (no waiver of federal sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax").

II. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

Although this Court is ordinarily loath to overrule its precedents, "[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In particular, "*stare decisis* does not prevent [the Court] from overruling a previous decision where there has been a significant change in, or subsequent development of, ... constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As explained above, this Court's sovereign-immunity decisions since *Hall* have undermined *Hall*'s reasoning and left it an outlier.

Moreover, none of the other stare decisis factors counsels against overruling *Hall*. *Hall* does not involve a statutory interpretation, which the Court is ordinarily more reluctant to overrule. *Hall* has given rise to no reliance interests. And *Hall* has proven impracticable in its "real world implementation," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

A. The Court's Post-*Hall* Jurisprudence Has Left *Hall* An Outlier

"[T]he Court has not hesitated to overrule an earlier decision" where "intervening development of the law" has "removed or weakened the conceptual underpinnings [of] the prior decision" or "rendered the decision irreconcilable with competing legal doctrines or policies." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also, e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). A decision is properly overruled, the Court has explained, where the "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). The development of sovereign-immunity doctrine since *Hall* is thus reason enough to overturn that decision.

As explained above (at 18-20), this Court's more recent cases have rejected the key "conceptual underpinning[]" of *Hall*—namely the idea that a State's sovereign immunity is limited to the express terms of the Constitution. *Hall* is also inconsistent with the Court's recognition in more recent decisions of the values underlying the doctrine of sovereign immunity. *See supra* pp. 36-39. *Hall* thus represents an outmoded way of thinking and is "no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

Hall is also out of step with this Court's recognition of state sovereign immunity in other contexts. Even at the time *Hall* was decided, it created a striking anomaly in this Court's sovereign immunity jurisprudence: States could not be sued in their own courts, or in the neutral federal courts, but could be sued in the poten-

tially hostile courts of sister States. That anomaly has grown even more glaring over time, as the Court has decided case after case expanding the reach of sovereign immunity for States and Indian Tribes.

Since *Hall*, for example, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court. *See Seminole Tribe*, 517 U.S. at 47. The Court has also held that state sovereign immunity extends to federal agency adjudications. *Federal Mar. Comm'n*, 535 U.S. at 747. And it has immunized States against federal claims brought by individuals in the defendant State's own courts. *Alden*, 527 U.S. at 712. Those decisions, when contrasted with *Hall*, have created a "bizarre state of doctrinal affairs" in which "the states have more authority with respect to each other than the federal government has with respect to the states." Smith, 89 Va. L. Rev. at 101. Even as the Court has recognized the constitutional imperative to shield States from litigation in one tribunal after another, it has exempted from that otherwise consistent doctrinal progression the single type of forum potentially most hostile to a State's interests—the courts of another State.

It is also hard to reconcile *Hall* with this Court's decisions recognizing the sovereign immunity of Indian Tribes. The Court has long held that Tribes possess "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 134 S. Ct. at 2030. It had applied that immunity even before *Hall* to suits against Tribes by States, even when brought in the plaintiff State's own courts. *See id.* at 2031 (citing prior cases). After *Hall*, the Court held that a Tribe's immunity extends even to "suits arising from [its] commercial activities, even when they take place off

Indian lands." *Id.* (citing *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998)). The Court reaffirmed that holding in *Bay Mills*. *Id.* at 2036-2039. Those decisions have created what several Justices have recognized as a "striking[] anomal[y]"—that is, that Tribes have "broader immunity than the States," *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting, joined by Thomas and Ginsburg, JJ.), even though they arguably possess less sovereignty than the States, *see Bay Mills*, 134 S. Ct. at 2030-2031 (noting the "qualified nature of Indian sovereignty").

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally felt the need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall* and found *Hall* distinguishable. *See* 527 U.S. at 738-739. But nothing in *Alden* suggests *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with *Hall*'s view of the Eleventh Amendment as divorced from broader sovereign immunity principles. *See* Fallon et al., *Hart & Wechsler's The Federal Courts & The Federal System* 976 n.2 (7th ed. 2015) (noting the "difficulty of reconciling *Hall*'s rationale with that of *Alden*"); *see also* Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037 n.110 (2000).

In short, *Hall* cannot be reconciled with this Court's subsequent decisions, which have emphasized the need to look beyond the constitutional text to consider the historical understanding of state sovereign immunity, articulated the values that state sovereign immunity protects, and recognized the immunity of

States in contexts that pose less of a threat to sovereignty than allowing States to be haled into the courts of other States. Because *Hall* is a jurisprudential outlier, it can be overruled without threatening other precedents.

B. Stare Decisis Has Little Force Here Because *Hall* Is A Constitutional Decision That Has Not Engendered Reliance Interests

The other stare decisis factors, moreover, provide the Court no reason to perpetuate *Hall*'s error merely for the sake of consistency.

First, stare decisis "is at its weakest" when, as in *Hall*, the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235. In such cases, only the Court can correct the error of a prior decision, because "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (internal quotation marks omitted).

Second, stare decisis is further weakened here—more than in many cases involving constitutional issues—because sovereign immunity "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), and rules governing sovereign immunity therefore do not engender reliance interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). Here, by contrast, no parties "have acted in conformance with existing legal rules in order to conduct transactions," *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010), or have otherwise conducted their lives in a

manner that assumes the continuing vitality of a constitutional precedent.

C. *Hall* Has Proven Harmful In Practice

The decades since *Hall* have also exposed that decision's "practical deficiencies," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009), and the extent to which it undermines the values underlying the sovereign-immunity doctrine. None of Hyatt's proposed workarounds can cure the problems *Hall* creates.

1. This case exemplifies the damage that suits permitted by *Hall* can cause.

One purpose of sovereign immunity is to "shield[] state treasuries" from private litigants. *Federal Mar. Comm'n*, 535 U.S. at 765; *see also Alden*, 527 U.S. at 750 ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."). Yet Hyatt has forced California to spend vast sums of taxpayer money defending itself. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation. Once the case finally reached trial, the Nevada jury was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to more than $490 million after costs and interest. Since trial, California has spent another ten years fighting that verdict, and it will face additional proceedings on remand if this Court upholds *Hall*. And although appeals succeeded in trimming the trial court's half-billion-dollar judgment, the prospect of any damages award against California "place[s] unwarranted strain on [its] ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750-751.

Such damages awards necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

Another purpose of sovereign immunity, as discussed above, is to protect the "dignity and respect" States are owed in our federal union. *E.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 268. This suit has offended that purpose as well, by forcing California to submit its official conduct to the review of another State's judiciary and jury. And that harm is exacerbated because the conduct in question involves taxation, which "is an essential attribute of sovereignty," *Railroad Co.* v. *Maine*, 96 U.S. 499, 508 (1877). In short, this case shows how *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State in conducting a core sovereign function, *Alden*, 527 U.S. at 750.[7]

---

[7] This case may not even fully represent the extent of *Hall*'s harmful effects in the long-running dispute between Hyatt and the FTB. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting he may yet try to bring another tort action against the FTB in Nevada. *See* Pet. Nev. S. Ct. Req. for Judicial Notice at RJN-094 (Dec. 5, 2016) (Hyatt's brief before California State Board of Equalization arguing that "[a]ssertion of the 1992 fraud penalties is a continuing bad faith act by FTB"); *id.* at RJN-103 to RJN-134 (describing the FTB's alleged "continuing bad faith conduct").

Furthermore, in case there were any doubt that suits of this nature disrupt a State's execution of its sovereign responsibilities, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, on the view that it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." Grant, *Moving from Gold to Silver: Becoming a Nevada Resident*, Nev. Lawyer, Jan. 2015, at 24 & n.9.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation that would only compound the costs imposed by Hyatt's suit. For example, another taxpayer sued the FTB on fraud claims in Washington state court in 2015; more than three years later, that suit remains pending. *See* Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. Mar. 20, 2015); Status Report, *Satcher*, No. 16-2-00194-0 (July 30, 2018). Such copycat suits are regrettable yet, given *Hall*, unsurprising. Sovereign governments undertake many responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions decline to waive their sovereign immunity over tax disputes. *See, e.g.*, Cal. Gov't Code § 860.2; Nev. Rev. Stat. § 372.670; 28 U.S.C. § 2680(c). *Hall* has provided taxpayers with an avenue to skirt that immunity and disrupt the taxing authority.

California is not alone in facing *Hall*'s consequences. States are regularly haled into the courts of a sister State against their will, and (unlike in *Hall* itself) those suits often challenge acts of public policy, thus striking at the heart of the dignity and self-government concerns underlying sovereign immunity. Recently, for example, Nevada has been sued without its consent in the California courts. The pending petition for certiorari in *Nevada Department of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018), arises from a suit against Nevada Department of Wildlife officials in California court, alleging torts arising from a wildlife training presentation to California law enforcement officials; Nevada asks the Court to overrule *Hall* even though its own courts exercised jurisdiction over the FTB in this case. In another case against Nevada, the plain-

tiff—demanding monetary and equitable relief—challenged Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally used them to travel to California. Pet. for Cert. i, *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy—intrusions of the sort that sovereign immunity is meant to prevent. *See* Decl. of Kristine Poplawski, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015).

Nor is Nevada the only other State that has been sued without its consent in cases that implicate its sovereignty interests. In *Faulkner* v. *University of Tennessee*, 627 So. 2d 362 (Ala. 1992), for example, a former graduate student at the University of Tennessee asked an Alabama court to stop the university from revoking his doctoral degree after it determined that his dissertation did not contain original work. *Id.* at 363-364. The Supreme Court of Alabama ruled that the courts should exercise jurisdiction over the case because the University of Tennessee is not subject "to the will of the democratic process in Alabama," *id.* at 366—thus subjecting it, rather perversely, to the control of the Alabama courts. And in *Head* v. *Platte County*, 749 P.2d 6 (Kan. 1988), the Supreme Court of Kansas held that state courts should exercise jurisdiction over a suit alleging that a Missouri county and Missouri officials failed to train employees and establish policies concerning the execution of arrest warrants, thus permitting Kansas courts to decide which policies Missouri law enforcement officials should or should not adopt. *Id.* at 7-10. The States that supported certiorari in this case

supplied numerous other examples. Br. of Indiana and 44 Other States as Amici Curiae in Support of Pet'r 8-10. In each of those cases, *Hall* allowed state courts to interfere with the public policy choices made by another State.

2. Hyatt's brief in opposition to certiorari argued (at 12, 17) that any detrimental effects of *Hall* can be mitigated through the "voluntary doctrine of comity." But this case—which, ironically, Hyatt cited as an example of the proper functioning of that doctrine—demonstrates the inadequacy of relying on comity to protect the values underlying sovereign immunity. Comity has not saved the FTB from the burdens of litigation or prevented the Nevada courts from interjecting themselves into the tax-collection process here. And even where a state court decides to grant protection to another State on comity grounds, that protection may take years of litigation to obtain and is often less than what the State would have in its own courts. For example, in *Sam* v. *Sam*, 134 P.3d 761 (N.M. 2006), which Hyatt cited (Opp. 12), the defendant—an Arizona governmental trust—had to litigate for nearly five years before the New Mexico Supreme Court decided that it was entitled to the two-year statute of limitations afforded to New Mexico's government entities (but not the one-year statute of limitations that Arizona courts would have applied). Comity is no substitute for a clear rule of sovereign immunity, which allows a defendant State to terminate litigation quickly and without incurring the extraordinary costs seen in this case, in *Sam*, and in many other cases.

Hyatt also contended (at 17) that States could enter into an agreement to confer immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely the Consti-

tution. "It is inconsistent with the Court's proper role to ask [the States] to address a false constitutional premise of this Court's own creation." *Wayfair*, 138 S. Ct. at 2096. Interstate compacts "can take decades, or longer, to hammer out," Br. of Amicus Curiae Multistate Tax Comm'n in Support of Pet'r 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted.

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

SEPTEMBER 2018

EXHIBIT 89

No. 17-1299

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, California 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

MARK D. ROSENBAUM
ALISA HARTZ
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977

PAUL HOFFMAN
SCHONBRUN SEPLOW HARRIS & HOFFMAN LLP
200 Pier Avenue #226
Hermosa Beach, California 90254
(310) 396-0731

DONALD J. KULA
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, California 90067
(310) 788-3212

JOEL W. NOMKIN
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 351-8185

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether there is a compelling justification for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

ARTICLES

STATEMENT OF THE CASE

The underlying facts

This lawsuit concerns intentional tortious acts committed by the Petitioner, California Franchise Tax Board ("the Board"), and its employees while seeking to build a case to assess additional state income taxes against Gilbert P. Hyatt. The torts against Hyatt occurred while he was a resident of Nevada and thus this case is about the ability of that state to provide a remedy for one of its citizens who has been seriously injured. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495 (2003) ("[T]he plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada.")[1]

The Board speaks of the "astonishing intrusion" to the dignity of California for having to defend in Nevada the intentionally tortious acts committed by California officials in Nevada. Brief for Petitioner at 38. But the astonishing intrusions were the other way around: the Board never acknowledges the egregious, tortious behavior of the Board and its employees directed at Hyatt. To be clear, this case does not involve alleged misconduct merely stated in a pleading. Rather, after a lengthy contested trial, a jury found that the

[1] The Brief Amicus Curiae of Alan B. Morrison & Darien Shanske in Support of Neither Party mistakenly asserts that the "vast majority" of the acts by the Board and its employees against Hyatt occurred in California. *Id.* at 9. Quite the contrary, the torts that occurred and were the basis for the jury's verdict largely occurred in Hyatt's state of residence, Nevada.

Board and its employees had committed intentional torts. Then, after a careful review of the evidence from the trial, the Nevada Supreme Court affirmed the decision of the trial court that torts had been committed against Hyatt.

The evidence at trial showed that the Board's lead 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 Hyatt. Referring to Hyatt, the lead auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. The lead auditor operated on the view that most of the large income taxpayers in California were Jewish. 4/28/08 RT at 132:2-23; 140:11-141:25. According to testimony from a former Board employee, the lead auditor freely discussed personal information about Hyatt—much of it false—causing her former colleague to believe that the lead auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The lead auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After the lead auditor had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (Nev. filed Dec. 21, 2009). The lead auditor's incessant discussion of the investigation conveyed the impression to others within the Board that she had become "obsessed" with the case. *See*

4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, the lead auditor pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and other estranged members of Hyatt's family against him. *See*, *e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. The lead auditor often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

Fueled by the lead auditor's desire to "get" Hyatt, the Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with "Demand[s] for Information" about Hyatt and disclosed his confidential home address and social security number to third parties, including California and Nevada newspapers. *See*, *e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his two places of worship in Nevada and to a Nevada newspaper. *See* 83 RA at 020653-54, 020668-69, 020735-36, 020745. The Board also disclosed its investigation of Hyatt to patent licensees of the U.S. Philips Corporation in Japan. *See* 84 RA at 020788, 020791.[2] The Board knew that Hyatt, like other private inventors, had significant concerns

[2] Hyatt signed an agreement in July 1991 with the U.S. Philips Corporation granting Philips the exclusive authority to license Hyatt's patents.

about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, a tax attorney representing Hyatt, that tax payments were the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.2. The Board employee told Cowan that there would "extensive" demands for information from Hyatt, while simultaneously raising the subject of "settlement possibilities" in regard to the Board's audit and resulting tax assessments. *See* 5/22/08 RT at 80:3-81:2.

The initial litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy, fraud, and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. The Board did not challenge clearly established law that a state does not have sovereign immunity when sued in the courts of another state. *Nevada v. Hall*, 440 U.S. 410 (1979). The Board instead argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court unanimously rejected the Board's argument that it

was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. Although the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Franchise Tax Bd. of Cal. v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)). The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." *Id.*

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." *Id.* at *9. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." *Id.* at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." *Id.* Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by

sister states' government employees, than California's policy favoring complete immunity for its taxation agency." *Id.*

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*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." *Id.* at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.* The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied comity principles 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." 538 U.S. at 499.

The trial, verdict, and review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages. Pet. App. 11a. This substantial verdict reflects the jury's view that the conduct of the Board and its employees was truly egregious.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125 (Nev. 2014). In doing so, it reduced the Board's liability for compensatory damages to $1 million on Hyatt's fraud claim and remanded the case for a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim. *Id.* at 131. Proceeding to the merits, the Nevada Supreme Court set aside much of the judgment against the Board, finding that Hyatt had not established the necessary elements for various other torts under Nevada law. *Id.* at 140.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board's employees had "disclosed [respondent's] social security number and home address to numerous people and entities and that [auditors] revealed to third parties that Hyatt was being audited."

Id. at 144. 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.* at 145. The court thus determined "that substantial evidence supports each of the fraud elements." *Id.*

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." *Id.* at 147. The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because in-state officials "'are subject to legislative control, administrative oversight, and public accountability.'" *Id.* at 147 (citation omitted). 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.* (citation omitted).

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 Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability—noting that Hyatt had "suffered extreme treatment" at the hands of the Board (*id.* at 148)—but it reversed the award of damages. Finding errors in the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to determine the proper level of damages on this claim. *Id.* at 149-157.

The court 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 154. 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.*

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that

would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt*, 136 S.Ct. 1277, 1280 (2016) (*Hyatt II*).

After briefing and oral argument on both of these questions, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled and therefore "affirm[ed] the Nevada courts' exercise of jurisdiction over California." *Id.* at 1279. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. The Court concluded that "[d]oing 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.* (internal quotation marks omitted).

The case on remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court stated: "In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II*." *Franchise Tax Bd. of Cal. v. Hyatt*, 401 P.3d 1110, 1117 (Nev. 2017). The Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of

Nevada's statutory damages cap. The court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. *Id.* 121a-122a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also ruled that the statutory damages cap includes prejudgment interest.

SUMMARY OF ARGUMENT

1. The petition for writ of certiorari should be dismissed as improvidently granted.

This is the third time that this case has been before this Court. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

In the first instance, the Board did not raise the issue of whether *Nevada v. Hall*, 440 U.S. 410 (1977), should be overruled. In a unanimous opinion, the Court in *Hyatt I* explained: "[In *Nevada v. Hall*] [w]e affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of

petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

This Court remanded the case and a trial was held. Only after the jury verdict against the Board and the decision of the Nevada Supreme Court affirming key aspects of liability and damages did the Board decide that it wanted this Court to reconsider *Nevada v. Hall*. The Court granted certiorari on the issue of whether to overrule *Nevada v. Hall* and it was briefed and argued. The Court issued its decision on this issue and declared: "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*." *Hyatt II*, 136 S.Ct. at 1279 (emphasis added). This Court, though, did announce a new rule limiting the damages that can be awarded against a state in another state's court: California could be held liable only to the extent that Nevada would be liable in its own courts. *Id.* at 1281. This holding was premised on the affirmance of *Nevada v. Hall*. The Board did not ask for rehearing and reconsideration of this Court's decision.

The case was remanded to the Nevada Supreme Court which, after briefing and argument, lowered the damage award against the Board to $100,000. The Board here does not question any aspect of the Nevada Supreme Court's reasoning or decision.

First, the law of the case doctrine should resolve this case. It is long and firmly established that an

affirmance by an evenly divided Court is a judgment on the merits. *See Durant v. Essex Co.*, 74 U.S. 107, 112 (1869); *Etting v. United States*, 24 U.S. 59, 78 (1826). The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine "promotes the finality and efficiency of the judicial process." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

This Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is the law of the case for this litigation. After the Board did not ask the Court to reconsider *Nevada v. Hall* in *Hyatt I*, Hyatt tried the case and litigated the appeal in reliance on that precedent. After this Court reaffirmed *Nevada v. Hall* in *Hyatt II*, Hyatt litigated the case on remand in reliance on *Nevada v. Hall* being settled law for this case. The Nevada courts likewise handled this matter with the expectation and reliance that *Nevada v. Hall* was the law to be followed in this case. This Court decided the "rule of law" for this case in *Hyatt I* and *Hyatt II* and it would violate the law of the case doctrine and basic fairness to change it now for this litigation.

Second, the Board did not ask this Court to reconsider *Nevada v. Hall* when this case was first here. As the Court noted, the Board expressly chose not to ask the Court to reconsider this decision. *Hyatt I*, 538 U.S. at 497. The Board could have done so then. By failing to do this in the Supreme Court, the Board should be

deemed to have waived the ability to ask for *Nevada v. Hall* to be overruled. *See, e.g.*, *Granite Rock Corp. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in the Supreme Court is "deemed waived"); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (arguments not raised in the Supreme Court are deemed waived). Hyatt chose to litigate this case in the Nevada courts, at huge expense, in reliance on this Court's ruling—and reaffirmation—that state governments may be sued in the courts of other states.

Simply put, the Board should be bound by its own choices in this litigation. It could have, but did not ask this Court to reconsider *Nevada v. Hall* when the case was here in *Hyatt I*. It could have, but did not file a petition for rehearing after this Court's decision in *Hyatt II* to reaffirm *Nevada v. Hall*. Because of these choices, the petition in this case should be dismissed as certiorari having been improvidently granted.

2. *Nevada v. Hall* should not be overruled

On the merits, the central issue in this case is whether the Constitution *prohibits* a state court from exercising its sovereign power to provide a forum to its citizens when they are injured by another state. In *Nevada v. Hall*, the Court concluded that a state may exercise its sovereignty to permit such suits and thus the question is whether there is a "compelling justification" for overruling this almost 40-year-old precedent. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S.

197, 202 (1991) (stare decisis requires that there be a "compelling justification" for overruling prior decisions).

The Board's core argument is that this Court's decisions concerning sovereign immunity, especially *Alden v. Maine*, 527 U.S. 706 (1999), undermine *Nevada v. Hall*. The Board, though, misses a crucial distinction: *Alden v. Maine* is about whether a state court is *required* to hear cases against its state government. *Nevada v. Hall* is about whether the Constitution *forbids* a state from choosing to hear suits by its own citizens against another state government. The Tenth Amendment creates a huge difference between compelling a state to do something, which is impermissible commandeering, as opposed to finding that a state is constitutionally prohibited from doing something. *See, e.g.*, *Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992) (explaining the Tenth Amendment forbids the commandeering of state governments).

No case after *Nevada v. Hall* ever suggested that the Constitution imposes a limit on a state's sovereign power to define the jurisdiction of its courts and to provide a remedy for its citizens, including when they are injured by another state. This Court's decisions about the Eleventh Amendment are inapposite because they are about a constitutional limit on *federal* court power. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (emphasis added) (citations omitted) ("For over a century we have reaffirmed that

federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.").

Alden v. Maine dealt solely with whether a state court is constitutionally required to hear a federal claim against its state government by its own citizens. In *Alden v. Maine*, this Court expressly drew a "distinction . . . between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign." 527 U.S. at 739-740.

Thus, unlike any of the other cases about sovereign immunity that the Board cites, this is a case about the Tenth Amendment and whether the Constitution prohibits a state from using its power to provide a forum for its injured citizens. There is nothing in the text of the Constitution which justifies such a limit on state power.

Nevada v. Hall reflects that states have a vital sovereign interest in providing a remedy for their citizens when they suffer injuries. *See*, *e.g.*, *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977) (recognizing "the legitimate and substantial interest of the State in protecting its citizens"). As this Court stated in *Nevada v. Hall*, history "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign." 440 U.S. at 416. *Nevada v. Hall* stressed that there is no constitutional limit on

the ability of a sovereign state to provide a forum for its citizens when they are injured, including by another state.

Quite tellingly, the Board concedes that "[i]n the pre-ratification era . . . [n]o State could be required to respect another's sovereign immunity in its courts." Brief for Petitioner at 31-32. Nor is there anything in the Constitution or its history that establishes a limit on the sovereign power of a state to provide a remedy for its citizens when they are injured by another state. As Justice Thomas declared, "immunity does not apply of its own force in the courts of another sovereign." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815 (2014) (Thomas, J., dissenting).

This, though, does not mean that state governments are without protection when they are sued in other states. This Court ruled in *Hyatt II* that the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. *Hyatt II*, 136 S.Ct. at 1281. Additionally, state courts can and do accord comity to other states, as in this case where the Nevada Supreme Court ruled that negligence claims could not go forward against the Board and that punitive damages are not available against the Board because of considerations of comity. Moreover, states can enter into agreements that provide for greater immunity. *Nevada v. Hall*, 440 U.S. at 416. Obtaining this protection through comity and mutual agreements is preferable to a new constitutional rule that limits state sovereignty by stripping states of

the power to determine the jurisdiction of their own courts and of the ability to protect their own citizens.

Under the Tenth Amendment a state can do anything except that which is prohibited by the Constitution. There is no constitutional prohibition against a state exercising its sovereignty to provide a forum for its citizens when they are injured by another state. The Board thus has failed to provide the "compelling justification" for overruling a long-standing precedent.

ARGUMENT

I. The Court Should Dismiss This Case As Certiorari Having Been Improvidently Granted

A. The Law of the Case Doctrine Resolves the Issue Before This Court and This Case

1. An affirmance by an evenly divided Court is a decision on the merits

This Court has been clear that the decisions of an equally divided court are binding and conclusive on the parties on the issues presented, although the rulings do not have precedential value for other litigation. *See* Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 252 (2016) ("The Supreme Court has long applied the rule that where the Justices reach a tie vote on the judgment in a case, the lower court's

opinion is affirmed. Such a decision binds the parties, but has no precedential value.").

This principle is long established. As early as 1826, Chief Justice John Marshall held that in a case where the Court was equally divided, "the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting v. United States*, 24 U.S. 59, 78 (1826). Particularly instructive is this Court's decision in *Durant v. Essex Co.*, 74 U.S. 107, 112 (1869) (cited by this Court in its affirmance in *Hyatt II*, 136 S.Ct. at 1279). Durant filed a bill against the Essex Company for certain real estate. *Id.* at 109. Durant lost in the lower courts and appealed to the Supreme Court. *Id.* at 108. The Supreme Court was equally divided and "affirmed with costs" the Circuit Court's decision. *Id.* Durant, believing that an equally divided court meant that the Court had actually not decided the issue, filed another bill against Essex. *Id.* at 109. Essex argued that the judgment of the equally divided Supreme Court was a bar on the second litigation and the Court agreed. The Court explained that the first suit "was an adjudication of the merits of the controversy," and as such "constitutes a bar to any further litigation on the same subject between the same parties." *Id.*

The Court went on to specifically reject the idea that an equally divided court's judgment constitutes no decision, explaining:

> There is nothing in the fact that the judges of this court were divided in opinion upon the

> question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.
>
> . . . The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

Id. at 110-112.

This Court has reaffirmed on many occasions that a decision by an equally divided Court is a conclusive resolution of the law in the litigation between the parties. *See Hertz v. Woodman*, 218 U.S. 205, 213-214 (1910) (explaining both precedent and reason justify the rule that "affirmance by an equally divided court is . . . a conclusive determination and adjudication of the matter adjudged; but the principles . . . having [not] been agreed upon by a majority . . . prevents the case from becoming an authority for the determination of other cases); *Neil v. Biggers*, 409 U.S. 188, 191-192 (1972) (explaining that a decision by an evenly divided Court resolves a matter between the parties).

Similarly, in *United States v. Pink*, 315 U.S. 203, 216 (1942), the Court held that a ruling by an equally divided court binds the parties, although it does not have precedential value. The Court explained the significance of its earlier ruling by an evenly divided Court: "*While it was conclusive and binding upon the parties as respects that controversy*, the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." *Id.* at 216 (emphasis added) (citation omitted).

Thus, under precedents stretching back throughout American history, it is firmly established that this Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is a decision on the merits for these parties.

2. Under the law of the case doctrine, the prior decision of this Court in this case should not be reconsidered

This Court has explained that the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine protects the parties in litigation by allowing them to rely on a court's ruling in their case without needing to fear that the rug later will be pulled out from under them by a court changing its mind about the law to be applied in their litigation. It also protects lower courts, here the Nevada Supreme Court,

which expended great resources hearing and deciding the issues presented to it because this Court had ruled twice that the Board could be sued in Nevada state court.

Justice Gorsuch, while a Circuit Judge, expressed the importance of this doctrine when he stated:

> Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. It's a pretty important thing too. Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve. All of which would 'gradual[ly] undermin[e] . . . public confidence in the judiciary.'

Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1240 (10th Cir. 2016) (citations omitted). This is the rationale that this Court has followed in articulating the law of the case doctrine. *See, e.g.*, *Arizona v. California*, 460 U.S. at 618.

Having split 4-4, this Court, of course, could have dismissed the petition for certiorari as improvidently granted or it could have put the case over for