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 14 OF 17

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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
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6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	16, 17	RA003698-RA004027

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 14 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;

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PETITION FOR WRIT OF CERTIORARI

Over twenty years ago, petitioner Franchise Tax Board of the State of California (FTB), the California state agency charged with collecting California income taxes, audited respondent Gilbert P. Hyatt and determined that he had falsely disclaimed his California residency in order to avoid substantial state income taxes. Rather than simply exercise his right to challenge FTB's assessment via administrative review followed by suit in California state court, Hyatt also sued FTB in Nevada state court, alleging that FTB committed various intentional torts in conducting its audits. Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—before it finally reached trial. There, a Nevada jury demonstrated the dangers of allowing a sovereign State to be haled into another State's court system against its will by finding for Hyatt on every one of his claims and awarding Hyatt $490 million in damages. Another six years passed before the Nevada Supreme Court, while trimming the award, affirmed that FTB is liable for fraud and intentional infliction of emotional distress and must pay Hyatt over a million dollars in damages, with potentially millions more to come. In the process, the Nevada Supreme Court deepened splits on important federal issues and expressly declined to extend to California the same immunities Nevada enjoys in its own courts.

This extraordinary case demands the Court's review for a second time because the judgment below contravenes sovereign immunity principles three times over. First, the Nevada Supreme Court held that the federal discretionary-function immunity rule,

28 U.S.C. §2680(a), which applies in Nevada courts, is categorically inapplicable to intentional torts and bad-faith conduct. That conclusion squarely conflicts with the decisions of numerous federal circuits holding that subjective intent is irrelevant to discretionary-function immunity and, therefore, such immunity can apply even to intentional torts and bad-faith conduct.

Second, the court ignored this Court's previous decision in this case by declining to extend to a sister sovereign the same immunities Nevada enjoys in its own courts. If the Court persists in the view that a sovereign State can be haled into the courts of another State against its will (but see *infra*), then it is imperative that the foreign sovereign receive the same immunities as the domestic sovereign, as this Court indicated in its earlier decision. Nonetheless, the Nevada Supreme Court refused to apply a statutory cap on compensatory damages applicable to Nevada agencies, on the remarkably candid ground that extending the rule to a California agency would undermine the interest in compensating Nevadans without any corresponding benefit to Nevada and its taxpayers. That determination denies California its dignity as a co-equal sovereign and cannot be squared with basic principles of sovereign immunity, cooperative federalism, or the Full Faith and Credit Clause.

Third, the proceedings in this case amply demonstrate that this Court took a wrong turn in *Nevada v. Hall*, 440 U.S. 410 (1979). Bedrock principles of sovereign immunity dating back to the Framing make clear that a sovereign State cannot be haled into a sister State's court system absent its

consent. Moreover, this Court's cases recognize that a State generally may not be haled into federal court absent its consent, and all the same justifications apply *a fortiori* in the sister State context. *Nevada v. Hall* was decided before many of the Court's modern sovereign immunity cases, and it is incompatible with those later, better reasoned cases. Indeed, this case amply demonstrates the problems with allowing one sovereign to be sued in the courts of a different sovereign absent consent. A Nevada jury with an opportunity to award damages to a Nevada citizen at the expense of a California governmental entity did so to the tune of half a billion dollars. Although the Nevada Supreme Court eventually trimmed that award back half a decade later, it expressly refused to apply the immunities available to a Nevada state agency. These facts illustrate exactly why sovereign immunity does not allow a sovereign State to be placed at the mercy of foreign juries and judges absent consent. In short, this case presents a perfect vehicle for this Court to correct two certworthy errors made by the court below or one of its own, *viz.*, *Nevada v. Hall*.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 335 P.3d 125 and reproduced at App.1-73. The order of the Nevada Supreme Court denying rehearing is unreported and reproduced at App.74-75. The relevant orders of the state trial court are unreported, but reproduced at App.78-81.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2014, and denied rehearing on November 25, 2014. On January 13, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including March 23, 2015. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, §1 of the United States Constitution and 28 U.S.C. §2680(a) are reproduced at App.82-83.

STATEMENT OF THE CASE

A. Factual Background

Hyatt is a former resident of the State of California who has earned hundreds of millions of dollars in licensing fees on certain technology patents he once owned. App.4; *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 490-91 (2003). Hyatt filed a "part-year" resident income tax return in California for the year 1991, claiming that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. *Hyatt I*, 538 U.S. at 490. Within days after that purported move, Hyatt received substantial patent licensing fees that he did not report on his California tax return. App.4. Although Hyatt represented that he had lived in California for three-quarters of 1991, he reported only 3.5% of his total taxable income on his California return. And despite his supposed change of residence,

Hyatt claimed no moving expenses on his California return. *Id.*

Based on these discrepancies, FTB opened an audit into Hyatt's 1991 California return. FTB concluded that Hyatt did not move from California to Nevada before October 1991, as he had claimed, but rather remained a California resident until April 1992. App.4-5. It determined that, "in an effort to avoid [California] state income tax liability on his patent licensing," Hyatt "had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote." App.6. It further determined that although Hyatt claimed he had sold his California home to his work assistant, the purported sale was a sham. *Id.* FTB provided a "detailed explanation" of its conclusions, complete with evidence. It determined that Hyatt owed California approximately $1.8 million in unpaid state income taxes from 1991, plus an additional $2.6 million in penalties and interest. *Id.* Because it determined that Hyatt resided in California for part of 1992 yet paid no California taxes at all, FTB opened a second audit into Hyatt's state income tax liability for that year. App.7. It concluded that Hyatt owed an additional $6 million in taxes and interest for 1992, along with further penalties. *Id.*

Hyatt challenged the tax audits by filing protests with FTB. *Id.* Those protests initiated an administrative review process under which both audits were examined again to ensure their accuracy. FTB upheld the audits after administrative review. *Id.* Hyatt is currently challenging that outcome in an administrative appeal to the California State Board of

Equalization.[1] Hyatt has also filed a federal lawsuit against FTB board members and other State officials alleging violations of his constitutional rights. *See Hyatt v. Chiang*, No. 14-849, 2015 WL 545993, at *6 (E.D. Cal. Feb. 10, 2015) (dismissing suit as barred by Tax Injunction Act), *appeal docketed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

B. The Nevada Litigation

In January 1998, when the administrative review process was just beginning, Hyatt filed suit against FTB in Nevada state court. He asserted a variety of tort claims based on FTB's alleged conduct during its audits—specifically, negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. Hyatt sought compensatory and punitive damages. App.7-8, 11.

FTB moved for summary judgment on the ground that it was entitled to complete immunity from suit in Nevada just as it would be in California. App.10. Under California law, no public entity can be held liable for any injury caused by "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or by any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of sovereign immunity and comity, required the Nevada courts to

[1] The decision below erroneously stated that Hyatt is challenging the audits' conclusions "in California courts." App.7 n.2.

grant FTB that same immunity. *Hyatt I*, 538 U.S. at 491-92.

The trial court denied the motion, and FTB sought review by petitioning the Nevada Supreme Court for a writ of mandamus ordering dismissal of the case. *Id.* at 492. The Nevada Supreme Court initially granted the petition and ordered judgment for FTB on all of Hyatt's claims. *Id.* Ten months later, however, it vacated its decision and instead granted the writ in part and denied it in part. It refused to extend complete immunity to FTB based on sovereign immunity, the Full Faith and Credit Clause, or comity, and held that "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.10. The Nevada Supreme Court therefore ordered the trial court to dismiss Hyatt's claim for negligent misrepresentation, but allowed his intentional tort claims to proceed.

C. *Hyatt I*

FTB filed a petition for certiorari, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. This Court granted certiorari and affirmed. It explained that the Full Faith and Credit Clause generally does not require one State to apply the law of another. *Hyatt I*, 538 U.S. at 496. Although recognizing that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," it held that the Full Faith and Credit Clause did not require Nevada to respect that sovereign interest by giving FTB the complete

immunity that it would have under California law. *Id.* at 498-99.

In reaching that conclusion, the Court acknowledged that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* at 499. But it observed 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.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Noting that the Nevada Supreme Court had merely granted FTB the same immunity that a Nevada agency would enjoy under similar circumstances—thereby placing FTB on an equal footing with Nevada agencies—the Court commented that the Nevada Supreme Court had "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit" to determine what immunity FTB was entitled to claim. *Id.*

The Court also emphasized that its ruling did *not* address a broader issue: whether the Constitution incorporates a principle of State sovereign immunity that protects a State from being sued in the courts of another State without its consent. *Id.* at 497. The Court had previously rejected that principle in *Nevada v. Hall*, 440 U.S. 410 (1979), holding that the Constitution did not "require[] all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I* that urged the Court to revisit and overrule *Hall*, explaining that the case "cannot be reconciled with" the leading decisions on State sovereign immunity. Br. of Florida et al. as Amici

Curiae 17, *Hyatt I*, 538 U.S. 488 (No. 02-42), 2002 WL 32134149. But because FTB itself did not press the issue at that time, the Court declined to reach it. *Hyatt I*, 538 U.S. at 497.

D. Trial and Appeal

Following this Court's decision in *Hyatt I*, the case returned to the Nevada state trial court. The parties then engaged in lengthy discovery and pretrial proceedings. Finally, in 2008—over ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App.11. The Nevada jury found for Hyatt on all his claims, awarding him just over $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id.*

Nevada law imposes a statutory cap on tort damages against a Nevada government agency. Nev. Rev. Stat. §41.035(1). For actions accruing before 2007, that cap was set at $50,000—less than one one-thousandth of the compensatory damages awarded against FTB. *See* 1995 Nev. Stat. 1071, 1073.[2] The same Nevada law also prohibits punitive damages against Nevada government agencies. Nev. Rev. Stat. §41.035(1). The state trial court, however, declined to apply those limits to FTB. Instead, it added over $2.5 million in costs and $102 million in prejudgment interest to the jury verdict, for a total judgment against FTB of over $490 million. App.11, 72.

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[2] 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.

FTB appealed the numerous errors made by the trial court. First, it argued that under the federal discretionary-function immunity rule, 28 U.S.C. §2680(a), which the Nevada Supreme Court had adopted after *Hyatt I*, it could not be held liable for any claims arising from the inherently discretionary conduct underlying its audit of Hyatt's taxes—even intentionally tortious or bad-faith conduct. Second, it argued that Hyatt's intentional tort claims failed as a matter of law. Third, it argued that under principles of full faith and credit, cooperative federalism, sovereign immunity, and comity, the trial court should have treated FTB like a Nevada government entity by capping compensatory damages and precluding punitive damages. Finally, FTB preserved and pressed its argument that *Nevada v. Hall* was wrongly decided and should be overruled, and that FTB could not be haled into the Nevada courts absent its consent.

Six years after trial—over sixteen years after Hyatt filed suit—the Nevada Supreme Court affirmed in part and reversed in part. App.1-73. The court first held that FTB could not invoke the federal discretionary-function immunity rule to dispose of Hyatt's claims because, in its view, that rule is categorically inapplicable to "intentional torts and bad-faith misconduct." App.14. The court acknowledged that Nevada has "adopted … the federal test for determining whether discretionary-function immunity applies." App.17. Furthermore, it noted that under this Court's jurisprudence, "[t]he focus of the inquiry" under the federal test "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."

App.24 (quoting *United States v. Gaubert*, 499 U.S. 315, 325 (1991)). And it conceded that "[o]ther courts" have held that "allegations of intentional or bad-faith misconduct are not relevant to determining if" federal discretionary-function immunity applies. App.19 (citing *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008), and *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135, 1141 (10th Cir. 1999)). Nevertheless, relying heavily on a single Second Circuit decision, *see* App.22-24 (citing *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000)), the court adopted a categorical rule that "[d]iscretionary-function immunity does not apply to intentional and bad-faith tort claims," App.72.

The Nevada Supreme Court then turned to the merits of Hyatt's intentional tort claims. It held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, App.25-38; however, it affirmed the jury's verdict finding FTB liable for fraud and intentional infliction of emotional distress, App.38-41, 46-51. On those counts, the court pointed to evidence that FTB disclosed Hyatt's address and social security number to third parties when requesting information, revealed to third parties that he was being audited, and took eleven years to resolve his administrative appeals, and that one of the auditors assigned to his case purportedly made an isolated remark regarding Hyatt's religion and was "intent on imposing an assessment" against Hyatt. App.40. In the court's view, this was sufficient evidence for the jury to find FTB liable for intentional infliction of emotional distress. App.50. It was also sufficient for the jury to find fraud, the court

concluded, because FTB had provided Hyatt a document at the outset of his audit explaining that during the audit process, Hyatt should expect "[c]ourteous treatment by FTB employees," "[c]onfidential treatment of any personal and financial information," and "[c]ompletion of the audit within a reasonable amount of time." App.5, 39. In the court's view, a reasonable jury could conclude these were "fraudulent representations," FTB "knew [they] were false," and FTB "intended for Hyatt to rely on [them]." App.40-41.

Turning to damages, the Nevada Supreme Court refused to apply to FTB the statutory damages cap applicable to a Nevada government entity. It conceded that "[m]ost courts" in other States extend to out-of-state entities the same protections granted to in-state entities. App.44. It nevertheless concluded that Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages." App.45. Accordingly, it "reject[ed] FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities." App.62. It then held that "[b]ecause punitive damages would not be available against a Nevada government entity," FTB was immune from punitive damages. App.65. The court accordingly upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest), and remanded for retrial on emotional distress damages due to evidentiary and jury-instruction errors. App.72.

REASONS FOR GRANTING THE PETITION

The decision below warrants this Court's review on three vitally important issues of sovereign immunity. *First*, certiorari is necessary to resolve the acknowledged split over the scope of the federal test for discretionary-function immunity under 28 U.S.C. §2680(a). As the Nevada Supreme Court conceded, numerous federal courts of appeals have held that subjective intent is irrelevant to determining whether §2680(a) applies. Siding with the minority view, however, the Nevada Supreme Court created a categorical exception to discretionary-function immunity that turns *entirely* on subjective intent, concluding that §2680(a) simply does not apply to intentional torts or bad-faith conduct. That holding deepens a conflict in the lower courts, cannot be reconciled with this Court's precedents, and eviscerates discretionary-function immunity in practice by allowing plaintiffs to challenge any government policy decision simply by alleging an intentional tort or bad faith.

Second, by refusing to extend to an out-of-state agency the same immunities that a Nevada state agency would receive, the Nevada Supreme Court violated this Court's command in *Hyatt I*. That decision explained that a State is not required to provide *greater* protection to an out-of-state agency than its own law provides to an in-state agency. But it cautioned that the Full Faith and Credit Clause and principles of sovereign immunity and cooperative federalism prohibit a State from exhibiting a "policy of hostility" for another State's sovereign status by departing from the "contours of [its] own sovereign

immunity from suit." 538 U.S. at 499. The Nevada Supreme Court blatantly transgressed these principles when it refused to extend to FTB, an out-of-state agency, the *same* sovereign immunity Nevada provides to in-state agencies. If this Court is going to retain the rule of *Nevada v. Hall*, it is imperative that it reaffirm the principle that a sister sovereign is entitled to the same immunities as the domestic sovereign.

Third, this case amply demonstrates that the better course would be to recognize that *Nevada v. Hall* is incompatible with both bedrock principles of sovereign immunity and later, better reasoned decisions of this Court and should be overruled. That decision departed from fundamental principles of sovereign immunity as understood at the Framing and as embodied in the structure of the Constitution. Subsequent decisions of this Court have developed those constitutional principles and recognized that the Eleventh Amendment is not a narrow principle applicable only in federal court, but a reflection of more fundamental constitutional principles equally applicable in state court. Those later decisions are better reasoned and incompatible with *Hall*. What is more, this case amply demonstrates the practical danger of allowing one State to be haled into the courts of a sister sovereign against its will. A Nevada jury needs little incentive to side with a Nevada citizen against another State's government, especially when the latter is involved in an inherently sovereign and inherently unpopular function like tax collection. And Nevada courts do not feel compelled to respect either the sister State's or Nevada's limitations on the waiver of sovereign immunity. In short, *Hall* has proven both

doctrinally and practically unworkable. This Court should take this opportunity to restore the dignity and residual sovereignty of the States. That sovereignty survived the formation of the national government and generally does not yield even in federal court. It should not yield to a mistaken decision that has proven unworkable in this very case.

I. This Court Should Grant Review To Determine Whether The Federal Discretionary-Function Immunity Rule Is Categorically Inapplicable To Intentional Torts And Bad-Faith Conduct.

In holding that the federal discretionary-function immunity rule categorically "does not apply to intentional and bad-faith tort claims," the Nevada Supreme Court concededly broke from the holdings of "[o]ther courts" that have held precisely the opposite. App.19, 72. Certiorari is necessary to resolve the acknowledged split on this important question.

The federal discretionary-function immunity rule provides that the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA) does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty … whether or not the discretion involved be abused." 28 U.S.C. §2680(a). The rule "prevent[s] judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

This Court has articulated a two-part test for determining whether a government defendant is

entitled to discretionary-function immunity. First, the conduct at issue must "involve[] an element of judgment or choice"; and second, the judgment must be "of the kind that the discretionary function exception was designed to shield," that is, "governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37; *see Gaubert*, 499 U.S. at 322-23. The Nevada Supreme Court has expressly adopted the two-part federal test for discretionary-function immunity as its own, because the relevant state statute "mirrors the Federal Tort Claims Act." *Martinez v. Maruszczak*, 168 P.3d 720, 722 (Nev. 2007).[3]

In applying that test, "[t]he focus of the inquiry is not on the [defendant's] subjective intent … but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Based on that reasoning, at least four federal courts of appeals have explicitly held that, in determining whether discretionary-function immunity applies, the defendant's subjective intent is irrelevant. *See, e.g.*, *Irving v. United States*, 162 F.3d 154, 167 (1st Cir. 1998) ("We know from *Gaubert* that the subjective intent of an agency actor is irrelevant to conducting a discretionary function analysis."); *Fisher*

[3] Other states have likewise adopted the federal test. *See, e.g.*, *Johnson v. Agency of Transp.*, 904 A.2d 1060, 1063 (Vt. 2006). Because the decision below relies on the federal discretionary-immunity rule and federal precedent to interpret the parallel Nevada rule, App.14-15, 17-24, this Court has jurisdiction to "review[] the federal question on which the state law determination [was] premised." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 152 (1984); *see Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Bros. Sales v. United States, 46 F.3d 279, 286 (3d Cir. 1995) (*Gaubert* "ruled out any inquiry into an official's 'subjective intent'"); *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008) ("[S]ubjective intent is irrelevant to our analysis."); *Franklin Sav. Corp*, 180 F.3d at 1137 (*Gaubert* establishes "an affirmative bar to inquiry into officials' subjective intent"). Under the reasoning of these courts, performing a discretionary function in bad faith does not take that conduct outside the purview of the discretionary-function immunity rule.[4]

Along the same lines, at least three federal courts of appeals have expressly rejected the proposition that intentional torts fall outside the scope of the discretionary-function immunity rule. *See Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001) ("[C]laims of intentional torts … must clear the §2680(a) discretionary function hurdle[.]"); *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994) (where "the tortious conduct involves a 'discretionary function,' a plaintiff cannot maintain an FTCA claim, even if the discretionary act constitutes an intentional tort"); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983). Two others have implicitly rejected that proposition by

[4] Other circuits agree that *Gaubert* looks only to the objective nature of the decision at issue, not the extent to which the defendant subjectively weighed different policy priorities to make that decision. *See Indemnity Ins. Co. v. United States*, 569 F.3d 175, 181 (4th Cir. 2009); *Spotts v. United States*, 613 F.3d 559, 572 (5th Cir. 2010); *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997); *Demery v. U.S. Dep't of Interior*, 357 F.3d 830, 833 (8th Cir. 2004); *Miller v. United States*, 163 F.3d 591, 593 (9th Cir. 1998); *Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006).

dismissing intentional infliction of emotional distress claims on discretionary-function grounds. *See Pierce v. United States*, 804 F.2d 101, 102 (8th Cir. 1986); *Hart v. United States*, 894 F.2d 1539, 1543-46 (11th Cir. 1990).

The Nevada Supreme Court, however, declined to follow these decisions, and relied instead on the Second Circuit's position in *Coulthurst v. United States*, 214 F.3d 106 (2d Cir. 2000). App.22-24. In *Coulthurst*, the Second Circuit held that discretionary-function immunity did not apply where a prisoner alleged that a prison guard had failed to adequately inspect and maintain exercise equipment. The court concluded that if a decision not to inspect was "unrelated to any plausible policy objectives," then immunity would not be available. *Id.* at 111; *see also Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475-76 (2d Cir. 2006) (following *Coulthurst*). Under this approach, discretionary-function immunity depends on why the government official made the decision at issue; that is, it requires an inquiry into subjective intent that the other circuits have rejected. The Nevada Supreme Court then relied on that principle to hold that 28 U.S.C. §2680(a) contains a *categorical* "exception … for intentional torts and bad-faith conduct," on the theory that such actions are by definition "unrelated to any plausible policy objective." App.24; *see* App.72 ("Discretionary-function immunity does not apply to intentional and bad-faith tort claims.").

The Nevada Supreme Court's holding is plainly irreconcilable with the majority view. Instead of holding that subjective intent is irrelevant and

intentional torts do not fall outside the discretionary-function immunity rule, the Nevada Supreme Court's rule is that once a plaintiff alleges intentionally tortious or bad-faith conduct, the claim is *automatically* exempt from the discretionary-function immunity rule. The court adopted this rule despite acknowledging that many "[o]ther courts" have "reached differing results." App.19. This conceded split in the lower courts over this Court's precedent clearly warrants certiorari.

As reflected by the substantial wall of precedent from which it diverged, the Nevada Supreme Court's decision is plainly wrong. To begin with, it is foreclosed by this Court's decisions, which make clear that discretionary-function immunity attaches so long as the challenged conduct involves "an element of judgment or choice" and is "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37. That test focuses on "the nature of the actions taken and on whether they are susceptible to policy analysis," and "not on the [defendant's] subjective intent" in carrying out the actions. *Gaubert*, 499 U.S. at 325. The Nevada Supreme Court's rule takes exactly the opposite approach: it focuses not on the actions taken but on the defendant's subjective intent in undertaking them. Its rule is also incompatible with the text and purpose of 28 U.S.C. §2680(a). "[T]he plain language" of that provision "states that the FTCA's general waiver of sovereign immunity is inapplicable to '*any* claim' based on a discretionary function." *Gray*, 712 F.2d at 507. The text admits no exceptions, much less the categorical exception created by the Nevada Supreme Court. Moreover, discretionary-function immunity exists to "prevent judicial 'second-guessing'" of policy

decisions entrusted to the other branches of government. *Gaubert*, 499 U.S. at 323. That is why it protects *all* discretionary decisions, "whether or not the discretion involved be abused." 28 U.S.C. §2680(a). It cannot serve that purpose if courts must second-guess the subjective intent behind those discretionary decisions in order to decide whether immunity is warranted.

Finally, the importance of this question confirms the need for certiorari. To begin with, proper construction of 28 U.S.C. §2680(a) would bring this misbegotten litigation—now in its seventeenth year—to a much-deserved end. Investigations conducted by governmental entities, like tax audits, are clearly discretionary functions under the *Gaubert* test. *See, e.g.*, *Sloan v. U.S. Dep't of Hous. & Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001); *Johnson v. United States*, 680 F. Supp. 508, 514 (E.D.N.Y. 1987); *Foster v. Washoe Cnty.*, 964 P.2d 788, 792 (Nev. 1998). Therefore, absent the Nevada Supreme Court's misguided exception for intentionally tortious or bad-faith conduct, Hyatt's claims—all arising out of FTB's audit—cannot survive. More broadly, government agencies must know the metes and bounds of the federal discretionary-function rule. The wrong interpretation could—as here—drag a government through years of unwarranted litigation, imposing extraordinary institutional costs ultimately footed by taxpayers.

II. This Court Should Grant Review To Determine Whether A State May Refuse To Extend To Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

Certiorari is also warranted because, in refusing to treat a California agency as it would a Nevada agency, the Nevada Supreme Court flagrantly violated the principles of full faith and credit and cooperative federalism that this Court clearly set forth in *Hyatt I*. If this Court is to retain the rule of *Nevada v. Hall*, it is imperative that the Court reaffirm that a State haled into another State's court system against its will at least enjoys the same immunities as the host sovereign.

In *Hyatt I*, this Court held that the Full Faith and Credit Clause did not require Nevada to apply California law granting FTB full immunity from Hyatt's claims. Instead, Nevada could lawfully choose to provide FTB only the lesser protections of Nevada law. 538 U.S. at 498-99. Thus, the Court held, Nevada was not required to apply out-of-state law that would afford out-of-state agencies *greater* protections than in-state agencies. In reaching this conclusion, the Court relied on the critical premise—advanced by Hyatt himself—that Nevada sought only to treat an out-of-state agency *equal* to its own agencies. *See, e.g.*, Br. for Resp. at 8, 10, 38-39, *Hyatt I*, 538 U.S. 488 (No. 02-42), 2003 WL 181170; Tr. of Oral Argument at 46:19-20, *Hyatt I*, 538 U.S. 488 (No. 02-42) ("We are treating the other sovereign the way we treat ourselves.").

The Court took that equality premise seriously. In holding that Nevada was not required to treat an out-of-state agency better than an in-state agency, the Court was careful to note that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. And it signaled a different result should a State "exhibit[] a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll*, 349 U.S. at 413). But by affording equal treatment to in-state and out-of-state government agencies, this Court concluded that the Nevada Supreme Court had "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 decision below eviscerates that premise and transgresses *Hyatt I*'s stated limitations. Instead of treating FTB *equal* to a Nevada agency, this time the Nevada Supreme Court treated FTB distinctly *worse* than a Nevada agency, denying FTB the compensatory damages cap that Nevada law provides for Nevada agencies. And it did so based on reasoning that only a host sovereign could embrace—namely, that there was no reason to subordinate Nevada's policy favoring full compensation for injured Nevadans to the interests of an out-of-state government. In every relevant respect, that determination squarely infringes on the "sovereignty interests" of California that *Hyatt I* preserved. *Id.*

First, the decision plainly demonstrates a "'policy of hostility to the public Acts'" of California. California law provides FTB absolute immunity, while Nevada

law provides its entities only a damages cap. Nev. Rev. Stat. §41.035(1). As *Hyatt I* establishes, it is one thing for Nevada to refuse FTB the absolute immunity it would enjoy under California law, but it is altogether different and impermissibly hostile for Nevada to refuse to apply the immunity granted by California *even to the extent consistent with Nevada law*—that is, to refuse FTB the same protection against unlimited damages that a Nevada entity would enjoy. If Nevada provides only a limited waiver of its own sovereign immunity, it cannot allow its citizens to hale sister sovereigns into court without providing those sovereigns at least as much protection as Nevada affords itself. If denying that equal treatment does not constitute "hostility," it is hard to imagine what does.

Second, the decision below fails to "sensitively appl[y] principles of comity." As the Nevada Supreme Court itself recognized, "[m]ost courts" hold that under comity, "a state should recognize another state's laws to the extent that they do not conflict with its own"—meaning that a State will not treat a sister State worse than itself. App.44 (citing *Solomon v. Supreme Court of Fla.*, 816 A.2d 788 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283 (Ill. 1989); *McDonnell v. Illinois*, 748 A.2d 1105 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247 (N.D. 2004)). Yet the Nevada Supreme Court disregarded these cases and declined to apply comity on the basis of a single decision, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992)). App.44-45. But that reasoning is doubly flawed. First, *Faulkner* predates *Hyatt I* and its equality premise; more important, *Faulkner*

addressed a materially different claim. There, the out-of-state agency argued that it should receive the immunity its *home state* afforded, which is precisely the argument *Hyatt I* rejected. *See* 627 So. 2d at 366. Here, however, the out-of-state agency argues that it is entitled to the protections that *Nevada* provides to its *own* agencies, which is what *Hyatt I* and broader principles of sovereign immunity and cooperative federalism require.

Third, the decision below clearly failed to display a "healthy regard for California's sovereign status." *Hyatt I*, 538 U.S. at 499. To the contrary, in refusing to apply to California agencies the same damages cap it applies to Nevada agencies, the Nevada Supreme Court manifested a palpable *disregard* for California's sovereign status. Nevada's damages cap recognizes the intrusion upon State sovereignty and proper government administration occasioned by excessive damages awards. *See, e.g.*, *Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (acknowledging that caps "protect taxpayers and public funds from potentially devastating judgments"). That intrusion is unquestionably present here; the decision below upheld compensatory damages against FTB of at least $1 million (pre-interest), with potentially millions more to come. The only difference is whether California or Nevada taxpayers will foot the bill. The Nevada Supreme Court's unwillingness to see the former as a comparably serious problem demonstrates at least a failure to fully respect a sister sovereign, and at most that the regime envisioned by *Hall* is simply unworkable.

Fourth, and most obviously, the Nevada Supreme Court failed to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499. Quite the contrary, for if the court had relied on the contours of "Nevada's own sovereign immunity"—which limits the amounts recoverable from the State—it would have applied those principles to FTB. Instead, the Nevada Supreme Court created an *exception* to its own law, holding that whatever caps may apply to Nevada state agencies do not apply to California agencies. While Nevada may have a "policy interest in providing adequate redress to Nevada citizens," App.45, Nevada has already decided how to balance that interest against its competing interest in protecting government officials and the public fisc, and that balance is reflected in the contours of the damages caps that it provides its own agencies. Having set that balance one way for itself, it cannot reset that balance differently for sister States.

At bottom, if this Court is to retain the rule of *Hall*, then the equal-treatment principle embraced in *Hyatt I* must be strictly enforced. If States really can be haled into the courts of their sister States without consent, then the Full Faith and Credit Clause and basic principles of sovereign immunity and cooperative federalism demand that the involuntarily coerced State receive at least the same protections as the host State. Any other rule allows one State to compensate its citizens at the expense of another sovereign's treasury on terms that the first State is unwilling to live with itself. Such a regime, embodied by the decision below, demeans sovereign immunity and poses a "substantial threat to our constitutional

system of cooperative federalism." *Hyatt I*, 538 U.S. at 497. The better course may well be to recognize that *Hall* was a wrong turn—but if not, it is imperative for this Court to make clear that a State must respect other States' sovereign immunity to the same extent as its own.

III. This Court Should Grant Review To Overrule *Nevada v. Hall*.

In *Nevada v. Hall*, this Court held that a State can be sued without its consent in the courts of another State. That holding violates the core principle of sovereign immunity: that "the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added). It runs contrary to the intent of the Framers, the structure of the Constitution, and the prior and subsequent, better reasoned sovereign immunity jurisprudence of this Court. And as the facts of this case demonstrate, it demeans the dignity of the States and seriously threatens interstate relations. This case perfectly demonstrates why *Hall* was wrongly decided, and why the Court should grant certiorari to reconsider and overrule that decision.[5]

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[5] FTB challenged the validity of *Hall* before the Nevada Supreme Court. Appellant's Opening Br. at 101 n.80, *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125 (Nev. 2014) (No. 53264). Given that the Nevada Supreme Court was not free to overrule *Hall*, that was more than sufficient to preserve this issue for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that issue is adequately preserved when "pressed or passed upon below"); *cf. Pennhurst State Sch. & Hosp. v.*

In *Hall*, California residents injured in an automobile collision with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-12. A California jury found negligence and awarded over a million dollars in damages. *Id.* at 413. This Court granted certiorari and held that principles of sovereign immunity do not preclude one State from being haled into the courts of another State. *See id.* at 426-27.

In so holding, the Court recognized that, at the Framing, common practice would have made sovereign immunity available to one State in the courts of another. *Id.* at 417. It likewise acknowledged that the debates over ratification of the Constitution, and later Supreme Court decisions, reflected "widespread acceptance of the view that a sovereign state is *never* amenable to suit without its consent." *Id.* at 415-20 (emphasis added). Nevertheless, the Court held that this "widespread" view was only relevant in the context of federal-court (not state-court) jurisdiction, and it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction of Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court therefore held 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, a State must simply hope that, as "a matter of comity"

Halderman, 465 U.S. 89, 99 n.8 (1984) (sovereign immunity "may be raised at any point").

and "wise policy," a sister State will not subject it to suit. *Id.* at 425-26.

Justice Blackmun dissented, joined by Chief Justice Burger and Justice Rehnquist. Unlike the majority, those Justices would have held that the Constitution implicitly embodied a "doctrine of interstate sovereign immunity" as an "essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). Justice Rehnquist also separately dissented, 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." *Id.* at 432-33 (Rehnquist, J., dissenting).

Hall was mistaken when decided, and subsequent developments have undermined its doctrinal underpinnings. In particular, a whole line of this Court's subsequent precedents have rejected the *Hall* majority's conception of the Eleventh Amendment as concerned only about federal court jurisdiction, and have instead explained that the Eleventh Amendment reflected the Framers' original understanding in ways that have implications for proceedings in state courts, *see Alden v. Maine*, 527 U.S. 706, 712 (1999), and even federal administrative agencies, *Fed. Mar. Comm'n v. S.C. State Ports Auth.* (*FMC*), 535 U.S. 743, 747 (2002). In short, subsequent developments have vindicated the views of the *Hall* dissenters in ways that make *Hall*'s reconsideration long overdue.

To begin with, the rule of *Hall* cannot be reconciled with any fair reading of history. As the *Hall*

majority conceded, the Framers would clearly have acknowledged the sovereign immunity of one State in the courts of another. See 440 U.S. at 417, 420. Indeed, a prominent Pennsylvania case from 1781 determined that an individual could not use the state courts of Pennsylvania to attach property belonging to Virginia. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. C.P. 1781); *see Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). While the ratification debates focused (naturally enough) on sovereign immunity in the new federal courts, the language they used leaves no doubt that the same immunity was recognized in state courts. *See, e.g.*, The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton 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 altered)); *see also* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 252-63. 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 Eleventh Amendment confirms the Framers' understanding. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), this Court held that a private citizen of one State could sue another State in federal court. The Eleventh Amendment was adopted as an immediate and outraged response, to restore to the States their "immunity from private suits." *Alden*, 527 U.S. at 724. While 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). After all, the federal courts were intended to be a neutral forum for interstate disputes. A State would surely *rather* be tried in that neutral federal forum than before a partisan jury and judge in another State's courts. By removing the option of suit in federal forum while leaving the worse option of suit 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).

Hall likewise conflicts with this Court's precedents from both before and after the decision. Before *Hall*, this Court repeatedly indicated that State sovereign immunity extended to "any court in this country." *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Beers*, 61 U.S. (20 How.) at 529; *see also In re New York*, 256 U.S. 490, 497 (1921) (noting the "fundamental rule of jurisprudence" that "a state may not be sued without its consent").[6] And since *Hall*, this Court has rejected almost every premise that underlies that decision. *Hall* refused to recognize sovereign immunity as a basic assumption

[6] The only case on which *Hall* relied in holding otherwise was *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). But even that case recognized "a class of cases in which every sovereign is understood" to grant immunity to foreign sovereigns, based on the principle that "[a] foreign sovereign is not understood as intending to subject [itself] to a jurisdiction incompatible with [its] dignity." *Id.* at 137.

of the Constitution, 440 U.S. at 426; subsequent decisions, by contrast, have repeatedly treated sovereign immunity as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *see also, e.g.*, *Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011); *FMC*, 535 U.S. at 751-53; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). *Hall* effectively limited sovereign immunity to the words of Article III and the Eleventh Amendment, 440 U.S. at 421, 424-27; subsequent cases, by contrast, have recognized that the Constitution implicitly protects principles of sovereign immunity that go beyond its literal text. *See, e.g.*, *FMC*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-29; *Blatchford*, 501 U.S. at 779. *Hall* casually departed from the Framing-era view of sovereign immunity; subsequent cases have consistently relied on the Framing-era view, and have interpreted sovereign immunity to prohibit "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *FMC*, 535 U.S. at 756 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). In short, while *Hall* was wrong the day it was decided, a host of subsequent, better reasoned decisions have fatally undermined its doctrinal underpinnings.

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally had the felt 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. But nothing in *Alden* suggests that *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with the *Hall* majority's view of the Eleventh Amendment as divorced from broader sovereign immunity principles. Indeed, based on *Alden*'s understanding of sovereign immunity, not even the *Hall* majority could credibly argue that it is permissible for a State to be haled into the courts of another State absent consent.

Not only does *Hall* rest on flawed doctrinal premises that have been eliminated by subsequent precedent; it has proven practically unworkable as well. Indeed, this Court need look no further than the facts of this case to understand why *Hall* must go. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—and untold financial and administrative burdens. Once the case finally reached trial, the Nevada jury below was happy to find for a fellow Nevadan on his questionable tort claims against the California tax authorities. They were even happier to award their fellow Nevadan some $388 million in damages, which the Nevada trial court calmly raised to over $490 million after costs and interest. Since trial, California has spent another seven years fighting that verdict, and it faces the prospect of yet another trial on remand if this Court denies review.

Perhaps worst of all, this suit has encouraged other Nevada residents to file similar complaints, raising the prospect of similar litigation in endless

repetition. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB). These suits are highly regrettable yet, given *Hall*, entirely unsurprising. Sovereign governments undertake a number of sovereign responsibilities that have been unpopular as long as there have been governments. Taxation is near the top of that list. Sovereign immunity allows the sovereign to undertake such activities without the constant threat of litigation. And while sovereigns are a tempting target for litigation in any circumstance, a jury might at least have some sense that a large verdict against the sovereign will ultimately be footed by taxpayers. Thus, a foreign sovereign stripped of sovereign immunity and haled into courts by citizens of a foreign State is a uniquely vulnerable target. What is more, an increasingly mobile citizenry creates ample opportunities for suits like this one. Indeed, 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." David M. Grant, *Moving From Gold to Silver: Becoming a Nevada Resident*, Nev. Law., Jan. 2015, at 22, 25 n.9.

And make no mistake, the threat here extends beyond the State's fiscal and dignity interests. If FTB can be found liable for fraud and intentional infliction of emotional distress arising out of its "power to … enforce income tax laws," *Hyatt I*, 538 U.S. at 498, it will undoubtedly be forced to alter how it conducts this "essential attribute of sovereignty." *Id.* But that is precisely why sovereign immunity has been extended

to States sued in their own courts and the federal courts. *See Alden*, 527 U.S. at 750-51 (observing that "[p]rivate suits against nonconsenting States" may "threaten the financial integrity of the States" and impose "substantial costs [upon] the autonomy, the decisionmaking ability, and the sovereign capacity of the States"). There is no principled reason why a State must endure these same burdens because it has been sued in another State's courts as opposed to its own courts or the federal courts.

In short, this case emphatically illustrates the "severe strains on our system of cooperative federalism" against which the *Hall* dissenters warned. *Hall*, 440 U.S. 429-30 (Blackmun, J., dissenting). If the Framers would have "reprehended the notion of a State's being haled before the courts of a sister State," *id.* at 431, a suit like this one would have left them aghast. This case firmly demonstrates the obvious flaws of *Hall* and the virtues of applying the sovereign immunity principles this Court has repeatedly recognized both before and after *Hall*.

But the Court need not take FTB's word for it: *Nevada itself* recently asked this Court to overrule *Hall* after being haled into the *California* courts against its will. *See* Petition for Writ of Certiorari 12 n.3, 17 n.8, 19, *Nevada v. City & Cnty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073). The spectacle of two States being sued in each other's courts—each unsuccessfully invoking sovereign immunity—confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would substitute a race-to-the-bottom for cooperative federalism. *See* 440 U.S. at 429-30 (Blackmun, J.).

And it underscores the absurdity and perniciousness of *Hall* in practice.

Needless to say, this Court does not reconsider its precedents lightly. But virtually every *stare decisis* consideration militates against retaining *Hall*. *Hall* set no substantive rules that "serve as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995), and *Hall* engenders no meaningful reliance interests. Most important, *stare decisis* cannot save a decision that is both practically unworkable and "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." *Id.* At a bare minimum, the continuing validity of *Hall* is a question that merits this Court's plenary consideration.

* * *

Each of the questions presented in this petition independently warrants certiorari. But it bears emphasizing that they are interrelated as well: each concerns the extent to which one State is at the mercy of another State's courts. Under fundamental principles of sovereign immunity and cooperative federalism, FTB should have never been subjected to suit in the Nevada courts in the first place. To the extent *Hall* holds otherwise, it should be overruled. But if the Court will not revisit *Hall*, then it becomes that much more important to reaffirm that the discretionary-function standard is more than a pleading obstacle, and that States may not afford foreign sovereigns less immunity than they grant themselves.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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March 23, 2015

APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant/
Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/
Cross-Appellant.

Filed: September 18, 2014

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.

Affirmed in part, reversed in part, and remanded.

BEFORE THE COURT EN BANC.[1]

[1] The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.

OPINION

By the Court, HARDESTY, J.:

In 1998, inventor Gilbert P. Hyatt sued the Franchise Tax Board of the State of California (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 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 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, but evidentiary and jury instruction errors committed by the district court require reversal of the damages awarded for emotional distress and a remand for a new trial as to the amount of damages on this claim only.

In connection with these causes of action, we must address whether FTB is entitled to a 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 Nevada's policy interest in providing adequate redress to its citizens outweighs providing FTB a statutory cap on damages under comity, and therefore, we affirm the $1,085,281.56 of special damages awarded to Hyatt on his fraud cause of action and conclude that there is no statutory cap on the amount of damages that may be awarded on remand on the intentional infliction of emotional distress claim.

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 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 for further proceedings.

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 companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. 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, 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, FTB upheld the audits, and Hyatt went on to challenge them in the California courts.[2]

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,

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

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 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.[3] 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.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking

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

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 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 (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. The Court upheld this court's determination that Nevada was not required to give FTB full immunity *Id.* at 499. The Court further upheld this court's conclusion that FTB was entitled to partial immunity under 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. Following the trial, Hyatt sought prejudgment interest and 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.[4]

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[4] 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,

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.

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

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

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Oklahoma, Tennessee, Vermont, Virginia, and Washington) to file amicus curiae briefs.

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.

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.,* 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Ill.,* 748 A.2d 1105, 1107 (N.J. 2000); *Sam v. Estate of Sam,* 134 P.3d 761, 764-66 (N.M. 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 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

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 (1988), and *United States v. Gaubert,* 499 U.S. 315 (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. Cnty. 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)).

FTB contends that when this court adopted the federal test in *Martinez,* it impliedly overruled the *Falline* exception to discretionary-function 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 workers' 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 workers' 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 workers' 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 workers' 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 circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

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. 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. "[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. 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. *Id.* at 324-25. The second step focuses on whether the conduct undertaken is a policymaking 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 policymaking 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 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).[5] These courts bar the application of

[5] *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

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.

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 the 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

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cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay*.

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 [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 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.

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.*

The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the 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. *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 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.[6] 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.

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

The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion

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[6] 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.

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 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

On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number 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.

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 plaintiffs 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.

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 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.[7]

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.[8]

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[7] 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

[8] 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

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 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
>
> (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.

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claims that are not cogently argued or supported by relevant authority).

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.[9] *See Welling v. Weinfeld,* 866 N.E.2d 1051 (Ohio 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.,* 320 S.E.2d 70, 83 (W. Va. 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

[9] 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)).

privacy tort, such an individual would be left without a remedy. *West,* 53 S.W.3d at 646.

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.,* 312 S.E.2d 405 (N.C. 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, 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.

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 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

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 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.[10]

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

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

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

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.[11]

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. *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 favor and awarded damages. *Id.* Perry appealed, arguing that this court had not

[11] 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*.

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. *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.[12] 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 court judgment in Hyatt's favor on this claim is reversed.

Abuse of process

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).

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

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[12] 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.,* 696 P.2d 527, 533-35 (Or. 1985).

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,* 113 Cal. Rptr. 2d 625, 644 (Ct. App. 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 L.L.C. v. Ultimate Distribs., Inc.,* 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

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).

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 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 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.

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.[13] 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.[14]

Fraud damages

Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his

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

[14] 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., L.L.C.,* 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).

fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[15] In doing so, we address whether FTB is entitled to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[16] NRS 41.035 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." FTB argues that because it is immune from liability under California law, and Nevada provides a statutory cap on liability damages, it is entitled to the statutory cap on its liability to the extent that the law does not conflict with Nevada policy. Hyatt asserts that applying the statutory caps would in fact violate Nevada policy because doing so would not sufficiently protect Nevada residents. According to Hyatt, limitless compensatory damages are necessary as a means to control non-Nevada government actions. Hyatt claims that statutory caps

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[15] 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.

[16] 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).

for Nevada government actions work because Nevada can control its government entities and employees through other means, such as dismissal or other discipline, that are not available to control an out-of-state government entity. Additionally, Hyatt points out that there are other reasons for the statutory caps that are specific only to Nevada, such as attracting state employees by limiting potential liability. Therefore, Hyatt argues that FTB is not entitled to statutory caps under comity because it would violate Nevada's superior policy of protecting its residents from injury.

The parties base their arguments on precedent from other courts that have taken different approaches to the issue. FTB primarily relies on a New Mexico Supreme Court case, *Sam v. Estate of Sam,* 134 P.3d 761 (N.M. 2006), and Hyatt supports his arguments by mainly relying on *Faulkner v. University of Tennessee,* 627 So. 2d 362 (Ala. 1992).

In *Sam,* an employee of an Arizona government entity accidentally backed over his child while driving his employer's vehicle at his home in New Mexico. 134 P.3d at 763. In a lawsuit arising out of this accident, the issue before the *Sam* court was whether Arizona's one-year statute of limitation for government employees, or New Mexico's two-year statute of limitation for government employees or three-year general tort statute of limitation law should apply. *Id.* at 764. The court discussed the comity doctrine and concluded that New Mexico's two-year statute of limitations for government employees applied because by doing so it was recognizing Arizona's law to the

extent that it did not conflict with New Mexico's law. *Id.* at 764-68.

In reaching this conclusion, the *Sam* court relied on the United States Supreme Court's holdings in *Nevada v. Hall,* 440 U.S. 410 (1979), and *Franchise Tax Board of California v. Hyatt,* 538 U.S. 488 (2003). *Sam,* 134 P.3d at 765-66. The *Sam* court stated that "[b]oth these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies." *Id.* at 765. Based on this framework for comity, the *Sam* court concluded that Arizona should be entitled to the statute of limitations for government agencies that New Mexico would provide to its government agencies. Most courts appear to follow FTB's argument regarding how comity applies and that a state should recognize another state's laws to the extent that they do not conflict with its own. *See generally Solomon v. Supreme Court of Fla.,* 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.,* 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Illinois,* 748 A.2d 1105, 1107 (N.J. 2000); *Sam,* 134 P.3d at 765; *Hansen v. Scott,* 687 N.W.2d 247, 250 (N.D. 2004).

In *Faulkner,* the plaintiff filed a lawsuit against the University of Tennessee after it threatened to revoke plaintiff's doctoral degree. 627 So. 2d at 363-64. The issue in *Faulkner* was whether the University of Tennessee (UT) was entitled to discretionary immunity under comity, when both Tennessee and Alabama had similar discretionary-immunity provisions for their states' government entities. *Id.* at

366. Considering the policy of allowing residents legal redress, compared to the immunity policies that both states had, the *Faulkner* court observed that

> [w]e cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State, where those alleged acts are associated with substantial commercial activities in Alabama. We conclude that comity is not such an overriding policy in this instance.

Id. The court rejected the argument that granting comity would not violate Alabama policy because its residents were used to Alabama government entities receiving immunity:

> Agencies of the State of Alabama are subject to legislative control, administrative oversight, and public accountability in Alabama; UT is not. Actions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in Alabama. UT, as an instrumentality of the State of Tennessee, operates outside such controls in this State.

Id. The *Faulkner* court ultimately declined to grant UT immunity under comity. We are persuaded by the *Faulkner* court's reasoning.

This state's policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity. Therefore, as we conclude that allowing FTB a statutory cap would violate this state's public policy in this area, comity does not require this court to grant

FTB such relief. *Id.*; *Sam,* 134 P.3d at 765 (recognizing that a state is not required to extend immunity and comity only dictates doing so if it does not contradict the forum state's public policy). As this is the only argument FTB raised in regard to the special damages awarded under the fraud cause of action, we affirm the amount of damages awarded for fraud. The prejudgment interest awarded is vacated and remanded to the district court for a recalculation based on the damages for fraud that we uphold. In light of our ruling that only the special award of damages for fraud is affirmed, FTB's argument that prejudgment interest is not allowed because future damages were interwoven with past damages is moot.

Intentional infliction of emotional distress

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 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.

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 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); *Ruckman-Peirson v. Brannon,* 822 N.E.2d 830, 840-41 (Ohio Ct. App. 2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiffs own testimony 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. *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.*

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.

In support of his IIED claim, Hyatt presented testimony from three different people as to the 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.[17] Accordingly, we affirm the judgment in favor of Hyatt on this claim as to liability. As discussed below, however, we reverse the award of damages on this claim and remand for a new trial as to damages on this claim only.

A new trial is warranted based on evidentiary and jury instruction errors[18]

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.

On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction

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[17] 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.

[18] While we conclude, as discussed below, that evidentiary and jury instruction errors require a new trial as to damages on Hyatt's IIED claim, we hold that sufficient evidence supports the jury's finding as to liability on this claim regardless of these errors. Thus, these errors do not alter our affirmance as to liability on this claim.

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 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

FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to 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 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

FTB also argues that the district court wrongly instructed the jury. Specifically, 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 it was 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 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.

Exclusion of evidence to rebut adverse inference

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 e-mail 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 e-mails to its employees, before the change, requesting that they print or otherwise save any e-mails related to Hyatt's case.

Backup tapes containing several weeks' worth of e-mails 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 e-mail 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 e-mails 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 e-mails did not contain anything harmful.

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 emails in an effort to demonstrate that none of the destroyed information contained in the e-mails 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 e-mails 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

FTB additionally challenges the district court's exclusion of evidence regarding 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 warrant reversal and remand for a new trial on damages only on the IIED claim

Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, the question becomes 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., L.L.C.,* 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 reversal and remand). We hold that substantial evidence exists to support the jury's finding as to liability against FTB on Hyatt's IIED claim regardless of these errors, but we conclude that the errors significantly affected the jury's determination of appropriate damages, and therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages.

In particular, the record shows that at trial Hyatt argued that FTB promised fairness and impartiality in its auditing processes but then, according to Hyatt, proceeded to conduct unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt to extort him." In connection with this argument, Hyatt asserted that the penalties FTB

imposed against Hyatt were done "to better bargain for and position the case to settle." Hyatt also argued that FTB unfairly refused to correct a mathematical error in the amount assessed against him when FTB asserted that there was no error.

None of these assertions could be made without contesting the audits' conclusions and determining that they were incorrect, which Hyatt was precluded from doing. Further, excluding FTB's evidence to rebut the adverse inference was prejudicial because Hyatt relied heavily on the adverse inference, and it is unknown how much weight the jury gave the inference in making its damages findings. The exclusion of evidence concerning Hyatt's loss of his patent and his federal tax audit, both occurring during the relevant period, relate to whether Hyatt's emotional distress was caused by FTB's conduct or one of these other events. As for the jury instruction, Instruction 24 gave the jury permission to consider the audits' determinations, which the district court had previously precluded it from reaching. As such, all of these errors resulted in prejudice to FTB directly related to the amount of damages Hyatt may be entitled to on his IIED claim. Therefore, a new trial as to the IIED damages is warranted.

Recoverable damages on remand

As addressed above in regard to damages for Hyatt's fraud claim, we reject FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities under comity principles. Based on our above analysis on this issue, we conclude that providing statutory caps on damages under comity would conflict with our state's policy

interest in providing adequate redress to Nevada citizens. Thus, comity does not require this court to grant FTB such relief. *Faulkner v. Univ. of Tenn.,* 627 So. 2d 362, 366 (Ala. 1992); *see also Sam v. Estate of Sam,* 134 P.3d 761, 765 (N.M. 2006) (recognizing that a state is not required to extend immunity and comity, and only dictating doing so if it does not contradict the forum state's public policy). As a result, any damages awarded on remand for Hyatt's IIED claim are not subject to any statutory cap on the amount awarded. As to FTB's challenges concerning prejudgment interest in connection with Hyatt's emotional distress damages, these arguments are rendered moot by our reversal of the damages awarded for a new trial and our vacating the prejudgment interest award.

Punitive damages

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 to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

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,* 293 S.E.2d 101, 114 (N.C. 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 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 its 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.[19]

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,

[19] 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.

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.

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 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).

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 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.

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

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 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.

Damages "cannot be based solely upon possibilities and speculative testimony." *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." *Horgan 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. *Horgan,* 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 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 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. We also uphold the amount of damages awarded, as we have determined that FTB is not entitled to a statutory cap on damages under comity principles because this state's interest in providing adequate relief to its citizens outweighs providing FTB with the benefit of a damage cap under comity. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability, but conclude that evidentiary and jury instruction errors require a new trial as to damages. Any damages awarded on remand are not subject to a statutory cap under comity. We nevertheless 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 remand the prejudgment interest and the costs awards to the district court for a new determination 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.

s/_____, J.
Hardesty

We concur:

s/_____, C.J.
Gibbons

s/_____, J.
Pickering

s/_____, J.
Parraguirre

s/_____, J.
Douglas

s/_____, J.
Cherry

Appendix B

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant/
Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/
Cross-Appellant.

Filed: November 25, 2014

ORDER DENYING
PETITIONS FOR REHEARING

Having considered the parties' petitions for rehearing and the answers thereto, we deny both petitions. NRAP 40(c).

It is so ORDERED.[1]

s/ Gibbons	C.J.	s/ Pickering	J.
s/ Hardesty	J.	s/ Parraguirre	J.
s/ Douglas	J.	s/ Cherry	J.

[1] The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.

Appendix C

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 53264

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant/
Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/
Cross-Appellant.

Filed: January 2, 2015

ORDER STAYING REMITTITUR

Appellant/cross-respondent has moved to stay issuance of the remittitur pending the filing of a petition for a writ of certiorari with the United States Supreme Court. We grant the motion. *See* NRAP 41(b). We hereby stay issuance of the remittitur until April 22, 2015. If the clerk of this court receives written notice by April 22, 2015, from the clerk of the United States Supreme Court that appellant/cross-respondent has filed a petition for a writ of certiorari, the stay shall continue in effect until final disposition of the certiorari proceedings. If such notice is not

received by April 22, 2015, the remittitur shall issue on April 23, 2015.

It is so ORDERED.

s/_____, C.J.
Gibbons

Appendix D

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Dated: January 29, 2009, 9:00 a.m.
Filed: February 2, 2009
(filed under seal by order of the Discovery Commissioner dated February 22, 1999)

ORDER DENYING:

(1) FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50; AND

(2) FTB'S ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59

This matter having come before the Court on January 29, 2009, for hearing the Defendant California Franchise Tax Board's ("FTB") Motion for Judgment as a Matter of Law or Alternatively, and

Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59, Plaintiff having been represented by Mark A. Hutchison, Peter C. Bernhard, Donald J. Kula, and Michael K. Wall and the Franchise Tax Board having been represented by Pat Lundvall, Carla Higginbotham, and Robert L. Eisenberg; the Court having considered the papers submitted by counsel as well as oral arguments at the hearing; and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that the FTB's Motion for Judgment as a Matter of Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and FTB's Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 be and the same hereby are denied.

Dated this 2 day of Feb., 2009.

s/Jessie Walsh
DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

No. A382999

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Filed: May 31, 2000

ORDER

Defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), having come before the Court, the plaintiff being represented by Thomas L. Steffen, Esq., Mark A. Hutchison, Esq., Donald J. Kula, Esq., and Thomas K. Bourke, Esq., and the defendant being represented by Thomas R. Wilson, II, Esq., Thomas Heller, Esq., and George Takenouchi, Esq., the Court having considered all of the papers filed by the parties and argument of counsel, and GOOD CAUSE APPEARING;

IT IS HEREBY ORDERED that defendant's motion for summary judgment under Nev. R. Civ. P. 56(b), or alternatively for dismissal under Nev. R. Civ. P. 12(h)(3), is denied.

ORDER

IT IS SO ORDERED.

Dated this 31 day of May, 2000.

s/Nancy M. Saitta
DISTRICT COURT JUDGE
NANCY M. SAITTA

Appendix E

U.S. Const. art. IV, §1

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

28 U.S.C. §2680(a)

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

EXHIBIT 73

No. 14-1175

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

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May 26, 2015

QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court's interpretation of Nevada Revised Statutes § 41.032(2) – Nevada's discretionary function statute – raises an issue of federal law for this Court to review.

2. Whether the Full Faith & Credit Clause requires Nevada state courts to apply California's law of sovereign immunity, in whole or in part, to a matter over which Nevada has legislative jurisdiction.

3. Whether the doctrine of comity requires Nevada state courts to apply California's law of sovereign immunity, in whole or in part, when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

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

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STATEMENT

1. This state-law tort suit is one of several disputes between respondent and petitioner California Franchise Tax 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 respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit, in turn, concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." *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 respondent – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about respondent. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. *See* 4/24/08 RT at 62:16-24. After she had closed the audit, she boasted about having

"convicted" respondent 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 auditor's 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 respondent, including imposition of fraud penalties that were rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See, e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. And she often spoke coarsely and disparagingly about respondent and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *See, e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming respondent 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 respondent to respondent's patent licensees in Japan. *See* 84 RA at 020788, 020791.

The Board knew that respondent, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respect-

ing those concerns, however, the Board sought to use them as a way to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." *See* 5/22/08 RT at 80:3-81:2. Both Cowan and respondent understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.

2. Respondent brought suit against the Board in Nevada state court, asserting both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although a sovereign has no inherent sovereign immunity in the courts of a co-equal sovereign, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith & Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against respondent's state-law claims.

The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. Nevertheless, the court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," *Franchise Tax Bd. of California v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discre-

tion is abused," *id.* It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." *Id.*

The Nevada Supreme Court declined, however, to apply California's immunity law to respondent's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." *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.*, citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." *Id.*

This Court, in a unanimous opinion, affirmed. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith & Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith & 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." *Id.*

3. At trial, the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy. It awarded respondent a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court, for the most part, reversed. In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to respondent's intentional infliction of emotional distress claim). And it held that, as a matter of comity, the Board was immune from any award of punitive damages.

In its opinion, the Nevada Supreme Court first examined whether Section 41.032(2) of the Nevada Revised Statutes – which provides immunity to Nevada officials performing discretionary functions – applied to the commission of intentional or bad-faith

torts. Although the court had previously held in *Falline* that Section 41.032(2) did not provide Nevada officials with such immunity, it decided to reexamine the issue because a subsequent decision had adopted a discretionary function test drawn from the similarly worded Federal Tort Claims Act ("FTCA"). *See Martinez v. Maruszczak*, 168 P.3d 720 (Nev. 2007) (adopting the test derived from *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). After considering various decisions interpreting the FTCA, the court decided to "affirm [its] holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, 'by definition, [cannot] be within the actor's discretion.'" Pet. App. 24, quoting *Falline*, 823 P.2d at 891-92 (first alteration added). Given its determination that Section 41.032(2) did not give Nevada officials immunity for intentional torts, the court went on to conclude that it would "not extend such immunity to [the Board] under comity principles, as to do so would be contrary to the policy of this state." *Id.* at 25.

Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that respondent had not established the necessary elements for various torts under Nevada law. *See id.* at 25-38. The court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." *Id.* at 40. The court also pointed to evidence that

"the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* The court thus determined "that substantial evidence supports each of the fraud elements." *Id.* at 41.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." Pet. App. 45-46. The court pointed out that officials from other States are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" *Id.* at 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.*, quoting *Faulkner*, 627 So. 2d at 366. Considering this lack of authority over other States' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." *Id.*

With respect to respondent's intentional infliction of emotional distress claim, the Nevada Supreme

Court affirmed the jury's finding of liability – noting that respondent had "suffered extreme treatment" at the hands of the Board (*id.* at 50) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to determine the proper level of damages. *Id.* at 51-62. It remanded the case to the trial court for that purpose.

Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 65. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

REASONS FOR DENYING THE PETITION

None of the issues raised by the petition merits further review. The Board's primary argument – that the Court should resolve a conflict regarding interpretation of the Federal Tort Claims Act – founders on the fact that the Nevada Supreme Court was interpreting a Nevada statute, Nev. Rev. Stat. § 41.032(2), not the federal Act. The state court's interpretation of state law presents no federal question for this Court to consider. As for the Board's arguments seeking application of California's immunity laws under the Full Faith & Credit Clause and the doctrine of comity, those arguments are squarely foreclosed by decisions of this Court establishing, first, that the Full Faith & Credit Clause does not

require courts with legislative jurisdiction to subordinate their own laws to the laws of other States, and, second, that the granting of immunity under the doctrine of comity lies wholly within the discretion of the forum State. Finally, the Board offers no good reason, let alone a compelling one, for disregarding principles of *stare decisis* and overruling *Nevada v. Hall*, 440 U.S. 410 (1979). The petition should be denied.[1]

1. The Proper Interpretation of Nevada Revised Statutes § 41.032(2) – Nevada's Discretionary Function Statute – Is a Question of State, Not Federal, Law.

The Board's flagship argument for review is that this Court needs to resolve a conflict among federal courts of appeals regarding the scope of discretionary function immunity under the Federal Tort Claims Act ("FTCA"). *See* Pet. 15-20; 28 U.S.C. § 2680(a) (FTCA). But this case has nothing to do with the FTCA. Respondent brought his tort claims against the Board pursuant to Nevada tort law, and the Board's assertion of discretionary function immunity was grounded in Nevada Revised Statutes § 41.032(2), not the federal act. Consequently, in holding that Nevada officials could not claim discretionary function immunity for intentional torts – and that out-

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[1] There is also a serious question whether the Nevada Supreme Court's decision is "final." *See* 28 U.S.C. § 1257(a). Several of the Board's asserted grounds for review challenge the amount of compensatory damages that Nevada courts may award, *see* Pet. 21-26, even though damages for the intentional infliction of emotional distress claim are still to be determined on remand. The petition thus invites the sort of "piecemeal review of state court decisions" that Section 1257(a) was meant to protect against. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

of-state officials could not either – the Nevada Supreme Court was interpreting the Nevada statute, not the FTCA. *See* Pet. App. 24 ("we conclude that *discretionary-function immunity under NRS 41.032* does not include intentional torts and bad-faith conduct") (emphasis added).

There is no reason for this Court to review that interpretation of Nevada law. The Court has often declared that state courts "have the final authority to interpret . . . that State's legislation," *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), and that this Court is "bound by a state court's construction of a state statute," *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). As a result, "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

The Board points out that, in the process of construing Section 41.032(2), the Nevada Supreme Court looked to decisions interpreting a similarly worded provision in the FTCA. *See* Pet. 18. But that commonplace practice does not turn state law into federal law. State courts routinely consult decisions from other jurisdictions – including federal courts – in order to arrive at the best interpretation of their own state law.[2] In the end, however, their interpretations of state law remain just that: interpretations of state law. Thus, "[e]ven if . . . [state] and federal

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[2] The Nevada Supreme Court followed the same practice elsewhere in the decision below, consulting cases from other jurisdictions to decide whether to recognize a false light invasion of privacy tort, *see* Pet. App. 29-32, and whether to require medical evidence as a prerequisite for an intentional infliction of emotional distress tort, *see id.* at 47-49.

statutes contain[] identical language . . . [,] the interpretation of the [state] statute by the [state] Supreme Court would be binding on federal courts." *Johnson*, 520 U.S. at 916.

Conversely, the Nevada Supreme Court's interpretation of discretionary function immunity under Section 41.032(2) has no effect on the scope of discretionary function immunity under the FTCA. The scope of immunity for federal officials under the FTCA *is* a question of federal law, and "in answering that question [a federal court is] not bound by a state court's interpretation of a similar – or even identical – state statute." *Johnson v. United States*, 559 U.S. 133, 138 (2010). Just as Nevada is free to decide that discretionary function immunity under Section 41.032(2) should be different from discretionary function immunity under the FTCA, this Court can choose a different standard for federal officials under the FTCA than Nevada has chosen for state officials under Section 41.032(2). The decision below is thus irrelevant to any "conflict" with respect to interpretation of the FTCA.

To support review here, the Board cites two cases, *see* Pet. 16 n.3, neither of which is on point. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Michigan Supreme Court expressly decided an issue of federal law, holding that a vehicle search violated the Fourth Amendment. *See id.* at 1037 n.3.[3] Likewise, in *Three*

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[3] The Michigan court also referred twice to the corresponding provision of the state constitution, *see* 463 U.S. at 1037 n.3, raising the question whether its decision rested upon an adequate and independent state ground. This Court concluded that it did not and that the Court thus had jurisdiction to review the Michigan court's resolution of the defendant's Fourth Amendment challenge to the search. *See id.* at 1044.

Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984), the North Dakota Supreme Court appeared to have determined that the federal Civil Rights Act of 1968 was "an affirmative bar to the exercise of jurisdiction" over a suit filed by an Indian tribe. *Id.* at 155. In this case, by contrast, the Nevada Supreme Court neither applied federal law (as in *Long*) nor treated federal law as "bar[ring]" the operation of any contrary state law (as in *Three Affiliated Tribes*). Rather, as it had done seven years earlier in *Martinez*, it simply "turn[ed] to federal decisions to aid in formulating a workable test for analyzing claims of immunity under NRS 41.032(2)." *Martinez v. Maruszczak*, 168 P.3d 720, 727 (Nev. 2007). *See id.* at 727 n.29 ("federal precedents are relevant in interpreting NRS 41.032(2)"); *id.* at 728 & n.32 (also reviewing immunity cases from state courts). Nothing in that reasoned approach transforms interpretation of Section 41.032(2) into an issue of federal law subject to this Court's review.

The Board's effort to convert Nevada law into federal law – solely because the Nevada Supreme Court discussed cases interpreting a similar federal statute – not only is incorrect on the merits, but, if successful, would severely diminish the authority and independence of state courts. Many state laws have analogous provisions in federal law, and it is entirely natural for state courts to consult federal decisions for guidance. Indeed, California itself made that point in a recent merits brief to this Court. *See* Reply Brief for Petitioner at 1-2, *Davis v. Ayala*, No. 13-1428 (U.S. filed Feb. 18, 2015) (arguing that "state court's discussion of federal cases" did not decide issue of federal law because "[c]ourts deciding novel issues

frequently consider how courts in other jurisdictions applying their own laws have addressed a question"). That is all that the Nevada Supreme Court did here. It construed the provisions of Nevada Revised Statutes § 41.032(2), not the Federal Tort Claims Act, and its interpretation of that state statute raises no question of federal law for this Court to review.

2. Neither the Full Faith & Credit Clause nor Principles of Comity Require a State To Subordinate Its Sovereign Interests to Those of Another State.

The Board argues that, by declining to impose a cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith & Credit Clause and principles of comity. Neither argument justifies further review.

A. The Full Faith & Credit Clause.

According to the Board, the Full Faith & Credit Clause requires the Nevada courts "to apply the [sovereign] immunity granted by California," Pet. 23, at least "to the extent consistent with Nevada law" (i.e., the damages cap in Nev. Rev. Stat. § 41.035(1)), *id.* (emphasis deleted). But the Board's continued insistence on application of California's law of sovereign immunity – once in whole, now in part – reflects its continued misunderstanding of the Full Faith & Credit Clause. Because the Full Faith & Credit Clause is primarily concerned with recognition of judgments, not the laws of other States, this Court has stressed that the Full Faith & 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.'" *Franchise Tax Bd. of California v. Hyatt,*

538 U.S. 488, 494 (2003) ("*Hyatt I*"), quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (other internal quotation marks omitted). That principle is controlling here. This Court has already held that the Nevada Supreme Court has legislative jurisdiction over the subject matter of this case. *See id.*

The Board tries to get around that problem by asserting that a State cannot exhibit "'hostility'" towards the laws of another State. Pet. 22, quoting *Hyatt I*, 538 U.S. at 499. But it is not "hostile" for a State to apply its own law – rather than the law of another State – to a matter over which it has legislative jurisdiction. "[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Emp'rs Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders"). In applying Nevada law to this dispute, therefore, the Nevada Supreme Court was doing nothing more than the Constitution entitles it to do.[4]

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[4] Contrary to the Board's assertion, the Nevada Supreme Court did not "create[] an exception to its own law." Pet. 25 (emphasis deleted). The cap on damages is an integral part of Nevada's waiver of sovereign immunity in its own courts, and it thus applies, by its plain terms, only to Nevada officials. The law makes no mention of officials from other States because those States do not have sovereign immunity in Nevada courts. *See Nevada v. Hall*, 440 U.S. at 416.

In any event, the Court has also made clear that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. at 422. Here, the Nevada Supreme Court specifically explained why granting the immunity sought by the Board would undermine Nevada's interest in protecting its residents from deliberate attacks by other sovereigns. The court noted that, unlike officials from other States, Nevada officials "'are subject to legislative control, administrative oversight, and public accountability'" in Nevada. Pet. App. 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). *See, e.g.*, Nev. Rev. Stat. § 284.385(1)(a) (authorizing dismissal or demotion of employees for "the good of the public service"); Nev. Admin. Code § 284.650(1), (4) (authorizing discipline for "[a]ctivity which is incompatible with an employee's conditions of employment" and for "[d]iscourteous treatment of the public . . . while on duty"). As a result, it noted, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while there is no comparable safeguard against state officials that "'operate[] outside such controls in this State.'" Pet. App. 45, quoting *Faulkner*, 627 So. 2d at 366.

The Board does not quarrel with this reasoning, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it cannot exert influence over their apparent willingness to violate Nevada's tort laws. Consequently, it had no ability to rein in California tax officials once they embarked upon an offensive, and wholly inappropriate, personal campaign to "get" a Nevada resident. Instead, Nevada was left with

the after-the-fact option of awarding compensation for the harm caused by the Board's deliberate and malicious acts. The Nevada Supreme Court's decision to allow full compensation – rather than directly or indirectly giving priority to California's immunity laws – was well within the bounds of Nevada's own sovereign authority.

B. Comity.

As an alternative, the Board argues that Nevada was required to apply California's law of sovereign immunity – again, above the amount of the damages cap applicable to Nevada officials – as a matter of comity. *See* Pet. 23. But the Board cites no case in which this Court has ordered a state court to grant either partial or total immunity to another State as a matter of comity. That omission is hardly surprising. As this Court has long observed, the decision of one sovereign to grant immunity to a co-equal sovereign lies solely within its own discretion.

The authority on this point is clear and longstanding. Beginning in the early Nineteenth Century, this Court has stated repeatedly that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), for example, the Court declared that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," stressing that "[i]t is susceptible of no limitation not imposed by itself." *Id.* at 136. Since that time, the Court has consistently followed the basic principle that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Court has applied the same principle to relations between the individual States. In *Nevada v. Hall*, the Court rejected a claim that Nevada had inherent sovereign immunity in California's courts, noting that, unlike a sovereign's assertion of immunity in its own courts, "[s]uch a claim necessarily implicates the power and authority of a second sovereign." 440 U.S. at 416. Because "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another," *Alden v. Maine*, 527 U.S. 706, 738 (1999), the source of any immunity for a State in the courts of another State "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 (emphasis added). It is thus for each State to decide, in its discretion, whether it would be consistent with its sovereign interests to grant immunity to a sister State. *See Hyatt I*, 538 U.S. at 498 (rejecting Board's attempt to "elevate California's sovereignty interests above those of Nevada").

Saying that the Nevada Supreme Court did not "sensitively" apply principles of comity, the Board urges this Court to invent a new *mandatory* principle of state-to-state comity, effectively granting all States the same immunity that forum States enjoy in their own courts. *See* Pet. 23. But the idea of "mandatory comity" is a contradiction in terms. Nothing in the Constitution tells a State how it must exercise its discretion in providing immunity to another State, any more than the Constitution tells the United States how much immunity it must extend to a foreign State. *See Verlinden B.V.*, 461 U.S. at 486. Thus, while state courts often use the immunity of their own officials as a "benchmark" for granting

immunity to officials from other States, they do so as a matter of grace, not obligation. As *Nevada v. Hall* firmly established, that "voluntary" decision is left to the sovereigns themselves, informed by mutual respect and a desire for advantageous reciprocity.

A newly fashioned doctrine of "mandatory comity" would also be wholly out of place in this context. Although the Board says that principles of comity should require a State to "'recognize another state's laws to the extent that they do not conflict with its own,'" Pet. 23, quoting Pet. App. 44, it would be strange indeed to impose that kind of binding obligation under the doctrine of comity when the Full Faith & Credit Clause – a constitutional provision directly addressing the extent to which one State must "recognize another state's laws" – imposes no such duty. *See* pages 13-16, *supra*. Of course, the Full Faith & Credit Clause *does* require a forum State to recognize another State's laws when the forum State lacks legislative jurisdiction, but that is not the case here. *See Hyatt I*, 538 U.S. at 494. Thus, under both the Full Faith & Credit Clause and principles of comity, a state court with proper authority over the subject matter may apply its own laws in preference to foreign laws when, in its judgment, application of the foreign laws would conflict with its sovereign interests.

Applying traditional principles of comity here, the Nevada Supreme Court in fact went to great lengths to "respect the dignity" of its neighboring State. Far from treating the Board "just as any other litigant," *Nevada v. Hall*, 440 U.S. at 427 (Blackmun, J., dissenting), the court shielded the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court held that the Board should be absolutely

immune from liability for its negligent acts, and it relieved the Board of the obligation to pay any punitive damages, solely because of its status as a co-equal sovereign. And, in the one instance where the Nevada court departed from the "benchmark" of liability for its own officials, it explained just why it had decided to do so. That respectful treatment hardly shows a lack of "sensitiv[ity]" to the standing of a co-equal sovereign.[5]

Finally, we note the irony created by the Board's attempt to invoke (albeit, at second hand) the protection of a damages cap for Nevada officials under Nevada law. It may be recalled that, when the shoe was on the other foot in *Nevada v. Hall*, Nevada officials sought protection under the very same Nevada law in the California courts, only to be told by the California courts that they would not apply it. *See* 440 U.S. at 412-13 (discussing California proceedings). As a result, Nevada officials were exposed to unlimited damages in California for a claim of negligence. Here, of course, Nevada voluntarily accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself obligated to pay damages at all only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at causing harm to a Nevada resident. Given these circumstances, the Board's demand for additional immunity is particularly unjustified.

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[5] As a further sign of respect for the Board, the Nevada court reversed the jury's award of damages on the intentional infliction of emotional distress claim, finding that the trial court had improperly allowed consideration of issues that were being contested in the independent California tax proceedings. *See* Pet. App. 53-57.

3. There Is No Compelling Justification for Overruling *Nevada v. Hall*.

The Board concludes its list of issues for review by urging the Court to overrule *Nevada v. Hall*. The Court has declined this invitation on a number of previous occasions, including in this very case. *See* Petition for Certiorari at 9-26, *Montana Bd. of Invs. v. Deutsche Bank Sec., Inc.*, *cert. denied*, 549 U.S. 1095 (2006) (No. 06-291), 2006 WL 2519589; Petition for Certiorari at 9-13, *Illinois v. McDonnell*, *cert. denied*, 531 U.S. 819 (2000) (No. 99-1934), 2000 WL 34013543; *Hyatt I*, 538 U.S. at 497. It should do so again now.[6]

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality). Indeed, just last Term, this Court again reaffirmed that it "does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," *Hilton*, 502 U.S. at 202, the Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification," *id.* *See also Bay Mills*, 134 S. Ct. at 2036 ("'[A]ny departure' from the doctrine 'demands special justification.'"), quoting *Arizona v. Rumsey*, 467 U.S.

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[6] The Board does not discuss its failure to raise this issue many years ago in *Hyatt I*. Even if sovereign immunity can be raised at any time, the Board's prior default makes its current 11th-hour plea a poor candidate for undoing well-established law.

203, 212 (1984). There is no compelling justification here.

Contrary to concerns expressed by the dissenters in *Nevada v. Hall*, the Court's decision in that case did not "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting to our federal system." 440 U.S. at 427 (Blackmun, J., dissenting). To the contrary, suits against States in state court – rare before the decision in *Nevada v. Hall* – are still rare today. 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); pages 18-19, *supra*. The decision in *Nevada v. Hall* thus caused no problem that this Court needs to address.

Presumably for that reason, the Board stakes its claim for overruling *Nevada v. Hall* on doctrinal grounds. Relying heavily on *Alden v. Maine*, the Board argues that the law of sovereign immunity has changed significantly in recent years and that *Hall* is out of step with the new trend. *See* Pet. 28. But the Court in *Alden* expressly distinguished the absolute right of a sovereign to immunity in its own courts (the issue in *Alden*) from its lack of right to sovereign immunity in the courts of another sovereign (the issue in *Hall*). *See* 527 U.S. at 738-40. Taking its cue from (rather than questioning) *Hall*, the Court pointed out that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738, quoting 440 U.S. at 416. And it again declared that "the Constitution did not reflect an agreement between the States to

respect the sovereign immunity of one another." *Id.* *See also id.* at 739 (expressing "reluctance to find an implied constitutional limit on the power of the States").

The Board (and *amici* States) assert that, at the time of the Convention, independent sovereigns traditionally accorded immunity to other sovereigns in their courts. *See* Pet. 28-29; States' Br. 11-14. This adds nothing new. In *Nevada v. Hall* itself, this Court explicitly recognized the historical practice of granting immunity to other sovereigns. *See* 440 U.S. at 417. What the Court also pointed out, however, is that sovereigns extended this immunity, not as a matter of absolute right, but as a matter of comity. *See id.* at 416-18; *see also Bay Mills*, 134 S. Ct. at 2046-47 (Thomas, J., dissenting) ("Sovereign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another."). That is still the case today. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014). Thus, both history and long experience squarely contradict the already-rejected theory that sovereigns may demand immunity in the courts of other sovereigns as a matter of absolute privilege.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Of course, 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, *see* Petition for Certiorari, *Nevada v. City & Cnty. of San Francisco*, No. 14-1073 (U.S. filed Mar. 4, 2015), 2015 WL 981686, 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.

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May 26, 2015

EXHIBIT 74

NO. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This suit, in which a private citizen has haled the sovereign taxing authority of California into Nevada state court against its will, has dragged on for seventeen years, imposing untold costs upon California even before accounting for the damages awarded below. And there is no end in sight—unless this Court grants certiorari and reaffirms or reestablishes key principles of sovereign immunity. Hyatt provides no principled reason to deny review of the exceptionally important questions presented here.

As to the first question, Hyatt effectively concedes a split over discretionary-function immunity, and rests his opposition on the claim that there is no federal issue for this Court to review. But it is well established that where, as here, a state court's construction of state law is premised on a misconception of federal law, this Court may review the mistaken understanding of federal law. As to the second question, Hyatt concedes that there is a federal issue, but then argues for a toothless version of comity and full faith and credit inconsistent with the principles this Court set forth—at Hyatt's own urging—in *Franchise Tax Board of California v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). If sovereign States can be haled into their sister sovereigns' courts by citizens of those States, the minimum protection they need is to be afforded the same immunities as the sister sovereign. If comity and full faith and credit do not provide even that minimal protection, then the need to revisit *Nevada v. Hall*, 440 U.S. 410 (1979), is truly acute. As to that third question, Hyatt offers only a perfunctory defense of *Hall*'s reasoning, relying

instead on *stare decisis*. But almost every *stare decisis* consideration militates against preserving *Hall*, an aberration in this Court's modern sovereign immunity doctrine. At the very least, with forty States, including Nevada, asking this Court to overrule *Hall*, the question surely merits plenary consideration.

I. This Court Should Grant Review To Determine Whether The Federal Discretionary-Function Immunity Rule Is Categorically Inapplicable To Intentional Torts And Bad-Faith Conduct.

Effectively conceding the split of authority on the scope of discretionary-function immunity, Hyatt offers only one argument against review of the first question presented: the Nevada Supreme Court's "interpretation of [NRS §41.032(2)] raises no question of federal law for this Court to review." Opp.13. Hyatt is incorrect.

It is "well established" that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 152 (1984). Thus, in *Three Affiliated Tribes*, the Court fully acknowledged—as Hyatt argues, Opp.10—that it ordinarily defers on "question[s] of state law over which the state courts have binding authority." 467 U.S. at 151. But it added an equally important caveat that Hyatt essentially ignores: this Court has jurisdiction "[i]f the state court has proceeded on an incorrect perception of federal law," or its "interpretation of" a state statute "rest[s] on a misconception of federal law." *Id.* at 152-53; *see*

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (jurisdiction when "state court decision fairly appears … to be interwoven with the federal law" such that "independence" of state-law ground is unclear). The Court reaffirmed these principles in *Ohio v. Reiner*, 532 U.S. 17 (2001), adding that it also has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *Id.* at 20.

Under these well-established principles, there is clearly a question of federal law for this Court to review. In construing Nevada's discretionary-function immunity statute, the Nevada Supreme Court relied solely on the "federal two-part test for determining the applicability of discretionary-function immunity" under 28 U.S.C. §2680(a), which the court had previously adopted for construing Nevada's "practically identical" provision. App.14-15; *Martinez v. Maruszczak*, 168 P.3d 720, 727 n.29 (Nev. 2007). That federal two-part test derives from this Court's decisions in *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991). The Nevada court thoroughly reviewed the federal test, App.15, 17-18, looked exclusively to federal circuit decisions to determine whether the federal test encompasses bad-faith conduct or intentional torts, App.19-23, observed that the federal circuits have split over "how broadly [they] apply" this Court's decisions articulating the federal test, App.24, and followed the minority approach, *id.*; IMLA Br.9-12.

In every relevant respect, therefore, the Nevada court's construction of NRS §41.032(2) was interwoven with its (mis)perception of federal law—specifically,

the interpretation and applicability of the federal *Berkovitz-Gaubert* test. Accordingly, there is a federal issue this Court may review. *See, e.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982) ("[T]he fact that the state court relied to the extent it did on federal grounds requires us to reach the merits.").

Hyatt suggests that *Three Affiliated Tribes* is limited to circumstances where a state court simply treated federal law as "'an affirmative bar to the exercise of jurisdiction,'" Opp.12 (quoting 467 U.S. at 155), and *Long* is limited to circumstances where a state court simply "applied federal law." *Id.* But nothing in those decisions or common sense indicates those limits. If a state-court decision is premised on a misconstruction of federal law, this Court has the final word on the proper construction of federal law and has jurisdiction to correct the mistake.

Hyatt further argues that the "commonplace practice" of looking to decisions interpreting similar statutes "does not turn state law into federal law." Opp.10. True enough, but there is a critical difference between a state-court decision considering federal-court decisions as persuasive authority, and a state-court decision adopting federal law as the state-law standard to obtain the benefit of more developed federal law. In the latter circumstance, which this case involves, it is "well established" that this Court can correct a misconstruction of federal law.

That feature distinguishes Hyatt's leading case, *Johnson v. Fankell*, 520 U.S. 911 (1997). There, the issue was whether a state court construing state law "must follow the federal construction" of the term "final decision" in 28 U.S.C. §1291. *Id.* at 916. The

Court held, unsurprisingly, that the state court had "a choice" whether to adopt the federal standard as its own. *Id.* at 918. But once a state chooses to adopt federal law, its interpretations of federal law are not immune from this Court's review. Here, the Nevada Supreme Court exclusively premised its decision on an interpretation of federal law that has split the circuits. Hyatt's contention that addressing that misinterpretation of federal law is beyond this Court's jurisdiction is wrong, and he offers no other argument against review of this important question.[1]

II. This Court Should Grant Review To Determine Whether Comity And Full Faith And Credit Principles Require A State To Extend To Sister States The Same Immunities It Enjoys In Its Own Courts.

Unlike the first question presented, Hyatt fully acknowledges that the second question presented raises federal issues this Court may review. Hyatt contends instead that principles of comity and full

[1] Hyatt's tepid contention that there is a "serious question" regarding jurisdiction under 28 U.S.C. §1257(a), Opp.9 n.1, lacks merit. This Court may review state-court decisions "in which there are further proceedings—even entire trials—yet to occur … but where … the federal issue is conclusive," or where "the federal issue … will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975). Immunity questions are classic examples of issues satisfying the *Cox* standard. Two of the three questions presented here would end this case if decided for FTB; all will survive regardless of future proceedings that may be unnecessary. Exercising jurisdiction clearly would "avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 477-78. The Court recognized these principles in granting review of the interlocutory petition in *Hyatt I*.

faith and credit do not require Nevada to grant a sister sovereign involuntarily haled into Nevada courts the same immunities Nevada enjoys. That argument largely ignores the equal-treatment premise that, at Hyatt's urging, *Hyatt I* embraced. Pet.21. But if Hyatt is correct and federal law does not require Nevada to treat sister sovereigns at least as well as Nevada treats its own agencies, then the regime of *Nevada v. Hall* is truly unsustainable. *Hall* itself hinted that its rule might not apply to taxing authorities, which tend not to be popular even in home-state courts. 440 U.S. at 424 n.24. *Hyatt I* rejected that proposition, but softened the blow by more than hinting that FTB would be entitled to at least the protections Nevada affords its own state actors. 538 U.S. at 498-99. If neither of those principles holds true, as Hyatt now insists, then a sovereign State is truly at the mercy of a sister sovereign when haled into court by a private citizen against its will. That proposition is antithetical to the constitutional design and this Court's post-*Hall* sovereign immunity decisions.

Hyatt has no real response to the Nevada Supreme Court's failure to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* at 499. Indeed, his efforts at defending the analysis below only underscore that the decision below lacked a "healthy regard for California's sovereign status." *Id.*; Pet.24-25. Hyatt emphasizes that the Nevada court refused to grant FTB the protections given a Nevada agency because California's officials are not "subject to legislative control, administrative oversight, and public accountability *in Nevada*." Opp.15 (emphasis

added). Of course not; but California agencies are subject to all those checks *in California*. And if respect for a sister sovereign means anything, it means respecting the governmental processes of the sister State, not dismissing them because they will occur in Sacramento rather than in Carson City. Indeed, a sister sovereign's agencies will never be subject to substantial legislative control and oversight in *Nevada*, so the decision below is a recipe for never extending comparable immunity to a sister sovereign. That is hardly the "healthy regard" envisioned in *Hyatt I*.

Hyatt disparages FTB's "continued insistence on application of California's law of sovereign immunity," and dismisses "mandatory comity" as an oxymoron. Opp.13-14, 17. But FTB does not seek application of California's sovereign immunity rule; it seeks application of *Nevada's* sovereign immunity rule. And there is no reason why comity (or full faith and credit principles) cannot give rise to a bright-line rule that sister sovereigns haled into court against their will receive at least the same immunities as a home-state agency under comparable circumstances. Indeed, if comity, full faith and credit, and *Hyatt I* do not embody even that minimal protection for a sister sovereign, then *Nevada v. Hall* is not just flawed but wholly unsustainable.

III. This Court Should Grant Review To Overrule *Nevada v. Hall*.

Faced with powerful historical and doctrinal evidence that *Nevada v. Hall* was wrongly decided and some forty States asking this Court to revisit it, Hyatt makes only a perfunctory attempt to defend *Hall* as

correctly decided. Instead, he emphasizes *stare decisis*, Opp.20-21, hoping this Court will remain "consciously wrong today because [it] was unconsciously wrong yesterday," *Massachusetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting). But Hyatt fails to acknowledge that almost every *stare decisis* consideration militates *against* retaining *Hall*. Pet.35.[2]

Hyatt claims, remarkably, that in exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "caused no problem that this Court needs to address." Opp.21. At least forty States—including Nevada itself—beg to differ. *See* States' Br.1-2, 18-25. This case illustrates why: a private individual has dragged a sovereign State through ten years of pretrial litigation, a four-month trial resulting in a nearly half-*billion* dollar verdict, another seven years (and counting) of post-trial litigation, and the possibility of a new trial. This ongoing saga has not only demeaned the State's sovereign dignity, but also subjected it to untold financial and administrative burdens. Pet.32-34; States' Br.19-23.

Both the support of forty States and Hyatt's defense of the decision below belie his claim (at 21) that the "voluntary doctrine of comity" sufficiently protects State sovereignty. If "comity" really is as voluntary as Hyatt insists, then it is a wholly

[2] Hyatt identifies no vehicle issue impeding review. He faults FTB (at 20 n.6) for failing to press this question in *Hyatt I*, but correctly concedes that sovereign immunity can be raised at any time, *see Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), and does not dispute that the issue was raised below.

insufficient substitute for the sovereign immunity implicit in the constitutional design that *Hall* eliminated.

While this case is an unusually egregious example, similar suits against non-consenting sovereign States are nowhere near as "rare" as Hyatt imagines, Opp.21. *See, e.g.*, *Montaño v. Frezza*, ___ P.3d ___, 2015 WL 1275366 (N.M. Ct. App. Mar. 19, 2015); *Atl. Coast Conference v. Univ. of Md.*, 751 S.E.2d 612 (N.C. Ct. App. 2013); *Athay v. Stacey*, 196 P.3d 325 (Idaho 2008). Indeed, Nevada itself has a pending petition for certiorari asking this Court to reconsider *Hall*. *See Nevada v. City & Cnty. of S.F.*, No. 14-1073, 2015 WL 981686 (Mar. 4, 2015).[3] Nor is there any reason to think that tax authorities will suddenly become popular with out-of-state juries, or that individuals reaping windfalls will not be tempted to assert that their move to a low-tax jurisdiction predated their windfall. The problems engendered by *Hall* are real and are not going away. *See* Multistate Tax Comm'n Br.3-7.[4]

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[3] Nevada's petition confirms that *Hall* should be reconsidered, but the Court should not grant that petition as an alternative to this one. Among other things, respondent there claims that the decision rests on an adequate and independent state procedural ground. This case involves no comparable objection and, more importantly, allows the Court to consider the continuing viability of *Hall* in conjunction with the comity and full faith issues raised in question two. As noted, if those doctrines really are as toothless as Hyatt insists, that provides an additional justification for overruling *Hall*.

[4] Hyatt alludes to two previous unsuccessful efforts to seek *Hall*'s demise. But this Court has not considered such a petition for nearly a decade, and both earlier efforts were undesirable

On *Hall*'s merits, the brief in opposition speaks louder by its silence than its words. Hyatt does not contest that *Hall* runs contrary to the Framers' understanding that one State cannot be sued in another State's courts absent consent, or that allowing such suits in another State's courts but not federal courts defies reason. Pet.28-30; States' Br.9-17. And he has no response to this Court's numerous cases explaining that a State "cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added); Pet.26, 30; States' Br.17-18.

Hyatt contends (at 21-22) that *Hall* does not conflict with *Alden v. Maine*, 527 U.S. 706 (1999). That argument misses the point. If *Alden* had overruled *Hall* rather than distinguished it, this case would have been dismissed a decade and a half ago. *Alden* clearly resolved a different issue, but its reasoning echoes the *Hall* dissent and underscores *Hall*'s incompatibility with a whole host of sovereign immunity decisions that followed it. If sovereign immunity is understood as narrowly demarcated by the metes and bounds of the Eleventh Amendment's text, then *Hall* may be defensible. But once sovereign immunity is understood as a "fundamental postulate[]

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vehicles and predated subsequent developments in sovereign immunity law. In one, a state agency insisted on greater sovereign immunity in its sister sovereign's courts than it would enjoy in its own courts. *Mont. Bd. of Invs. v. Deutsche Bank Sec.*, 549 U.S. 1095 (2006). The other was filed only shortly after *Alden v. Maine*, 527 U.S. 706 (1999), clarified the contours of State sovereign immunity, and involved a *pro se* respondent. *Illinois v. McDonnell*, 513 U.S. 819 (2000).

implicit in the constitutional design" that derives not exclusively from the Eleventh Amendment but "from the structure of the original Constitution itself," *id.* at 728-29, then *Hall* is wholly unsustainable. *See* Pet.30-31. Contrary to this now-established view, *Hall* explicitly refused to acknowledge any immunity "by inference from the structure of our Constitution," and intentionally departed from "the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418, 426.

Hyatt also suggests that sovereign immunity in this context is not an "absolute right" but merely a "matter of comity," which Hyatt insists is a wholly voluntary concept. Opp.22. That may be true for foreign nations, *Republic of Arg. v. NML Capital*, 134 S. Ct. 2250, 2255 (2014); but it is emphatically *not* true for the several States, whose sovereign immunity is guaranteed by the Constitution. *See Alden*, 527 U.S. at 728-29. The very dissenting opinion Hyatt cites recognizes this critical distinction. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2046-47 & n.1 (2014) (Thomas, J., dissenting) (explaining that while sovereign immunity normally is not a freestanding right, "State sovereign immunity is an exception" because it is "secured by the Constitution").

Grasping at straws, Hyatt asserts that there is no need for this Court to overturn *Hall* because States could "enter into an agreement to provide immunity in each other's courts." Opp.22 n.7. But that patchwork solution gets sovereign immunity exactly backwards. State sovereign immunity is the baseline guaranteed to the States by the Constitution's structure. A State can make a special, voluntary agreement to *waive* that

immunity, *see Edelman v. Jordan*, 415 U.S. 651, 673 (1974), and as a sovereign, it may do so without anyone else's consent. But as a sovereign, it hardly needs a special agreement or anyone else's consent to *assert* that immunity. If the problems of *Hall* can only be solved by a novel use of the Compact Clause, that is yet another in the long line of reasons to overrule *Hall*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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June 8, 2015

EXHIBIT 75

NO. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

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

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INTRODUCTION

Over twenty years ago, petitioner Franchise Tax Board of the State of California (FTB) audited respondent Gilbert P. Hyatt and determined that he had misrepresented the date of his purported move to Nevada and owed substantial income taxes and penalties to California. Rather than simply exhaust California's administrative remedies or file suit in California state court, Hyatt sued FTB in Nevada state court, alleging that FTB committed various torts in conducting its audits and owed Hyatt hundreds of millions of dollars in damages.

The FTB's odyssey in Nevada lasted a decade—including an earlier trip to this Court—before the case even reached trial. Then, in a trial fraught with legal error, the Nevada jury returned a verdict that dramatically demonstrates the dangers of having a sovereign State haled into another State's courts against its will: The jury found for Hyatt on every one of his claims and awarded him nearly half a billion dollars in damages. It took another six years for the FTB to procure an appellate decision that, while trimming the award, still awarded a million dollars in damages while denying FTB the benefit of the damages cap Nevada extends to its own government entities.

The Nevada Supreme Court's decision cannot stand. Its refusal to afford a sister sovereign the same protections Nevada enjoys in its own courts is inconsistent with this Court's previous decision in this very case and basic principles of comity. But the proceedings here illustrate the far more profound difficulties of allowing one sovereign to be haled into

the courts of a sister sovereign at the behest of a private citizen. Such suits were unknown at the Framing and for nearly two centuries afterward. Although this Court permitted such a suit in *Nevada v. Hall*, 440 U.S. 410 (1979), that decision was incorrect when decided, is incompatible with subsequent decisions, and has proven unworkable in practice. There is no question that the States enjoyed sovereign immunity from suit in each others' courts at the Framing, and nothing in the structure of the Constitution remotely suggests that the States possess sovereign immunity in both their own courts and in federal court, but not in the courts of another State.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 335 P.3d 125 and reproduced at Pet.App.1-73. The order of the Nevada Supreme Court denying rehearing is unreported and reproduced at Pet.App.74-75. The relevant orders of the state trial court are unreported but reproduced at Pet.App.78-81.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2014, and denied rehearing on November 25, 2014. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

Articles III and IV of the United States Constitution and the Eleventh Amendment to the Constitution are reproduced in the appendix to this brief at 1a-5a.

STATEMENT OF THE CASE

A. Factual Background

Gilbert Hyatt was a longtime resident of California. Pet.App.4; *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 490-91 (2003). In 1992, Hyatt filed a "part-year" resident income tax return in California for the year 1991, claiming that as of October 1, 1991, he had ceased to be a California resident and had moved to Nevada. *Hyatt I*, 538 U.S. at 490. Within days after that purported move, Hyatt received substantial income in connection with a patent he then owned. *Id.* at 490-91; Pet.App.4.[1] Hyatt did not report that significant income on his California return; indeed, he reported to California only 3.5% of his total taxable income for 1991 despite residing there for at least 75% of the calendar year.[2] And despite the conveniently-timed supposed change of residence, Hyatt claimed no moving expenses on his 1991 federal return. Pet.App.4.

Based on these discrepancies, in 1993, FTB opened an audit concerning Hyatt's 1991 California return to ascertain the legitimacy of Hyatt's asserted change of residence. FTB is a California agency with the statutory duty to administer and enforce

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[1] That patent's relevant claims were canceled in 1996 after another individual was determined to have priority of invention. *See Hyatt v. Boone*, 146 F.3d 1348, 1350-51 & n.1 (Fed. Cir. 1998); John Markoff, *For Texas Instruments, Some Bragging Rights*, N.Y. Times (June 20, 1996), http://perma.cc/55gz-kul8.

[2] Under California law, taxpayers are presumed to have lived in California for the full year—and all their income is taxable to California—if they lived in California for at least nine months. Cal. Rev. & Tax Code §17016.

California's personal income tax law. Cal. Rev. & Tax Code §19501. It has the authority to examine records, require attendance, take testimony, and issue subpoenas. *Id.* §19504. Exercising these sovereign powers, and following standard practice, FTB sent Hyatt a form requiring him to provide certain information concerning his connections to California and Nevada and the facts surrounding his claimed move to Nevada. Pet.App.4-5. Using that information, FTB sent letters and demands for information to third parties. Pet.App.5. FTB representatives also interviewed third parties and visited locations in California and Nevada. Pet.App.5-6.

As a result of its audit, FTB concluded that Hyatt did not move from California to Nevada by October 1, 1991, as he had claimed, but rather remained a California resident until April 3, 1992, and had filed a fraudulent 1991 California return. Pet.App.4-5; *Hyatt I*, 538 U.S. at 491. It determined that, "in an effort to avoid [California] state income tax liability on his patent licensing," Hyatt "had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote." Pet.App.6. It further determined that although Hyatt claimed he had sold his California home to his work assistant, the purported sale was a "sham." *Id.* FTB provided a "detailed explanation" supporting its conclusions. *Id.* It cited evidence regarding, among other things, Hyatt's "contacts between Nevada and California, banking activity in the two states, … location in the two states during the relevant period, and professionals whom he employed in the two states." *Id.*

FTB determined that Hyatt owed California approximately $1.8 million in unpaid state income taxes from 1991, plus an additional $2.6 million in penalties and interest. *Id.* Because it determined that Hyatt resided in California for part of 1992 yet paid no California taxes at all, FTB opened a second audit into Hyatt's state income tax liability for that year. Pet.App.7. It concluded that Hyatt owed an additional $6 million in taxes and interest for 1992, along with further penalties. *Id.*

Hyatt challenged the audits by filing protests with FTB. *Id.*; *see* Cal. Rev. & Tax Code §19041. Those protests initiated an administrative review process under which both audits were examined again to ensure their accuracy. FTB affirmed the audits after further administrative review. Pet.App.7. Hyatt is currently challenging that outcome in an administrative appeal to the California State Board of Equalization. *See* Cal. Rev. & Tax Code §§19045-19048.[3]

B. The Nevada Litigation

In January 1998, after filing his administrative protests to FTB's determinations, Hyatt filed suit against FTB in Nevada state court. He asserted a full range of tort claims based on FTB's alleged conduct during its audit—negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a

[3] The decision below erroneously stated that Hyatt is challenging the audits' conclusions "in California courts." Pet.App.7 n.2. Hyatt will have an opportunity to file suit in California court if the State Board of Equalization upholds FTB's determinations. *See* Cal. Rev. & Tax Code §§19381-19382.

confidential relationship—and sought both compensatory and punitive damages. Pet.App.7-8, 11.

FTB moved for summary judgment, asserting its immunity from the entire lawsuit on several grounds. As relevant here, it argued that as an agency of the State of California, it was constitutionally immune from suit in the Nevada courts. It alternatively argued that it was entitled to the benefit of California law, which provided a complete immunity from the suit. Pet.App.10. In recognition of the need to protect the distinctly sovereign and inherently unpopular function of tax collection, California law prohibits "[i]nstituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," and immunizes any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of comity and sovereign immunity, required the Nevada courts to apply California law immunizing FTB's actions. *Hyatt I*, 538 U.S. at 491-92.

The trial court denied the motion, and the Nevada Supreme Court affirmed in part and denied in part a petition for mandamus. *Id.* at 492. It first held that, as a constitutional matter, "although California is immune from Hyatt's suit in federal courts, it is not immune in Nevada courts." J.A.167 (citing *Nevada v. Hall*, 440 U.S. 410 (1979)). Next, it refused to afford FTB the complete immunity granted to it by California law. It suggested instead that "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive" under

Nevada law, which meant immunity for negligence-based torts but not for intentional torts. Pet.App.10 The court therefore ordered the dismissal of Hyatt's claim for negligent misrepresentation but allowed his intentional tort claims to proceed.

C. *Hyatt I*

FTB filed a petition for certiorari, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. This Court granted certiorari. Hyatt defended the judgment by noting that the Nevada Supreme Court had "look[ed] at [Nevada's] own immunity" and granted California "that same" immunity. J.A.185. A State's "own immunity," Hyatt asserted, was the "baseline" for determining the immunity owed to sister States haled into its courts. J.A.186; *see also* J.A.189 ("We are treating the other sovereign the way we treat ourselves.").

The Court affirmed. It explained that the Full Faith and Credit Clause generally does not require one State to apply another State's law. *Hyatt I*, 538 U.S. at 496. Although it recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," it held that the Full Faith and Credit Clause did not require Nevada to respect that sovereign interest by giving FTB the complete immunity that it would have under California law. *Id.* at 498-99.

In reaching that conclusion, the Court acknowledged that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* at 499. But it observed 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.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Reflecting Hyatt's repeated insistence that the Nevada Supreme Court had merely granted FTB the same immunity that a Nevada agency would enjoy under similar circumstances—thereby placing California on an equal footing with Nevada—the Court commented that the Nevada Supreme Court had "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit" to determine what immunity FTB was entitled to claim. *Id.*

The Court also emphasized that its ruling did *not* address the broader issue of whether the Constitution incorporates a principle of State sovereign immunity that protects a State from being sued in the courts of a sister State without its consent. *Id.* at 497. In *Nevada v. Hall*, the Court had rejected that proposition, holding that the Constitution did not "require[] all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418. In *Hyatt I*, nineteen States and Puerto Rico filed an amicus brief that urged the Court to revisit and overrule *Hall*. *See* Br. of Florida et al. as Amici Curiae Supporting Pet'r, *Hyatt I*, 538 U.S. 488 (2003) (No. 02-42), 2002 WL 32134149. But because FTB itself did not seek to overrule *Hall* at that time, the Court declined to reach the issue. *Hyatt I*, 538 U.S. at 497.

D. Trial and Appeal

Following *Hyatt I*, the case returned to the Nevada state trial court. The parties then engaged in lengthy discovery and pretrial proceedings. Finally,

in 2008—over ten years after Hyatt filed suit—the case proceeded to a four-month jury trial. Pet.App.11. The Nevada jury found for Hyatt on all his claims, awarding him just over $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for intentional infliction of emotional distress, and $250 million in punitive damages. *Id*.

Nevada has partially waived the sovereign immunity of Nevada government agencies for intentional torts. It allows such suits but imposes a statutory cap on tort damages. Nev. Rev. Stat. §41.035(1). For actions accruing before 2007 (like Hyatt's), that cap was set at $50,000—less than one one-thousandth of the compensatory damages awarded against FTB. *See* 1995 Nev. Stat. 1071, 1073.[4] The same Nevada law prohibits punitive damages against Nevada government agencies. Nev. Rev. Stat. §41.035(1). The state trial court, however, among its other errors, declined to apply those limits to FTB. Thus, by the time it added over $2.5 million in costs and $102 million in prejudgment interest to the jury verdict, the trial court entered a total judgment against FTB of over $490 million. Pet.App.11, 72.

FTB appealed the numerous errors made by the trial court. First, it argued that Nevada's discretionary-function immunity statute foreclosed liability given the inherently discretionary conduct underlying its audit of Hyatt's taxes. Second, it contended that Hyatt's state-law claims failed as a

[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.

matter of law. Third, it appealed the trial court's failure to afford California the same immunity that Nevada law grants to a Nevada government entity. Finally, FTB preserved its argument that *Nevada v. Hall* was wrongly decided and should be overruled, and that FTB could not be haled into the Nevada courts absent its consent. *See* J.A.203.

Six years after trial—over sixteen years after Hyatt filed suit—the Nevada Supreme Court finally issued its decision affirming in part and reversing in part. Pet.App.1-73. The court first held that Nevada's discretionary-function immunity statute did not preclude Hyatt's claims because, in its view, discretionary-function immunity categorically "does not apply to intentional and bad-faith tort claims." Pet.App.72. The Nevada Supreme Court then held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, Pet.App.25-38, but it affirmed the jury's verdict finding FTB liable for fraud and intentional infliction of emotional distress, Pet.App.38-41, 46-51.

The court affirmed the fraud verdict based on FTB's initial notice to Hyatt that he was being audited. That notice contained boilerplate statements that, during an audit, a taxpayer should expect "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," and "Completion of the audit within a reasonable amount of time." Pet.App.5. The Nevada Supreme Court held that a reasonable person could conclude

that these general statements were false representations, FTB knew they were false, FTB intended for Hyatt to rely on them, and Hyatt did in fact rely on them, sustaining damages. Pet.App.38-40.

The court affirmed the jury's finding of liability on the IIED claim despite acknowledging that Hyatt had presented no objectively verifiable medical evidence of emotional distress. Pet.App.46. Instead, the court pointed to evidence that FTB had disclosed Hyatt's name, address, and social security number in its third-party information requests (though the court acknowledged that Hyatt himself had already previously disclosed this information to the public), FTB had revealed to third parties that he was being audited (via those same standard information requests), and one of the auditors assigned to his case allegedly made an isolated remark regarding Hyatt's religion and was "intent on imposing an assessment" against Hyatt. Pet.App.27, 50.

The Nevada Supreme Court refused to apply to FTB the statutory damages cap applicable to Nevada government entities. It conceded that "[m]ost courts" in other States extend to sister States the same immunities the forum State enjoys. Pet.App.44. It nevertheless concluded that Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages," and that the extension of the cap to a California entity did not serve the countervailing interest in protecting Nevada taxpayers. Pet.App.45. Accordingly, it declined to give FTB the benefit of the statutory cap enjoyed by Nevada government entities. Pet.App.62. It did find the FTB immune from punitive

damages "[b]ecause punitive damages would not be available against a Nevada government entity." Pet.App.65. The court thus upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest), and remanded for retrial on emotional distress damages due to evidentiary and jury-instruction errors. Pet.App.72.[5]

SUMMARY OF ARGUMENT

I. When a State is involuntarily haled into the courts of a sister State, it must be accorded at least the same sovereign immunity as the forum State accords itself. In *Hyatt I*, this Court explained that a forum State is not required to apply the sovereign immunity of another State or provide *greater* protection than that enjoyed by arms of the forum State. But the Court cautioned that, while a policy of equal treatment was permissible, principles of full faith and credit and comity prohibit a State from exhibiting a "policy of hostility" by departing from the "contours of [its] own sovereign immunity from suit." 538 U.S. at 499.

The Nevada Supreme Court blatantly transgressed these principles in the decision below when it refused to extend to FTB, a California agency, the *same* sovereign immunity Nevada provides its own agencies. Whereas compensatory damages against a Nevada state entity would be capped at $50,000 to

[5] Hyatt has also filed a federal lawsuit against FTB board members and other State officials alleging violations of his constitutional rights. *See Hyatt v. Chiang*, No. 14-849, 2015 WL 545993, at *6 (E.D. Cal. Feb. 10, 2015) (dismissing suit as barred by Tax Injunction Act), *appeal docketed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

reflect the sovereign's distinct status and to protect Nevada taxpayers, the Court authorized unlimited compensatory damages against the FTB. That result cannot be reconciled with *Hyatt I* and the principles it reflects. It demonstrates a clear "policy of hostility" toward California by refusing to recognize California's sovereign immunity even to the extent consistent with Nevada law. It palpably fails to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis" by departing from that baseline and relying instead on a one-sided policy interest in compensating Nevada citizens at the expense of California taxpayers. It fails to "sensitively appl[y] principles of comity" by applying neither California nor Nevada law but a wholly different and legislatively-unauthorized third approach. And it reflects the opposite of a "healthy regard for California's sovereign status" by treating a California agency different from a Nevada agency and the same as a non-sovereign.

II. While the decision below is incompatible with *Hyatt I*, both the decision and the broader course of proceedings here demonstrate the more fundamental problems with failing to afford a State sovereign immunity when a private citizen hales it into court in another State. *Nevada v. Hall* is fundamentally inconsistent with the dignity and residual sovereignty of the States and conflicts with the most fundamental precepts of our constitutional system. The Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), but they did not obliterate the residual sovereignty of the States in the process. Before the Framing, Massachusetts could not be haled into the

New York courts by a New York citizen against its will, and nothing in the text or structure of the Constitution purported to change that. Indeed, the notion that a sovereign State enjoys less immunity to suits in sister State courts than in the courts of the newly created federal sovereign gets things backwards. The contrary rule of *Hall* should be overruled so that bedrock constitutional principles can be restored.

The historical record firmly establishes that before the Nation's independence, under the Articles of Confederation, and during and after ratification of the Constitution, it was universally understood that no State could be involuntarily sued in the courts of another State. Debates between proponents and opponents of the Constitution over Article III reflect a shared view that States possessed sovereign immunity in other States' courts. And the reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), underscores the absurdity of suggesting that a populace shocked by the notion of a State being haled into federal court by a citizen of another State would tolerate such suits in the considerably less neutral courts of that citizen's home State. This Court's decisions before *Hall*, furthermore, uniformly reflect the view that States cannot be involuntarily haled into other States' courts. *Hall* not only failed to explain its departure from these cases; it barely addressed them.

Decisions of this Court since *Hall*, moreover, have rejected almost every premise that underlies that decision. *Hall* casually departed from the Framing-era view of sovereign immunity; subsequent cases have consistently relied on that view and extended

sovereign immunity to proceedings against States that were unheard of when the Constitution was ratified. *Hall* refused to infer sovereign immunity from the constitutional structure; subsequent cases have repeatedly treated sovereign immunity as inherent in the constitutional design absent contrary evidence. *Hall* effectively limited sovereign immunity to the metes and bounds of the Eleventh Amendment's text; subsequent cases have treated the Eleventh Amendment as a recognition of broader sovereign immunity principles from which *Chisholm* deviated. *Hall* essentially dismissed the significance of State sovereignty at the Framing; subsequent cases have emphasized the retention of residual sovereignty unless necessarily sacrificed by the constitutional design. In short, every pillar that supported *Hall's* ahistorical and counterintuitive conclusion has been thoroughly undermined by subsequent and better reasoned decisions. There is simply no coherent jurisprudential support remaining to prevent *Hall's* demise.

Hall has also proved unworkable doctrinally and in practice, as this case amply confirms. In place of a bright-line and predictable constitutional rule of sovereign immunity that applies unless waived, *Hall* created a regime in which a State never knows the extent of its sovereign immunity. While a State controls the extent of its waiver of sovereign immunity in its own courts, and this Court's cases provide clear guidance about exposure in federal court, the extent of liability in the courts of sister sovereigns under *Hall* is a guessing game. In an increasingly mobile world, a State could be haled into state court in virtually any State. The contours of sovereign immunity of state

entities in those courts are a product of sovereign judgments wholly outside the control of the foreign/defendant State. And, as this case demonstrates, the foreign/defendant State is at the mercy of the forum State's courts as to whether it even gets the benefit of the sovereign immunity enjoyed by arms of the forum state.

This case also demonstrates the practical danger of allowing one State to be haled into the courts of a sister sovereign against its will. Although subsequently trimmed, the Nevada jury's initial half-a-billion-dollar award dramatically illustrates the dangers to sovereign dignity and fiscal interests inherent in the *Hall* regime. On top of its substantial remaining damages exposure, California has expended untold resources defending this suit, which is now in its seventeenth year. What is more, as the verdict demonstrates, a Nevada jury needs little incentive to side with a Nevada citizen against another State's government, especially when the latter is involved in an inherently sovereign and decidedly unpopular function like tax collection. The Nevada jury is not even constrained by the reality that the award will ultimately be paid by Nevada taxpayers. Rather than protect against that structural risk, the Nevada courts seized on it as a justification for not providing a California entity with the same protection as an arm of Nevada.

No other *stare decisis* consideration militates in favor of preserving *Hall*. It is a constitutional rather than statutory decision; it does not affect primary conduct; and it has created no reliance interests, much less the contractual or property interests that this

Court has emphasized. More to the point, *Hall* represents a fundamental error on an issue that is essential to the basic design of the Constitution and Our Federalism. The States yielded some sovereignty to the new national government, but only what was necessary to the creation of the new federal government. States retained their full sovereign immunity in their own courts and the vast majority of their sovereign immunity even in the newly-created federal courts. That they nonetheless possess no sovereign immunity against private suits in the courts of sister States is an anomaly too extravagant to maintain. *Hall* should be overruled.

ARGUMENT

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

A. As *Hyatt I* Recognized, Full Faith and Credit and Comity Principles Require a Baseline of Equal Treatment When States Are Involuntarily Haled Into Sister States' Courts.

1. In *Hyatt I*, this Court held that the Full Faith and Credit Clause did not require Nevada to apply the terms of California's waiver of its own sovereign immunity under California law, which would have fully immunized FTB from Hyatt's claims. Instead, the Court held that Nevada could permissibly choose to provide an arm of California only the less protective terms of Nevada's waiver of its sovereign immunity under Nevada law, which affords state agencies protection from negligence-based torts but not intentional torts. 538 U.S. at 498-99. Thus, the Court

held, Nevada was not required to apply out-of-state law that would afford a sister State *greater* protections than its own law provides.

In reaching this conclusion, the Court relied on the critical premise—advanced by Hyatt himself—that Nevada evinced no hostility to a sister sovereign but sought only to treat California *equal* to itself. Hyatt argued that a State is "require[d]" to "look[] to its own immunity for similar torts in deciding whether to accord immunity to" a sister State. J.A.195. A State's "own immunity" is the "baseline" for determining the immunity owed to a sister State haled into its courts. J.A.186. By according FTB exactly the same sovereign immunity that Nevada law conferred upon a Nevada agency, the Nevada Supreme Court had given "full regard for the fact that California is a sovereign State." J.A.195; *see also* J.A.189 ("We are treating the other sovereign the way we treat ourselves."); p. 7, *supra*.

This Court embraced that equality premise. In holding that Nevada was not required to treat an out-of-state agency better than an in-state agency, the Court was careful to note that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. And it signaled a different result should a State "exhibit[] a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll*, 349 U.S. at 413). But by according equal treatment to in-state and out-of-state government agencies, the Court concluded, the Nevada Supreme Court had "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.*

2. The equal-treatment premise urged by Hyatt and accepted by this Court in *Hyatt I* derives from the Full Faith and Credit Clause and principles of comity and equal sovereignty rooted in the constitutional design. As this Court observed more than a century ago, "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith*, 221 U.S. 559, 580 (1911). That principle likewise undergirds the frequently applied constitutional "equal footing" doctrine. *See*, *e.g.*, *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (recognizing that "the States in the Union are coequal sovereigns under the Constitution"); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

This principle of equal sovereignty underlies *Hyatt I*'s admonishment that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. The "animating purpose of the full faith and credit command" was to make the States "'integral parts of a single nation.'" *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)). The Full Faith and Credit Clause was designed to "transform[] an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). While *Hyatt I* held that the Full Faith and Credit Clause does not entitle a State to have its own, more favorable sovereign immunity principles apply directly in the

courts of a sister State, refusing to extend a sister sovereign the same immunity enjoyed by the home sovereign offends equal sovereignty principles and the Full Faith and Credit Clause's intent to bind the independent and equal sovereigns together in a workable whole.

Equal sovereignty and equal treatment likewise inform *Hyatt I*'s observation that the Nevada Supreme Court had "sensitively applied principles of comity." The Court so held because the Nevada Supreme Court, by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis," had demonstrated "a healthy regard for California's sovereign status." 538 U.S. at 499. The Court quite naturally recognized that a State's departure from the "contours of [its] own sovereign immunity from suit" when determining the immunities of a sister sovereign would reflect an improper application of principles of comity. Comity principles allow states to honor a defendant State's request to apply its own sovereign immunity law (*i.e.*, what FTB unsuccessfully sought from the Nevada courts in the proceedings resulting in *Hyatt I*), *see, e.g.*, *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 288 (Ill. 1989) (honoring Indiana's "reservation of sovereign immunity"), or to grant the defendant State the protection afforded to arms of the forum State, *see, e.g., Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *see generally* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 289-91 (2006). But comity does not allow a State to deny a sister sovereign both the benefits of the sister sovereign's own sovereign immunity and the benefits of an equal-treatment rule. Such treatment

reflects not comity, but the precise "policy of hostility" *Hyatt I* warned against.

B. The Nevada Supreme Court's Decision Violates the Principles of Full Faith and Credit, Comity, and Equal Treatment Recognized in *Hyatt I*.

The Nevada Supreme Court's refusal to accord California the same immunity that Nevada would receive under Nevada law marks a sharp break from the equal-treatment principles recognized in *Hyatt I*. By refusing to apply to FTB the compensatory damages cap that would apply to a Nevada agency, the Nevada Supreme Court did not simply decline to apply California's broader sovereign immunity law. It declined to apply even Nevada's narrower sovereign immunity law, and did so for the worst of reasons—namely, that application of the cap would disadvantage a Nevada plaintiff with no countervailing benefits to Nevada taxpayers. That a state court could embrace such cavalier treatment of a sister sovereign strongly suggests that the equality principles of *Hyatt I* are no substitute for recognizing the sovereign immunity improperly denied in *Nevada v. Hall*. But the decision is plainly incompatible with *Hyatt I* in at least four respects.

First, the decision plainly demonstrates a "'policy of hostility to the public Acts'" of California. *Hyatt I*, 538 U.S. at 499. California law provides FTB absolute immunity, Cal. Gov't Code §860.2, while Nevada law provides its entities a damages cap, Nev. Rev. Stat. §41.035(1). As *Hyatt I* establishes, it is one thing for Nevada to refuse to apply the absolute immunity that California law would give FTB. That is consistent

with equal treatment. But it is altogether different for Nevada to refuse to recognize the immunity granted by California *even to the extent consistent with Nevada law*. That kind of hostility is forbidden by *Hyatt I*.

Second, and relatedly, the Nevada Supreme Court plainly failed to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499. Hyatt himself advocated this principle in *Hyatt I*, *see* pp. 7, 18, *supra*, and the contours of that benchmark here were not difficult to discern. Nevada capped compensatory damages in suits against the sovereign at $50,000. Rather than apply that straightforward cap, the Nevada Supreme Court upheld a damages award 20 times as large on the fraud count and remanded for another trial and the potential imposition of additional damages on the emotional distress count.

Third, the decision below fails to "sensitively appl[y] principles of comity." *Id.* The Nevada Supreme Court applied neither California's sovereign immunity law nor Nevada's sovereign immunity law, but instead a wholly different, non-legislative, and overtly hostile third approach subjecting California to uncapped liability for compensatory damages. Both California and Nevada law reflect deliberate legislative judgments about the extent to which each State's sovereign immunity should be waived. Determining the metes and bounds of the State's sovereign immunity is a core component of sovereignty. *See, e.g.*, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002). While comity may permit either full recognition of the sister sovereign's own waiver or the protection of the forum State's

waiver, providing neither based on an *ad hoc* judgment of the forum state court is a plain affront to both comity and sovereign immunity principles. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011) (noting that "[a] State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984))).[6]

Fourth, the decision below clearly failed to display a "healthy regard for California's sovereign status." *Hyatt I*, 538 U.S. at 499. To the contrary, the decision below reflects an open disdain for California's sovereign status and the kind of protectionist tendencies that are the very antithesis of comity principles. The Nevada Supreme Court recognizes that a partial waiver of immunity allows for some compensation for injured citizens, while the damages cap plays an important role in protecting both sovereign authority and the public fisc. *See, e.g.*, *Cty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (acknowledging that caps "protect taxpayers and public funds from potentially devastating judgments"). Rather than giving the FTB and California's treasury the benefit of a comparable trade-off, the Nevada Supreme Court yielded to the temptation of open protectionism. As the court

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[6] In explaining its decision, the Nevada Supreme Court relied on a single state-court decision, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992)), *see* Pet.App.44-45, but that reliance only underscores its error. In *Faulkner*, the defendant State agency sought application of its own immunity law, rather than the forum State's immunity law. Consistent with *Hyatt I*, Alabama denied that request for especially favorable treatment. Nothing in *Faulkner* supports the denial of equal treatment.

explained, applying the damages cap here would disadvantage a Nevada citizen with no countervailing benefit to the Nevada treasury. Pet.App.45-46. A comparable judgment by the legislative branch—capping damages for Nevada entities but not out-of-state entities—would be a blatant constitutional violation. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 889, 894 (1988). The result should be no different when a court imposes the same discrimination through a profoundly misguided comity analysis.

Hyatt's own arguments only confirm the absence of a "healthy regard for California's sovereign status." In the Nevada Supreme Court, Hyatt argued that "limitless compensatory damages [were] necessary as a means to control non-Nevada government actions." Pet.App.42. But while Nevada courts may have an interest in ensuring the compensation of injured Nevadans up to the limits imposed by Nevada, exercising control over non-Nevada government actions is hardly a constitutionally valid objective. In his brief in opposition, Hyatt emphasized that the Nevada court refused to grant FTB the protections given a Nevada agency because California's officials are not "'subject to legislative control, administrative oversight, and public accountability' *in Nevada*." Br. in Opp.15 (emphasis added). Of course not; but California agencies are subject to all those checks *in California*. And if respect for a sister sovereign means anything, it means respecting the governmental processes of the sister State, not dismissing them because they occur in Sacramento rather than in Carson City.

The Nevada Supreme Court's abject failure to apply the comity and equality principles of *Hyatt I* is powerful evidence that those principles are no substitute for correctly deciding the sovereign immunity question addressed in *Hall*. But if States really can be haled into the courts of their sister States without consent, then it is imperative that this Court give the equality principle of *Hyatt I* real teeth. That equality principle cannot give States the predictability and control over their own immunity that sovereign immunity generally provides. But it does ensure that the States' sovereign status is not simply ignored and that they enjoy the benefits of the rules that the forum sovereign has imposed on itself. If enforceable principles of federal law do not guarantee that much, then the rule of *Hall* is not just erroneous, not just ripe for reconsideration, but utterly unsustainable.

II. *Nevada v. Hall* Was Wrongly Decided, And Its Holding That A Sovereign State Can Be Involuntarily Haled Into The Courts Of Another State Should Be Overruled.

In *Nevada v. Hall*, this Court held that the Constitution does not prohibit a sovereign State from being sued in the courts of another State without its consent. *Hall* creates a constitutional anomaly—States protected against suits in their own courts, and even in the newly created federal courts, can nonetheless be haled into the courts of another State against their will. That decision runs contrary to the intent of the Framers, the constitutional structure, pre-*Hall* sovereign immunity decisions, and the subsequent, better reasoned sovereign immunity jurisprudence of this Court. And, as the facts of this

case demonstrate, the suits that *Hall* allows demean the dignity of the States, threaten their treasuries, and disregard their residual sovereignty. The *Hall* regime has proven thoroughly unworkable. In short, *Hall* was wrong the day it was decided, is more obviously wrong in light of subsequent developments, and should be overruled.

A. *Hall* Was a Poorly Reasoned Departure From the Historical Understanding of Interstate Sovereign Immunity and the Court's Prior Decisions.

1. In *Hall*, California residents injured in an automobile collision with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-12. A California jury found the state employee negligent and awarded over a million dollars 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 426-27.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably … was a matter of importance in the early days of independence." *Id.* at 418. It 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 Supreme Court decisions, reflected "widespread acceptance of the view that a sovereign state is *never* amenable to suit without its consent." *Id.* at 419-20 & n.20 (emphasis added).

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional issue. In the Court's view, 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, so it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-19.

The Court then held, without further explanation, 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. *Id.* at 421. Critically, it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction of 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, a State must simply 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, 425-26.[7]

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[7] The Court also held that the Full Faith and Credit Clause does not require a forum State to apply a defendant State's sovereign immunity law. *See* 440 U.S. at 421-24. The Court reaffirmed that holding in *Hyatt I* but, as noted, did not revisit the question of whether the Constitution generally "confer[s] sovereign immunity on States in the courts of sister States." 538 U.S. at 497-99.

Justice Blackmun dissented, joined by Chief Justice Burger and Justice Rehnquist. Unlike the majority, Justice Blackmun would have held that the Constitution implicitly embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). The dissenters drew a very different conclusion from the absence of more express discussion of this issue during the constitutional debates: The "only reason why this immunity did not receive specific mention" during ratification is that it was "too obvious to deserve mention." *Id.* at 431. Justice Blackmun also pointed to the Eleventh Amendment's swift passage following the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793): "If the Framers were indeed concerned lest the States be haled before the federal courts … how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J, dissenting). This "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was, in Justice Blackmun's view, "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist also separately dissented, 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." *Id.* at 432-33 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment 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.* The Eleventh Amendment "is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States." *Id.* Justice Rehnquist concluded that the Court's decision "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. The *Hall* Court's dismissal of the Framing-era consensus, the Eleventh Amendment experience, and previous precedents is difficult to fathom. In light of this trifecta, *Hall* is far from a "'well reasoned'" decision meriting *stare decisis*. *Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009)).

a. The Framing-era consensus on sovereign immunity is clear: Both before independence and under the Articles of Confederation, the original States enjoyed sovereign immunity from suit in each others' courts. This immunity derived not just from "'the common-law immunity from suit traditionally enjoyed by sovereign powers,'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014), but also from the law of nations governing relations between separate sovereigns, *see* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 582 (1994). Immunity under the law of nations "rested on the

theory that all sovereigns were equal and independent and that one sovereign was therefore not obliged to submit to the jurisdiction of another's courts." *Id.* at 583. During the pre-Constitution period, "the states regarded themselves and one another as sovereign states within the meaning of the law of nations, thereby possessing law-of-nations sovereign immunity." *Id.* at 584; *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1574-75 (2002).

Nathan v. Virginia, 1 U.S. (1 Dall.) 77 (1781), is instructive. There, a Pennsylvania citizen brought suit in the Pennsylvania courts in an effort to attach property belonging to the Commonwealth of 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 77. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan constitutes "a decisive rejection of state suability in the courts of other states." Pfander, *supra*, at 587. Other contemporaneous decisions likewise affirmed that one sovereign State could not be compelled to appear in another State's courts. *See, e.g.*, *Moitez v. The South Carolina*, 17 F. Cas. 574 (Adm. 1781) (No. 9697) (Pennsylvania court

dismissing action brought by South Carolinians because attached vessel was owned by "sovereign independent state" of South Carolina). The absence of additional reported cases is a testament to the obviousness of these outcomes: While it would have been tempting for a private citizen to try to redress his grievance with another colony or State in the citizen's own courts, the consensus view that such suits were barred by sovereign immunity deterred such efforts.

b. The consensus that the thirteen original States entered the Union immune from suit in each other's courts is so overwhelming that it can be disregarded only by dismissing its significance (as in *Hall*) or by deeming it superseded by the ratification of the Constitution. After all, if the unquestioned immunity flowed in part from the law of nations, then the partial sacrifice of the colonies' independent sovereignty could have compromised the immunity. But it is clear that ratification did not disturb the States' immunity from involuntary suit in the courts of other States. To the contrary, in debating Article III, the Framers repeatedly recognized that in the new Republic, as before, a State could not be involuntarily haled into another State's courts. Indeed, that was the shared premise for much of the debate concerning Article III.

While there was no obvious reason to think the new Constitution would undermine the States' immunity from suit in their own courts or each others' courts, the question of state sovereign immunity *in the new federal courts* was a central question during 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 this provision premised their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without consent. For example, the Federal Farmer compared Article III's requirement that a State be "oblige[d] … to 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 (Philip B. Kurland & Ralph Lerner, eds., Chicago 1987) (emphasis added).[8] Similarly, the Antifederalist Brutus attacked Article III for requiring States to "answer in courts of law at 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 (emphasis added).

Ratification proponents offered two conflicting responses to these arguments, but neither camp took issue with the premise that suits by a citizen of one State against a different nonconsenting State were entirely unprecedented. In the first camp were Federalists whose views would be temporarily vindicated in *Chisholm v. Georgia.* They contended that Article III *did* abrogate State sovereign immunity in such suits and viewed the provision of a federal forum for suits that could not otherwise be brought as a virtue. They argued that Article III provided federal-court jurisdiction over suits by individuals

[8] And while the Federal Farmer criticized the balance of Article III as redundant, he pointedly excepted the suits against state defendants: "Actions in all these cases, *except against a state government*, are now brought and finally determined in the law courts of the states respectively." *Id.* (emphasis added).

against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Edmund Pendleton, *Speech to the Virginia Ratifying Convention* in 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 549 (Jonathan Elliot ed., 1836) (hereinafter *Elliot's Debates*). As another proponent of this view, Edmund Randolph, the Nation's first Attorney General, remarked in his 1790 Report on the Judiciary: "[A]s far as a particular state can be a party defendant, a sister state cannot be her judge." Edmund Randolph, *Report of the Attorney-General to the House of Representatives*, reprinted in 4 The Documentary History of the Supreme Court of the United States*, 1789-1800* 130 (Maeva Marcus, ed., Columbia 1992). Significantly, Randolph added that the Constitution does not "narrow this exemption; but *confirms* it." *Id.* (emphasis added).

The second camp consisted of Federalists whose views would ultimately be vindicated in the Eleventh Amendment. They urged that the Antifederalists were misreading Article III, which they read as *not* abrogating State sovereign immunity in suits brought by individuals. But while these leading ratification proponents took issue with the Antifederalist view of what Article III accomplished, they fully embraced the premise that a suit by a private individual against a nonconsenting State was an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part and parcel of the reason that Article III did not authorize them in federal court. Alexander Hamilton wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," an immunity "now enjoyed by the

government of every State in the Union." The Federalist No. 81, at 487 (Clinton Rossiter ed. 1961) (Hamilton). Hamilton added that this immunity would "remain with the States" absent a "surrender of this immunity" in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued, "It is not in the power of individuals to call any state into court." 3 *Elliot's Debates* 533. John Marshall claimed, "It is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555.[9]

In short, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *supra*, at 263. Interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III. *Id.* at 253.

c. This foundational premise was equally manifest in the adoption of the Eleventh Amendment.

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[9] Because these remarks arose in a debate over federal-court jurisdiction, they might conceivably be construed as narrowly addressing only the impossibility of federal-court jurisdiction over suits against nonconsenting States. But with their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns, they "most plausibly included suits in the courts of another state" as well. Woolhandler, *supra*, at 256-57. Moreover, the Framers were well familiar with the *Nathan* case, which recognized States' immunity in other States' courts. Not only was the case well-publicized, but Madison was one of the Virginia delegates who sought the case's dismissal, while Marshall was later appointed to resolve the dispute. *See* Pfander, *supra*, at 586-87; 8 The Papers of James Madison 68 n.1 (Robert A. Rutland et al. eds., 1973).

In *Chisholm v. Georgia*, the Court sided with the first camp of Federalists, including Edmund Randolph (who argued the case for Chisholm), and held that federal-court jurisdiction under Article III did, in fact, extend to suits brought against one State by a citizen of another State. The decision was, to say the least, not popular. As Charles Warren has described it, the decision "fell upon the country with a profound shock." Charles Warren, 1 The Supreme Court in United States History 96 (rev. ed. 1926). While the Eleventh Amendment was the most concrete and enduring response to that decision, it was not the only one. The Massachusetts Legislature, for example, denounced the decision as "repugnant to the first principles of a federal government"; more dramatically, the House of Representatives in Georgia enacted a bill making any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden v. Maine*, 527 U.S. 706, 720-21 (1999). The notion that the Framing generation would condemn suits by private citizens against another State in the neutral federal courts this harshly and universally, but nonetheless tolerate such suits in the home state courts of such a citizen strains all credulity. And the strong affirmations of broad sovereign immunity following *Chisholm* confirm that such immunity was assumed in—and confirmed by—the Eleventh Amendment's passage.

For example, the Connecticut legislature pronounced that "no State can on any Construction of the Constitution 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

Documentary History of the Supreme Court 609 (emphasis added). 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 of the Supreme Court 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 of the Supreme Court 610-11. And in a speech to the Massachusetts General Court, John Hancock rejected the notion 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 of the Supreme Court 416.

As the *Hall* dissenters emphasized, these objectors to *Chisholm*, and indeed all those who sought and obtained the Eleventh Amendment's passage, were not embracing the illogical proposition that Georgia *could not* be sued by Chisholm in *federal* court, but *could* be sued by Chisholm in South Carolina *state* court. "If the Framers were indeed concerned lest the States be haled before the federal courts … how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). After all, the federal courts were intended to be a neutral forum for interstate disputes. A State would surely *rather* be

tried in that neutral federal forum than before a partisan jury and judge in another State's courts. If the former was repugnant and profoundly shocking, the latter was wholly unthinkable. It would produce confrontations between States wholly incompatible with the basic design of the new Republic. The States that ratified the Eleventh Amendment would not have "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437 (Rehnquist, J., dissenting). To conclude otherwise "makes nonsense of the effort embodied in the Eleventh Amendment." *Id.* at 441.[10]

d. This Court's decisions predating *Hall* uniformly reflect the Framers' view that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers v. Arkansas*, 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." 61 U.S. (20 How.) 527, 529 (1857) (emphasis added). In *Cunningham v. Macon & B. R. 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.

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[10] It bears noting that this "nonsense" results under any reading of the Eleventh Amendment. Even under the narrowest view of the Amendment and the federal-court cases it eliminates—a view this Court has repeatedly rejected, *see*, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 67-70 (1996)—it makes no sense to conclude that the Eleventh Amendment rendered Georgia immune from suit in this Court, but fully subject to Chisholm's action in South Carolina state court.

1, 16 (1890) (same). 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 must be dismissed, since the Pennsylvania courts have "no power to bring other States before them." *Id.* at 80.

The States, too, recognized this same general principle. For example, in *Paulus v. South Dakota*, 227 N.W. 52 (1929), the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. It held that "so carefully have the sovereign prerogatives of a state been safeguarded in the Federal Constitution," 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. Similarly, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to simply entertain suits against sister States in its own courts. Instead, it enacted a statute permitting citizens to assign claims to it, which the State would then pursue in original actions before this Court. *See New Hampshire v. Louisiana*, 108 U.S. 76, 76-77 (1883).[11]

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[11] New Hampshire's attempted original action highlights the connection between such State-versus-State actions and citizen-versus-State actions. The unamended Constitution provided a neutral federal forum for both on the assumption that sovereign immunity precluded any other forum for either type of suit. The Eleventh Amendment eliminated a federal forum for the latter suits and thus foreclosed any forum for such suits. But the notion

Indeed, shortly after *Hall* was decided, state supreme courts expressed surprise at the decision. Barely one year after *Hall*, the New York Court of Appeals remarked 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. Univ. of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise observed, "For 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," based on the theory that "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); *see also Kent Cty. v. Shepherd*, 713 A.2d 290, 297 (Del. 1998) ("For 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.").[12]

3. *Hall* engaged with almost none of the foregoing history or precedent. *See* Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case*

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that a South Carolina citizen could sue Georgia in South Carolina court was, for the Framing generation, equally as absurd as the notion that the State of South Carolina could sue Georgia in South Carolina court.

[12] Before *Hall*, suits against States in sister States' courts were very infrequently maintained, but these "few suits" were predicated on "extant federal-court exceptions to state and federal governmental immunities," not a rejection of the general principle of interstate sovereign immunity. *See* Woolhandler, *supra*, at 276-82.

Study, 70 Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due."). Indeed, to the extent *Hall* addressed the historical record at all, it *conceded* that States could not be involuntarily haled into sister States' courts at the Framing. But the full historical record—which *Hall* ignored—establishes much more than that. It demonstrates the error of *Hall*'s casual premise that interstate sovereign immunity was "apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-19. And it shows that even if the need for express "constitutional protection" against States' being haled into other States' courts "was not discussed" extensively, *id.* at 419, that relative silence reflects the absurdity of a private citizen suit haling a sovereign State into the citizen's home state courts, as well as the obviousness that immunity from such suits was preserved and reinforced by the Constitution. The States' continued immunity from such suits was "too obvious to deserve mention." *Id.* at 431 (Blackmun, J., dissenting).

Furthermore, *Hall* simply declared—without any meaningful analysis—that neither Article III nor the Eleventh Amendment provides "any basis, explicit or implicit," for recognizing a constitutional principle of interstate sovereign immunity. 440 U.S. at 421. But *Hall* was plainly wrong on both counts. The debates over Article III proceeded on the fundamental premise that States could not and would not otherwise be haled into *any court* by a private citizen. And as Edmund Randolph remarked, the Constitution did not "narrow" the Framers' clearly held understanding of interstate sovereign immunity; it "confirm[ed]" it. Moreover, any remaining doubt is erased by the

reaction to *Chisholm* and the Eleventh Amendment. The notion that the Eleventh Amendment simply cleared the way for Chisholm to sue Georgia in the South Carolina courts is risible. When both dissenting opinions in *Hall* emphasized as much, the majority did not even try to muster a response.

Hall also failed to acknowledge, much less explain its departure from, numerous earlier Court decisions reflecting the longstanding premise that States' sovereign immunity protected them from suit in the courts of their sister States. That alone is a basis for rejecting its novel holding. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 232 (1995); *United States v. Dixon*, 509 U.S. 688, 704, 712 (1993). And the only state-court decision regarding interstate sovereign immunity that it discussed was *Paulus*, which *affirmed* the federal constitutional dimension of interstate sovereign immunity. *See Hall*, 440 U.S. at 417 n.13.

In short, *Hall*'s reasoning lacks the "'careful analysis'" that warrants application of *stare decisis*. *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)). Its sudden, spurious rejection of the firmly entrenched principle of interstate sovereign immunity—recognized before the Nation's independence, under the Articles of Confederation, during and following the ratification of the Constitution, and for almost 200 years afterward—was "'unsound in principle,'" *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783 (1992) (quoting *Garcia v. San Antonio Metro. Transit*

Auth., 469 U.S. 528, 546 (1985)), and does not merit this Court's reaffirmation.[13]

B. *Hall* Is Inconsistent With the Court's More Recent and Better Reasoned Sovereign Immunity Jurisprudence.

Hall is not only unpersuasive on its own terms; it also conflicts with this Court's subsequent, and better reasoned, sovereign immunity precedents. Indeed, "[t]he reasoning of the Court's more recent jurisprudence has rejected" almost every rationale on which *Hall* was based, fatally "undermin[ing] [its] doctrinal underpinnings." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (quotation marks omitted); *see also United States v. Gaudin,* 515 U.S. 506, 521 (1995); *South Carolina v. Baker*, 485 U.S. 505, 520 (1988); *United States v. Salvucci*, 448 U.S. 83, 88-89 (1980).

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[13] Several factors may have contributed to *Hall*'s less-than-robust reasoning. First, the California Supreme Court decision resulting in *Hall* rejected the State's claim of sovereign immunity on different grounds from those embraced in *Hall*. That court had relied on since-discarded waiver principles to conclude that Nevada had waived its sovereign immunity in California by "enter[ing] into activities in this state," and thus did not address the scope of the (waived) immunity. *Hall v. Univ. of Nevada*, 503 P.2d 1363, 1364 (Cal. 1972); n.15, *infra*. Second, before this Court, the *Hall* respondents largely advanced that same waiver argument and barely addressed the constitutional issues. *See* Br. of Resp'ts, *Hall*, 1978 WL 206995, at *15-16. 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." (quotation marks omitted)).

To begin with, *Hall* casually dismissed the Framing-era view of interstate sovereign immunity. It acknowledged that the Framers would have viewed the sovereign as immune from suits in other States, but accorded that critical fact no constitutional significance. Subsequent decisions, however, have explained that in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). States enjoy the sovereign immunity that they "enjoyed before the ratification of the Constitution … except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. And "the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (*FMC*); *see also N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 193 (2006); *Seminole Tribe*, 517 U.S. 44, 70 & n.12 (1996); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 780-82 (1991).

These principles apply with full force here and underscore *Hall*'s error. The historical record clearly demonstrates that States were not subject to involuntary suit in other States' courts either "at the time of the founding or for many years thereafter." *FMC*, 535 U.S. at 755. Before ratification, the States enjoyed sovereign immunity in each others' courts, and nothing in the "plan of the Convention" or subsequent amendments was inconsistent with that

rule; to the contrary, the plan of the Convention and the Eleventh Amendment both confirmed it. *Alden*, 527 U.S. at 713. If an independent nation had purported to open its courts to allow one of its citizens to sue an unconsenting foreign sovereign, it would have violated the law of nations and been a serious affront to the foreign sovereign, prompting diplomatic (if not military) countermeasures. The plan of the convention was to knit the States together into a single Republic in which States treated each other with the dignity befitting co-equal States, but not the diplomacy that dictates relationships between unrelated sovereigns. Preserving the pre-existing immunity of the States from suits in each others' courts avoids serious affronts to each others' sovereignty and guarantees that no sovereign State can be haled into any courts in the United States other than as expressly provided for in the Constitution.

Moreover, the notion that an individual could hale an unconsenting sister State into his home State's courts was indisputably "anomalous and unheard of" at the Framing. *FMC*, 535 U.S. at 755. Indeed, "no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity" they enjoyed in other States' courts. *Alden*, 527 U.S. at 741. To the contrary, proponents *and* opponents of the Constitution shared the contrary premise and disputed only whether such suits could proceed in the newly formed federal courts. And the Eleventh Amendment decisively answered that question and underscored that a private suit against an unconsenting State was an affront to state sovereignty *even if* the suit proceeded in a neutral federal forum. The States' immunity from suit in less

neutral courts of other sovereigns was "a principle so well established that no one conceived it would be altered by the new Constitution." *Id.* In short, history provides "no reason to believe" that the Framers "intended the Constitution to preserve a more restricted immunity" than that widely recognized before—and for almost 200 years after—the Constitution's ratification. *Id.* at 735.

Hall also refused to "infer[]" sovereign immunity "from the structure of our Constitution." 440 U.S. at 426. Subsequent decisions, by contrast, have repeatedly treated sovereign immunity as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford*, 501 U.S. at 779; *see also, e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (*VOPA*); *FMC*, 535 U.S. at 751-53; *Seminole Tribe*, 517 U.S. at 54. These decisions 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.'" *VOPA*, 131 S. Ct. at 1637-38 (quoting *Alden*, 527 U.S. at 713). *Hall* applied the opposite presumption. Rather than respecting sovereign immunity unless altered by the plan of the Convention, *Hall* treated sovereign immunity as sacrificed unless expressly preserved by the Constitution.

Relatedly, *Hall* effectively limited sovereign immunity to the words of Article III and the Eleventh Amendment. *See* 440 U.S. at 421, 424-27. Subsequent

decisions, though, have recognized that the Constitution implicitly protects principles of sovereign immunity that go beyond the literal text. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004); *FMC*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-29; *Seminole Tribe*, 517 U.S. at 54; *Blatchford*, 501 U.S. at 779. And, as noted, those decisions observe that the Constitution itself protects that immunity to the extent it is not inconsistent with the plan of the Convention. Thus the absence of express constitutional language speaking directly to interstate sovereign immunity does not, as *Hall* indicated, undermine the proposition that the Constitution shields the States in this regard.

And while the Constitution's text does not expressly mention sovereign immunity for suits like Hyatt's, both Article III and the Eleventh Amendment presume it. Article III's provision of a federal forum for suits between States and between a citizen and another State were both premised on the understanding that in the absence of a federal forum, such disputes could not be resolved through litigation. Rather than allow such disputes to fester, Article III provided a federal forum premised on the inability of such disputes to be litigated in state court against an unconsenting State. *Cf. Chisholm*, 2 U.S. (2 Dall.) at 468 (opinion of Cushing, J.). When the Eleventh Amendment withdrew a federal forum for disputes between citizens and other States, it reinforced that such disputes could not proceed *in any court*, even a neutral federal forum, indeed even in this Court. To construe the Eleventh Amendment as anything other than a recognition that Chisholm could sue Georgia in neither South Carolina court nor a federal court is not

just ahistorical, but absurd. As the *Hall* dissenters observed (without rebuttal), it would be utterly illogical for the States to have swiftly, and indignantly, eliminated a neutral federal forum for hearing such suits against them, but to have intended to leave themselves open to the same suits in the less-impartial forum of another State's courts. *See Hall*, 440 U.S. at 431 (Blackmun, J., dissenting); *id.* at 437 (Rehnquist, J., dissenting).

Finally, *Hall* acknowledged but essentially dismissed the significance of State sovereignty at the Framing. *See* 440 U.S. at 416-17. Later decisions, however, have emphasized the critical role of that sovereignty in upholding sovereign immunity. "Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.'" *Sossamon*, 131 S. Ct. at 1657 (quoting *FMC*, 535 U.S. at 751); *Blatchford*, 501 U.S. at 779. "Immunity from private suits has long been considered 'central to sovereign dignity.'" *Id.* (quoting *Alden*, 527 U.S. at 751); *see also Bay Mills*, 134 S. Ct. at 2039 ("Sovereignty implies immunity from lawsuits."). Sovereign immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Alden*, 527 U.S. at 713. Given the States' indisputable sovereignty at the time of ratification, they continue to enjoy the sovereign immunity accorded to such sovereigns, which includes immunity from suit in other States' courts.[14]

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[14] At the Framing, the States "did surrender a portion of their inherent immunity" by consenting to a small class of suits, like suits brought by sister States in this Court or suits by the federal government in the federal courts. *FMC*, 535 U.S. at 752 (citing

Indeed, following *Hall*, the Court has held that Indian tribes are generally immune from suits by individuals in State courts. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *cf. Bay Mills*, 134 S. Ct. at 2036-39 (reaffirming *Kiowa*). Accordingly, if a State and a tribe are involuntarily haled into a State court—a foreign jurisdiction for either party—the tribe has sovereign immunity, but the State does not. That is so even though tribes arguably possess *less* sovereignty than States. *See Bay Mills*, 134 S. Ct. at 2030-31 (noting the "qualified nature of Indian sovereignty"). It is "strikingly anomalous" that Indian tribes have "broader immunity than the States." *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). Yet that is the unavoidable result of *Hall*'s failure to recognize the significance of State sovereignty at the Framing when evaluating sovereign immunity, in contrast with later decisions of this Court.[15]

Alden, 527 U.S. at 755). But as explained, nothing in the "plan of the Convention" indicates consent to suits by individuals in other States' courts. *Alden*, 527 U.S. at 755.

[15] Notably, the California Supreme Court decision that led to *Hall* has also been overtaken by subsequent precedent. In rejecting Nevada's sovereign immunity in California courts, the California Supreme Court principally relied on *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964), and added that "in a society such as ours … the doctrine of sovereign immunity must be deemed suspect." *Hall*, 503 P.2d at 1364, 1366; *see also* n.13, *supra*. But this Court has since overruled *Parden*, *see College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999), and has repeatedly rejected the notion that sovereign immunity is a "suspect" doctrine.

In sum, while *Hall* was wrong the day it was decided, subsequent decisions have undermined every pillar on which the decision rested. *Hall* is simply incompatible with both the reasoning and results of this Court's later, sounder sovereign immunity decisions. Embodying "a significant change in, or subsequent development of, our constitutional law" respecting sovereign immunity, *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997), those decisions have established that States possess sovereign immunity from individual suits in federal court, *see Seminole Tribe*, 517 U.S. at 54, 57-60, federal administrative adjudications, *see FMC*, 535 U.S. at 747, and their own courts, *see Alden*, 527 U.S. at 712; and that even Indian tribes are immune from suits in State courts, *see Kiowa*, 523 U.S. at 753.

The notion that a nonconsenting sovereign State is immune from suit in its own courts, is generally immune from suit in a neutral federal forum, but can nonetheless be haled into the potentially hostile courts of another State, is an anomaly too odd to sustain.[16] It is no accident that while the Court failed to reach the issue in its decision, numerous Justices in the *Hyatt I* oral argument rightly called the rule of *Hall* "very odd" (Justice Kennedy), a "tremendous anomaly" (Justice Breyer), and, most colorfully, "totally out of whack with our constitutional structure" (Justice O'Connor). *See* J.A.181, 183, 188. Commentators have likewise noted *Hall*'s incompatibility with subsequent

[16] The related "removal anomaly" is on full display here: FTB removed this case to federal court, which remanded after Hyatt argued (correctly) that "the Eleventh Amendment forecloses federal district court jurisdiction." J.A.289, 293.

precedent. *See* Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts & The Federal System* 937 n.2 (6th ed. 2009) (noting the "difficulty of reconciling Hall's rationale with that of Alden v. Maine"); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037-38 n.110 (2000).[17] Thus while *Hall* was a novel decision when it first appeared, it is now a jurisprudential outlier that can be overruled without threatening other precedents of this Court.

C. *Hall* Is Unworkable in Practice, Demeans States' Dignity, and Creates Interstate Friction.

Hall has also proven both doctrinally and practically "unworkable." *Montejo*, 556 U.S. at 792 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2562-63 (2015); *Seminole Tribe*, 517 U.S. at 63; *Dixon*, 509 U.S. at 712. To begin with, *Hall* replaced the previous "rational jurisdictional structure," which recognized States' sovereign immunity from suit in other States' courts, with a doctrinal morass where "restraints on suits against states in other states' courts now largely depend on the forum state's decisions as to law and comity." Woolhandler, *supra*,

[17] Hyatt has tepidly suggested that this Court reaffirmed *Hall* in *Alden*. Br. in Opp. 21-22. But *Alden* resolved a different issue and expressly distinguished *Hall* without suggesting that *Hall* was correctly decided. *Alden*'s reasoning, moreover, echoes the *Hall* dissents, is irreconcilable with the *Hall* majority's view of the constitutional structure and Eleventh Amendment, and underscores *Hall*'s incompatibility with a whole host of sovereign immunity decisions that followed it.

at 286. As a result, 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 whatever immunities a State receives at one time says nothing about what immunities it may (or may not) receive on different claims, under different immunity provisions, or when different policies are invoked.

This case provides a perfect example. Here, the *same* Nevada statute both caps compensatory damages and prohibits punitive damages against state agencies. *See* Nev. Rev. Stat. §41.035(1). The Nevada Supreme Court applied the punitive damages prohibition to FTB—because "punitive damages would not be available against a Nevada government entity," Pet.App.65—but *refused* to apply the compensatory damages cap to FTB—because the State's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB" that protection. Pet.App.45. The first explanation, of course, is fully applicable to the compensatory damages cap; and depending on one's justification for punitive damages, the second explanation could apply to the punitive damages prohibition. The Nevada legislature made no distinction between the two, and the California legislature categorically barred suits of this type, but *Hall* leaves the contours of California's sovereign immunity to the policy whims of the Nevada courts. And not just Nevada's courts, because under *Hall*, California can be haled into state courts in 48 other States, each with its own provisions and policies.

This Court also need look no further than this case to appreciate *Hall*'s practical unworkability.

From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—and untold financial and administrative burdens.[18] Once the case finally reached trial, 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 over $490 million after costs and interest. Since trial, California has spent another seven years fighting that verdict, and it will face another trial on remand if this Court upholds *Hall*.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation going forward. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB); Complaint, *Satcher v. Cal. Franchise Tax Bd.*, No. 15-2-00390-1 (Wash. Super. Ct. filed June 17, 2015) (alleging fraud by FTB). These suits are highly regrettable yet, given *Hall*, entirely unsurprising. Sovereign governments undertake a number of sovereign responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions generally decline to waive their sovereign immunity over tax disputes. *See* Cal. Gov't Code §860.2; 28 U.S.C. §2860(c). 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

[18] The trial court docket alone contains almost *three thousand* entries.

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. What is more, an increasingly mobile citizenry creates ample opportunities for suits like this one. Indeed, 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." David M. Grant, *Moving From Gold to Silver: Becoming a Nevada Resident*, Nev. Law., Jan. 2015, at 22, 25 n.9.

This case thus perfectly encapsulates the dangers of exposing States to unconsented suits in other States. Hyatt's seventeen-year (and counting) suit in the Nevada courts has manifestly demeaned California's "dignity and respect," which sovereign immunity is "designed to protect." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997). And it will almost certainly force California to alter "'the course of [its] public policy and the administration of [its] public affairs'" when it comes to taxation, *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)), even though the "power to … enforce income tax laws" is an "essential attribute of sovereignty." *Hyatt I*, 538 U.S. at 498. After all, if California can be liable for fraud and intentional infliction of emotional distress for conduct arising out of tax audits, it will naturally scale back its auditing efforts in the future to avoid such liability, particularly for taxpayers who have purported to move to another jurisdiction whose courts will be open to suits against FTB. Moreover,

the constant threat of litigation and the inability to predict whether any particular sister State will confer immunities create an incentive for California to err on the side of underenforcement. In short, *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State when it comes to this core sovereign function. *Alden*, 527 U.S. at 750.

This suit also "threaten[s] the financial integrity of" California. *Id.*; *see also FMC*, 535 U.S. at 765 (observing that "state sovereign immunity serves the important function of shielding state treasuries"). The State has spent untold amounts of taxpayer money defending against Hyatt's suit, and that is before accounting for the damages awarded below and potentially to come. While the Nevada Supreme Court trimmed 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 750-51. And damages to the tune of $1 million and counting, which California must pay absent this Court's reversal, necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

In short, this case emphatically illustrates the "severe strains on our system of cooperative federalism" against which the *Hall* dissenters warned. *Hall*, 440 U.S. 429-30 (Blackmun, J., dissenting). If the Framers would have "reprehended the notion of a State's being haled before the courts of a sister State," *id.* at 431, a suit like this one would have left them aghast. This case firmly demonstrates the obvious

flaws of *Hall* and the virtues of applying the sovereign immunity principles this Court has repeatedly recognized both before and after *Hall*.

And while this egregious case has amply "'pointed up [*Hall*'s] shortcomings,'" *Citizens United*, 558 U.S. at 363 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)), 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 involuntarily haled into the *California* courts against its will. *See* Petition for Writ of Certiorari, *Nevada v. City & Cty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073), *cert. denied*, 135 S. Ct. 2937 (U.S. June 30, 2015). In that case, the plaintiff, a California municipality, has demanded monetary and equitable relief based on Nevada's policy of providing vouchers to indigent medical patients discharged from a State-run facility, who occasionally use them to travel to California. A decision in favor of the plaintiff—or even a settlement—will almost certainly require Nevada to pay out of the public fisc and to alter its State policy, both of which sovereign immunity is designed to prevent. More generally, the spectacle of two 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 429-30 (Blackmun, J.).

In his brief in opposition, Hyatt emphasized *Hall*'s belief that the "voluntary doctrine of comity" would prevent States from subjecting sister States to suit. Br. in Opp. 21-22 & n.7. But, as this case demonstrates, vague principles of comity are no

substitute for a simple rule that States are immune from suits in foreign jurisdictions unless and until the state legislature waives that immunity. That bright-line rules places responsibility for the metes and bounds of any waiver of sovereign immunity where it belongs—namely, in the same body that controls the public fisc—rather than in the hands of out-of-state judges wielding doctrines of comity.

D. No Other Interests Warrant *Hall*'s Preservation.

Stare decisis is "at its weakest" when the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235; *see also Seminole Tribe,* 517 U.S. at 63; *Gaudin*, 515 U.S. at 521; *Payne*, 501 U.S. at 828. And it has even further reduced force "'in the case of a procedural rule … which does not serve as a guide to lawful behavior,'" *Hohn v. United States*, 524 U.S. 236, 251-52 (1998) (quoting *Gaudin*, 515 U.S. at 521); *see also Payne*, 501 U.S. at 828; *Adarand*, 515 U.S. at 234, and where no "serious reliance interests are at stake," *Citizens United*, 558 U.S. at 365; *see also Johnson*, 135 S. Ct. at 2563; *Montejo*, 556 U.S. at 792.

These considerations all militate against preserving *Hall*, a constitutional decision regarding immunity, a matter that "does not alter primary conduct." *Hohn*, 524 U.S. at 252. And *Hall* has engendered no reliance interests, much less those the Court has deemed meaningful in this context. "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*, 558 U.S. at 365. Nor does application of sovereign immunity leave *Hyatt* without a remedy to challenge the underlying tax assessment. To the extent that he would be left without a tort remedy, that is because a sovereign State declined to waive its immunity for such suits. And if Hyatt was relying on a continuing anomaly that allowed a suit in Nevada court that could not proceed in a California court or even in a neutral federal forum after the Eleventh Amendment, then his reliance was plainly unreasonable.

* * *

This case has dragged on for seventeen years, imposing untold costs upon California even before accounting for the damages awarded below. And there is no end in sight unless this Court reaffirms or reestablishes key principles of sovereign immunity. The Court should recognize that *Hall* was incorrect when decided, conflicts with this Court's subsequent precedents, has created an unworkable regime exemplified by this case, and should be overruled.

CONCLUSION

The Court should reverse the decision below.

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