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 OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

This case directly impacts the interests of *amici* and their members. States, as well as their agencies and municipalities, are increasingly burdened by the threat of litigation for the various discretionary functions they exercise. In particular, the past few decades have seen a momentous rise in the need for States and municipalities to engage in interstate travel and commerce to fulfill these various roles, from contracting with out-of-state corporations for

road equipment to making taxation decisions in light of an increasingly mobile and global citizenry.

To protect against the increasing risk of litigation in this environment, States and municipalities have traditionally relied on governmental tort immunity, waiving such immunities only in limited instances. Principles of comity and sovereign respect have regularly supplanted where those traditional immunities lay bare before a foreign state tribunal.

This delicate framework has been upended, however, by the Nevada Supreme Court's decision to refuse to extend equal treatment to a foreign state agency subjected to litigation in a Nevada court. The court's refusal to extend even Nevada's own state immunities threatens core constitutional principles of equal protection and state sovereignty and threatens to saddle *amici* and their members with unpredictable and unsustainable litigation costs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Nevada Supreme Court's holding—that, in the context of litigation by a Nevada resident, the State of Nevada may purposely treat a California government agency worse than a similarly-situated Nevada government agency—offends a core structural principle of the Constitution: that the States enjoy *equal* sovereignty. That principle is grounded in the Full Faith and Credit Clause, and follows from the guarantees of equal protection in the Equal Protection and Privileges and Immunities Clauses of the Constitution.

The Nevada Supreme Court's decision violates that principle of equal sovereignty, and for a basic reason: Nevada may not purposely place California in a class

of litigants who must be treated worse than other, similarly-situated litigants. In sanctioning this State vs. State discrimination, the Nevada Supreme Court's decision flouts the constitutional provisions that undergird the equal state sovereignty principle. In particular, it violates the Full Faith and Credit Clause and tramples its closely-related concepts of interstate comity and cooperative federalism; and it violates the antidiscrimination principle rooted in the Equal Protection and Privileges and Immunities Clauses, *i.e.*, that equal state sovereignty prohibits States from intentionally discriminating against certain classes of litigants, particularly when those litigants are their sister States.

These constitutional problems are amplified by the many practical burdens that the Nevada Supreme Court's ruling imposes on local governments: by opening the gates to continuous litigation about government policy decisions, the lower court's ruling virtually guarantees obstruction of the smooth functioning of State and local government; it creates a constitutionally-sanctioned incentive for plaintiffs to forum shop for favorable jurisdictions; it imposes litigation risks on State and local governments that are difficult to manage and unpredictable; and it ensures that those governments face substantial costs in having to defend against even a few of these types of suits, quickly burning through public dollars.

Rather than carve exemptions into the Constitution's antidiscrimination protections and impose potentially existential costs on State and local governments, this Court should reverse the ruling of the Nevada Supreme Court and hold that Nevada may not withhold, in a disparate manner, its statutory damages cap from a California agency sued in a Nevada court.

ARGUMENT

I. THE PRINCIPLE OF EQUAL STATE SOVEREIGNTY PRECLUDES ONE STATE FROM DISCRIMINATING AGAINST ANOTHER IN THE MANNER PRESENTED IN THIS CASE.

This case presents a relatively straightforward question of disparate treatment, albeit in an atypical context: may a State withhold from one litigant a protection that all other similarly-situated litigants enjoy in the courts of that State?

The answer is and must be "no" under a long line of rulings from this Court addressing the rights and immunities that must be afforded litigants under the Constitution. The Nevada Supreme Court nevertheless answered "yes" in this case, holding that the State of Nevada may deny to a California agency the protection of a statutory damages cap that a similarly-situated Nevada agency would be entitled to claim. The rationale the court gave for this extraordinary ruling is nothing more than bare-knuckled discrimination: because the defendant in this case is a *California* government entity, it is not entitled to the protections that the same entity would receive if it were a creature of the *Nevada* bureaucracy. That ruling is wrong and this Court should correct it by holding that Nevada may not withhold from its sister States—either by effect or by design—legal protections that Nevada itself enjoys when sued in a Nevada court.

A. The Full Faith And Credit Clause, Reinforced By Principles Of Comity And Cooperative Federalism, Requires States To Grant The Same Rights And Immunities To Sister State Agencies And Municipalities As Its Own.

The constitutional principle of full faith and credit demands that the States respect not only the judgments of other States but also their status as co-equals in a nation of individual sovereigns. Similarly, States must also grant the same rights and immunities to other State agencies and subdivisions as enjoyed by the forum state in its own courts. This principle is backed by the language of the Full Faith and Credit Clause and reinforced by principles of comity and federalism. The Nevada Supreme Court flouted this principle by holding that a California agency is not entitled to the protection of a Nevada statutory damages cap when sued in Nevada court.

1. To begin, the Full Faith and Credit Clause of the Constitution mandates that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. Centrally, this Clause requires the States to afford equal recognition to judgments rendered in other States. In this respect, "the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

Though a State is not bound to apply other States' statutes in the same manner, it *must* provide equal recognition to other States' judgments, even if they

are founded on statutory immunities that the State would otherwise not apply in its own courts. See *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943). By requiring states to recognize each others' judgments, the framers "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others . . . ." *Id*.

The Full Faith and Credit Clause also requires the States to respect each others' status as co-equal sovereigns. See *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 499 (2003). Indeed, this Court explained that "States' sovereignty interests are not foreign to the full faith and credit command." *Id*. As a State considers the sovereignty interests of other States, it is of course not required to afford other States or municipalities *greater* protections than it would to itself. However, a State runs afoul of the Full Faith and Credit Clause where it offers *lesser* protections to sister States and municipalities than those enjoyed by the forum State's own government. Doing so "exhibit[s] a 'policy of hostility to the public Acts' of a sister State," particularly where the issue of governmental immunities is concerned. See *id.* (quoting *Carroll* v. *Lanza*, 349 U.S. 408, 413 (1955)).

2. In *Hyatt I*, this Court previously considered the contours of the Full Faith and Credit Clause and the extent to which Nevada was required to extend California's immunities to a California agency. 538 U.S. at 494. The Court ultimately concluded that Nevada was not required to apply California's statutory immunities, as "the Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing

with a subject matter concerning which it is competent to legislate.'" *Id.* at 494 (quoting *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722 (1988)).

This Court's ruling was premised on a key observation—that the Nevada Supreme Court had exhibited no "policy of hostility" toward the public acts of California in its decision, instead "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis" and "sensitively appl[ying] principles of comity with a healthy regard for California's sovereign status." *Id.* at 499. Indeed, in fulfilling the demands of the Full Faith and Credit Clause, the Nevada Supreme Court had extended the *same* immunity to the California agency as applied to Nevada agencies. And it had reviewed the sovereign immunity statutes of both States, considering also California's sovereignty concerns in deciding whether to grant immunity as a matter of comity.

In the instant case, this Court is asked to resolve a related question, at the other end of the spectrum—not whether Nevada must extend *California's* state immunities (which are decidedly more protective), but rather whether Nevada may refuse to extend its *own*, less-protective immunities to foreign state agencies haled into its courts. In refusing to extend its own immunities to a California agency, the Nevada Supreme Court departed from its previous approach, failing to recognize California's status as a co-equal sovereign and declining to use its own immunity as a "benchmark for its analysis."

While the lower court acknowledged in passing the need for comity, it then disregarded that principle entirely. In particular, the Nevada Supreme Court's approach openly exhibited hostility towards California's public acts. Whereas in *Hyatt I* the

Nevada Supreme Court at least *considered* California's immunities, ultimately applying its own as a "benchmark for its analysis," in the instant case the Nevada Supreme Court disregarded Nevada immunities altogether, refusing to extend the same $25,000 cap on damages enjoyed by Nevada's own agencies.

The Nevada Supreme Court's approach also violates the command of the Full Faith and Credit Clause to respect the status of other States and their agencies as co-equal sovereigns. In its decision, the Nevada Supreme Court stated that its policy of "providing adequate redress to Nevada citizens" was paramount and that this interest overrode its interest in extending the state's cap on damages as a matter of comity. Pet. App. 45. The need to "provid[e] adequate redress" is, of course, a policy interest for every state, including Nevada. But the Nevada legislature already addressed this concern by waiving its immunity from suit in the case of intentional torts, subject to a $25,000 cap on damages. By disregarding these limits in instances where suit is brought against another State or agency, the Nevada Supreme Court openly disregarded the sovereignty concerns of other States, like California, who have likewise addressed the issue of immunity through their own statutory scheme.

The Nevada Supreme Court was bound to extend the same treatment to California agencies as enjoyed by Nevada agencies in Nevada courts. Had it provided this same treatment, the Petitioner would be subject to, at most, a damages cap of $25,000 for intentional torts. Accordingly, this Court should reverse the Nevada Supreme Court's decision and hold that States must extend the same rights and

immunities to sister States and agencies that the forum States themselves enjoy in their own courts.

B. Principles Of Equal State Sovereignty And Interstate Antidiscrimination Require Equal Treatment For Sovereign States And Municipalities Facing Suit In A Sister State.

The Full Faith and Credit Clause creates a constitutional structure of equal state sovereignty, see *supra*; that structure is reinforced and informed by the antidiscrimination principles underlying the Equal Protection and Privileges and Immunities Clauses. See U.S. Const., amend. XIV, § 1; U.S. Const., art. IV, § 2. The synergy between these three constitutional provisions explains, in part, why interstate comity, a principle that sounds in full faith and credit, is violated when States discriminate by affording lesser protections to other States and municipalities. *E.g.*, *Milwaukee Cty.* v. *M.E. White Co.*, 296 U.S. 268, 272 (1935); *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981).

The Equal Protection and Privileges and Immunities Clauses are well-established in this Court's jurisprudence. The former generally requires that government classifications be supported by a rational basis, *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), while the latter asks whether a State's discriminatory conduct is related to a "legitimate interest." *Saenz* v. *Roe*, 526 U.S. 489, 507 (1999).

Thus, absent a valid justification, Nevada may not create disparate classes of litigants by singling out certain individuals and entities for lesser protection in Nevada courts. Such conduct offends the

fundamental "principle that all States enjoy equal sovereignty." *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). This Court should reaffirm the principle of equal state sovereignty, as informed by these interlocking constitutional provisions, and reverse the ruling of the Nevada Supreme Court.

That ruling violated the antidiscrimination principle when it ruled that the defendant California agency—*because* it is a California entity—is not entitled to the benefit of a Nevada statutory damages cap. Whatever debate may be had about the extent to which one State may be sued in the courts of another State, and to what degree they are required to enforce judgments secured in other States, it is a fundamental precept of the Constitution that a State may not deny to one litigant the equal protection of its own laws. Yet that is precisely what Nevada has done here.

The Nevada Supreme Court attempted to justify its decision on grounds of political accountability, explaining that—in its view—because a Nevada resident injured by a California agency cannot hold that agency accountable through the political process, withholding the Nevada statutory damages cap for this particular litigant is an appropriate substitute.

But the defendant's status as a non-Nevadan government entity does not make it less deserving of equal protection. Indeed, the opposite is true: States, due to their sovereign status, are owed "special solicitude" in litigation, *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007), and must as a result *at the least* be accorded the same rights and immunities as similarly-situated litigants. The Nevada Supreme Court's holding that a California government entity should be treated worse than a similarly-situated Nevada entity sued in a Nevada court flies in the face

of this principle, as well as the constitutional precept that the Republic "is a union of states, *equal* in power, dignity, and authority," *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911) (emphasis added).

The requirement of equality amongst the States has been highlighted most often in cases involving the States' relationship with the federal government. *Shelby Cty.*, 133 S. Ct. at 2623–24. This concept is clearly not, however, relevant only in this context. The principle of equality of sovereign status necessarily encompasses a requirement that the States and their localities respect *one another's* equal sovereignty. That equality can constrain a State's sovereignty is not a novel idea: the guarantee of equal treatment have been recognized to, for example, forbid States from discriminating in favor of their own residents by burdening the residents of another State. *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869, 878 (1985). In other words, the Constitution already recognizes a limit, grounded in antidiscrimination, that prohibits each State from exercising its sovereign power in a way that would upset the system of equal state sovereignty.

What this case demonstrates is that protection of the States' equal sovereignty must incorporate a principle of interstate equality, and concomitantly, a prohibition on interstate discrimination. That makes sense. A constitutional structure that protects the equality of the States' sovereign status *only* vis-à-vis the federal government would render the principle of equal state sovereignty meaningless: it would effectively collapse it into federalism.

But the concepts are distinct. The rationale that underlies the requirement of interstate equality is not federalism, but rather preservation of "the harmonious operation of the scheme upon which the

Republic was organized," *Shelby Cty.*, 133 S. Ct. at 2623 (quoting *Coyle*, 221 U.S. at 580). Given that rationale, it would make little sense to guard vigorously against the federal government's disparate treatment of the States, but turn a blind eye to the same type of conduct perpetrated *by* the States (or their localities) against one another. Both are capable threats to the "harmonious operation" of the Republic's structure of government, and both offend the premise that the States enjoy equal sovereignty. Both are, therefore, deserving of this Court's scrutiny.

This Court has previously recognized the threat interstate discrimination poses to the harmonious operation of the Republic. It held in *Saenz*, 526 U.S. at 500–07, for example, that a State may not withhold benefits to individuals who relocate to that State simply because those individuals were previously residents of another State that did not offer the same generous benefits. While that decision cited the constitutional right to travel amongst the States, *id.* at 500–01, it was premised on the underlying principle that a State may not discriminate against a class of litigants merely because they hale from a different State. Without that guarantee of equality of privilege, "the Republic would have constituted little more than a league of states" and "would not have constituted the Union which now exists[.]" *Id.* at 502 (quoting *Paul* v. *Virginia*, 8 Wall. 168, 180 (1868)).

The Nevada Supreme Court's decision rebuked all this. Its ruling that a California agency is not entitled to the protection of a Nevada statutory damages cap that a Nevada agency would be entitled to in the same circumstances violates the principle of interstate equality. Pet. App 40-45. It places

California's sovereign status at a lower place relative to Nevada. That "departure from the fundamental principle of equal sovereignty requires a showing that" a State's disparate treatment of another State is sufficiently related to its legitimate justification. *Nw. Austin Mun. Util. Dist.* v. *Holder*, 557 U.S. 193, 203 (2009).

The Nevada Supreme Court's analysis fails this test. It ruled that a California agency should be exposed to greater liability than a similarly-situated Nevada entity because (1) a Nevadan has an interest in obtaining redress when injured, and (2) that redress interest is appropriately satisfied through lifting the damages cap because a Nevada resident cannot use the California political process to hold the California agency accountable. Pet. App. 41-45.

That proffered justification is illegitimate. It presumes that it is Nevada's responsibility to enhance its citizens' ability to sue foreign agencies and municipalities, but that interest is nothing more than dressed-up hostility towards another State. If Nevada were truly interested in providing complete compensation to Nevadans wronged by government conduct, then it would waive its own sovereign immunity in every case and lift the damages cap completely, including for Nevada government agencies. If, alternatively, Nevada is particularly concerned with providing to its residents injured by another State an adequate substitute for political accountability, it may negotiate with California an agreement to resolve these types of disputes or create a reciprocal arrangement whereby residents of each State are entitled to certain protections or a dispute resolution process.

But making the stakes limitless for a California tax agency sued by a Nevada resident in a Nevada court

with a Nevada judge presiding and a Nevada jury deciding the damages number is not about redress or political accountability. Stripped down to its true form, the Nevada Supreme Court's supposed interest in redress for its citizens is actually just an interest in helping Nevadans claw as much money as possible from a (likely unpopular) California tax agency. That is patently insufficient for purposes of constitutional review.

The other component of the Nevada Supreme Court's analysis—that the absence of recourse to the political process necessitates no cap on damages—is an ill-fitting means for an illegitimate end. As an initial matter, the irony of this logic is palpable: If a Nevadan should be entitled to limitless damages against California because he or she does not have recourse to the California political process, then California should similarly have some protections as a defendant in Nevada given that it similarly has no constituency in the Nevada political process. At minimum, the Nevada Supreme Court should not be able to blow a specially-created California-sized hole in its immunity provisions merely because California is a foreign state with no voice in Nevada's political process.

In any event, even assuming that Nevada has a valid interest in "redress," the question in this case is not whether Nevada residents should have a method of obtaining redress when they are injured by another State's government agency. Rather, the question is whether *limitless* damages—stretching, as in this case, into the millions of dollars—bears a substantial relationship to Nevada's proffered goal of providing a method of redress for its residents injured by an out-of-state agency or locality. The answer to that is obviously "no." Limitless damages is a wildly

overbroad solution to the (minor) issue of what a Nevada resident may do to hold a California agency accountable for alleged misconduct.

* * *

The Full Faith and Credit Clause requires equal state sovereignty, *i.e.*, States must grant to their sister States and municipalities the rights and immunities they would enjoy in the same circumstance. That premise is built upon the closely-related principles of comity and cooperative federalism, and it is reinforced by the antidiscrimination principle embedded within the Equal Protection and Privileges and Immunities Clauses. The Nevada Supreme Court's decision eschews equal state sovereignty and interstate antidiscrimination in favor of a type of immunity protectionism. Its decision should be reversed and this Court should instead hold that the principle of equal state sovereignty requires that Nevada treat the agencies of its sister States in the same manner as it would treat itself in the same situation.

II. FAILING TO EXTEND EQUAL TREATMENT TO SISTER STATES AND MUNICIPALITIES UNDERMINES THE EFFECTIVE FUNCTIONING OF GOVERNMENT.

The ruling below not only deviates from well-settled constitutional doctrine, it also poses a serious threat to the functioning of State and local governments. Where basic immunities are not afforded—particularly to municipalities—the effects can be immediate and destructive.

The possibility of another State court having jurisdiction to decide lawsuits involving foreign States and local governments isn't theoretical. As most States share a number of borders with other

States and numerous cities large and small are located on these borders, it is all but inevitable that a State or local government will be sued in another State for an incident taking place within that other State's borders. For example, the Arkansas police officers in *Plumhoff* v. *Rickard*, decided just two terms ago, were sued in Tennessee for a shooting that took place in Tennessee after officers were led on a high speed chase that crossed state lines. 134 S. Ct. 2012 (2014).

Where immunities are not afforded in this environment to foreign States and local governments, serious problems result. *First,* the Nevada Supreme Court's approach encourages forum shopping. It invites litigants—including plaintiffs from outside the State—to bring to their courts all lawsuits against out-of-state government litigants. A plaintiff who could conceivably bring his or her suit in a court that will sidestep immunities or damages caps has no incentive *not* to pursue litigation in that court, particularly where the court has signaled its willingness to suspend the standard rules of litigating against the governments of other States.

That is indeed exactly what occurred here. The plaintiff in this case sued a California entity in Nevada because courts in California would not have afforded him damages, and certainly not on the scale he obtained from litigating in Nevada. Similar forum shopping is easy to foresee in instances where plaintiffs ostensibly have the choice of dozens of jurisdictions in which to bring suit. See *Comptroller of Treasury of Md.* v. *Wynne,* 135 S. Ct. 1787 (2015) (taxpayer claiming credit for taxes paid in 39 states).

This approach, if approved by this Court, may trigger a race-to-the-bottom among States and courts across the Nation. States may be induced to adopt—

perhaps even by legislation—rules mandating disparate treatment of out-of-state agencies. There is no "California tax agency" constituency in Nevada. It is therefore conceivable that Nevada might, for instance, enact a statute compelling courts within Nevada to deny out-of-state agencies (or even other state citizens) the rights and privileges accorded to agencies of Nevada. That result would seem to clearly conflict with this Court's case law, but it is no different in practical impact than what the Nevada Supreme Court achieved through its ruling.

The inevitable result would be that one State or a few will become havens for litigation against State and local governments across the country. Indeed, if such a haven State exists, then a citizen of another State may be induced to bring suit against an agency of *his or her own* State in that other State if the citizen can thereby evade immunity or other restrictions. Beyond the flagrant violation of state sovereignty this would represent, it would render States and localities effectively unable to protect or administer their own interests, as they would potentially always be subject to suit in another State regardless of the rights and immunities conferred by their own statutes.

Second, a lack of equal treatment creates unpredictable risks of liability in other jurisdictions. Under the approach established by the Nevada Supreme Court, States and municipalities now have to anticipate the potential imposition of limitless damage caps, whereas States have routinely relied on governmental immunity statutes that protect the public fisc except in very limited circumstances of waiver. Indeed, even if a locality canvassed the country to ascertain the immunities and privileges that each State accords to its agencies and localities

(an enormous and likely unachievable enterprise), that body could still not be sure of its potential liability, as those other courts could in any decision–perhaps for any reason—deny immunity to that body.

This not only raises uncertainty, but could have immediate and concrete impacts on annual budgeting, future investments and planning, and insurance rates. Some agencies and localities may simply decline to take action, particularly if it would involve or impact a party who is from another State or if the affected party threatens litigation. Such baseless threats of litigation—which previously might have been properly ignored by an agency—may now be effective to preclude action.

Third, the resources required to defend against suits across various States could and likely would be exorbitant, and may even impede the effective functioning of government. These effects would be felt most acutely by municipal governments, where the cost to defend against suit in a foreign state alone poses an existential threat. Even the Nevada Supreme Court has recognized the potentially ruinous effects where no damages caps are imposed. *Cty. of Clark ex rel. Univ. Med. Ctr.* v. *Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (recognizing the "massive and deleterious effect upon state and local treasuries" were statutory damage caps to be expanded).

Aside from the potential cost of the judgment itself, these kinds of suits are by their very nature more expensive to defend, as they will proceed in the courts of another State. A California agency might, for example, be haled into a Rhode Island court—with no means to avoid the attendant expenses without exposing itself to an unfavorable judgment. In addition to the high costs associated with defending such suits, both in terms of travel expenses and lost

work, it could exponentially increase settlement pressures. The operation of State and municipal governments will be impeded in the process, as resources will be diverted away from basic services to settlement and litigation expenses.

* * *

Where basic immunities are not afforded, the functioning of State and local governments is placed in serious peril, as forum shopping would increase, the risks of litigation would become unpredictable, and the costs required to defend against these suits would become unsustainable. Accordingly, this Court should reverse the decision of the Nevada Supreme Court.

CONCLUSION

For the foregoing reasons, the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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