recognized legislative authority within our federal system. *See Bonaparte v. Tax Court*, 104 U.S. 592 (1881). Here, Nevada has decided that the interests in compensating injured tort victims and deterring intentional wrongdoing outweigh the benefits of providing immunity to state agencies, yet the proposed "new rule" would force Nevada to make the opposite choice, simply because California (the defendant in its courts) has done so. This preemption of Nevada law is directly contrary to the basic allocation of lawmaking authority among the several States. *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982) ("having the power to make decisions and to set policy is what gives the State its sovereign nature").

Nothing in the history of the Full Faith and Credit Clause requires this anomalous result. The relevant debates show that the Framers, in providing for full faith and credit, were primarily concerned with the subject of inter-State respect for *judgments* —where the force of the Clause is considerably greater, *see Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998)—and the brief discussion regarding other States' *laws* was largely addressed to the issue of congressional power to declare their "effect." This lack of scrutiny to state laws was reinforced by the fact that Congress subsequently enacted legislation specifying the effect of judgments, but not of "public Acts." Similarly, the decisions of this Court, while not always charting a straight path, have now established that the Clause does not strip States of the fundamental authority to apply their own law regarding matters about which they are competent to legislate.

The "new rule" would also raise largely unanswerable questions about interpretation and application. These problems start with the very premise of the rule: although the Board asks this Court to declare that the interest in legislatively conferred sovereign immunity for one State always outweighs another State's interest in protecting its citizens, it offers no judicially cognizable basis for making that constitutional value judgment.

Furthermore, the rule would require essentially standardless determinations about what are "core sovereign responsibilities"—the Board itself admits that "there is no clear definition of what constitutes a core sovereign responsibility" (FTB Br. 32)—and what might "interfere" with a State's "capacity to fulfill" them. To apply the proposed rule would thus lead to just the sort of subjective, unguided decisions that led this Court to abandon the now-discredited "balancing test" in full faith and credit analysis.

It is not apparent, in fact, how the rule would be applied even in this case. Although the Board claims that it needs immunity in order to conduct its tax collection activities, it must acknowledge that, despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California. Furthermore, the Nevada Supreme Court has already allowed the Board to assert immunity under California law for negligence and for any good-faith discretionary actions, which would appear to protect virtually all legitimate forms of investigation and enforcement. Other States are able to operate their tax systems without full immunity, and it appears that California itself permits some damage actions against the State for misconduct by its tax officials. *See* Cal. Government Code § 21021. Taking all this into account, it seems implausible for the Board to insist that immunity for intentional torts is critical to effective operation of the California tax system.

Finally, the "new rule" is unnecessary. Principles of comity have long protected States in the courts of other States, and they have continued to do so following the decision in *Nevada v. Hall*. State courts, in fact, have often done what the Nevada courts did here: they have assessed defendant States' claims of sovereign immunity by reference to the immunity of their own States, thereby treating defendant States as co-equal parts of "our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n. 24. Furthermore, if need be, States can obtain additional protection through agreements among

themselves or through legislation by Congress, which retains its express authority to legislate regarding the effect of "public Acts" under the Full Faith and Credit Clause.

III. The Court should reject the invitation of *amici curiae* Florida *et al.* to revisit that part of *Nevada v. Hall* holding that States lack sovereign immunity as of right in the courts of other States. In pressing this question, *amici* seek to raise an issue that is not within the Question Presented in the petition. *See* Pet. i. Rule 14.1(a) of the Rules of this Court precludes consideration of issues not encompassed in the Question Presented except in "the most exceptional cases." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (internal quotation marks omitted). This is not such a case.

Amici also have failed to demonstrate a good reason to depart from governing principles of *stare decisis*. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Although their entire argument rests upon historical evidence that States accorded immunity to other States at the time of the Convention, this Court has already expressly recognized that fact in *Nevada v. Hall*. The Court also recognized, however, that the States granted this immunity as a matter of comity, not as a matter of absolute right, a fact that *amici* never successfully overcome. And, while *amici* seek to rely on the decision in *Alden v. Maine*, 527 U.S. 706 (1999), the Court in *Alden* explicitly acknowledged the difference between immunity in a sovereign's own courts and immunity in the courts of another sovereign, pointing out that the latter case "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738 (quoting *Hall*, 440 U.S. at 416). The Court then reiterated: "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another . . . ." *Id.* at 738.

ARGUMENT

The Full Faith and Credit Clause does not require the Nevada courts to apply California law (here, its statutory defense of sovereign immunity) to intentional torts committed by California officials to harm a Nevada citizen in Nevada. Although the Clause provides "modest restrictions on the application of forum law," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), this Court has made clear that a State need not subordinate its own law with respect to matters about which it is "competent to legislate." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)). That test is readily satisfied here. The State of Nevada is fully competent to legislate regarding deliberate tortious acts that are intended to, and do, injure its citizens within its borders.

The Board does not actually take issue with this basic conclusion. Its sole argument is that this Court should announce a "new rule" under the Full Faith and Credit Clause barring application of forum law—even law that is unquestionably within the legislative jurisdiction of the forum State—"to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities." FTB Br. at 13. But this "new rule" finds no basis in the history of the Full Faith and Credit Clause or in the precedent of this Court. Furthermore, in urging the creation of a novel constitutionally binding rule, the Board takes no account of the substantial protection already afforded to State defendants by the willingness of forum States to treat sister States as equal sovereigns, or of the opportunity for States to gain additional protection either through agreements among themselves or through action by Congress, which is given explicit authority to legislate under the Full Faith and Credit Clause. The "new rule" is thus both unsupported and unnecessary.

I. THE DECISION OF THE NEVADA SUPREME COURT NOT TO APPLY CALIFORNIA IMMUNITY LAW TO THE INTENTIONAL TORT CLAIMS IS PLAINLY CONSTITUTIONAL UNDER ESTABLISHED FULL FAITH AND CREDIT PRINCIPLES.

A. The Full Faith And Credit Clause Allows A State To Apply Its Own Law To A Subject Matter About Which It Is Competent To Legislate

Although the Board rests its entire argument on the Full Faith and Credit Clause, it never acknowledges, much less quotes, the governing full faith and credit standard applied by this Court. Just a few Terms ago, however, this Court reiterated what it has long held: that "[t]he 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.'" *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Pacific Employers*, 306 U.S. at 501); *see Sun Oil*, 486 U.S. at 722 (same). This standard makes clear that, while a forum State may not constitutionally apply its substantive law to matters with which it has only a marginal or inconsequential connection, *see Phillips Petroleum*, 472 U.S. at 818-19, it is free to protect its sovereign interests by applying its law to those matters over which it has legitimate substantive lawmaking authority.

This focus on legislative competence rests upon the recognition of two important principles. The first principle is that, upon formation of the National Government, the States retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist, No. 39, at 245 (J. Madison)). *See Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *Parker v. Brown*, 317 U.S. 341, 359-60 (1943); *Skiriotes v. Florida*, 313 U.S. 69 (1941). As this Court has recently noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at

713 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. The Tenth Amendment expressly sets forth that understanding, declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amdt 10. "'These powers . . . remain after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001) (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)).

The second principle is that the States are, in considerable part, defined by their territorial limits. "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1869). For the most part, "the jurisdiction of a state is co-extensive with its territory, co-extensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotation marks omitted). The sovereignty retained by the States thus leaves them with broad powers to govern with respect to persons and events within those territorial limits. *See Printz*, 521 U.S. at 920 ("[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens").

These principles have important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory . . . ." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860); *see also Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (recognizing

"autonomy of the individual States within their respective spheres"). Conversely, the Court has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). As we discuss later in greater detail, the Full Faith and Credit Clause was not meant to, and did not, change this basic division of lawmaking authority among the States. *See* pages 23-29 *infra*. Thus, as this Court has stated, "[f]ull faith and credit does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers*, 306 U.S. at 504-05; *see Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

These principles, taken together, establish that a State has no obligation to subordinate its legitimate interests to the contrary policies of another State. Although a State should always seek to minimize conflicts with the legal rules of another State, and must defer when its own substantive interests are not genuinely implicated, *see Phillips Petroleum*, 472 U.S. at 818, the Full Faith and Credit Clause does not compel one State to favor the interests of another State over its own interests. *See Sun Oil*, 486 U.S. at 727 (noting that "the forum State and other interested States" should have "the legislative jurisdiction to which they are entitled"). Indeed, the contrary rule, as Chief Justice Stone once observed, "would lead to the absurd result that, whenever the conflict [between the laws of two States] arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). The Court has thus declared that "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. 408, 412 (1955).

The Court has held to these fundamental principles even when the "conflicting and opposed policy" is one that provides sovereign immunity to a defendant State. *See Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* reiterated 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." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of partial sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld the right of California to choose its own law, noting that California had a "substantial" interest in granting relief to persons injured within its borders. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").[4]

B. Nevada Is Competent To Legislate To Redress Harms Inflicted On A Nevada Resident In Nevada.

The central full faith and credit question, then, is whether Nevada was "competent to legislate" regarding the torts that are the subject matter of this lawsuit. To answer that question, it is

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[4] The Court in *Hall* noted that the application of California law "pose[d] no substantial threat to our constitutional system of cooperative federalism" and "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," 440 U.S. at 424 n.24, adding that it "ha[d] no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.* Although the Board attempts to turn this footnote into a new constitutional restriction on the application of forum-state law, its argument is, as we later discuss, ungrounded in either the relevant history or precedent. *See* pages 21-41 *infra*.

necessary to look at the relationship between Nevada and the "persons and events," *Carroll v. Lanza*, 349 U.S. at 412, that are the basis of the several tort claims. At a minimum, "'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)). Those contacts and interests are clearly present in this case.

To start with, and most basically, Nevada is the state in which the plaintiff suffered his injuries. Although the Board has claimed (wrongly) that respondent moved to Nevada after the date that he declared for tax purposes, even the Board cannot dispute that respondent was living in Nevada several years later—at the time of the tortious acts that caused the injuries—and that, indeed, respondent has been living there ever since. This Court has frequently noted the strong legislative interest possessed by a forum State that is also the site of the injury to be redressed. *See Carroll v. Lanza*, 349 U.S. at 413 ("[t]he State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987); *Pacific Employers*, 306 U.S. at 503; *Hall*, 440 U.S. at 423. Pointing out the "constitutional authority of [a] state to legislate for the bodily safety and economic protection of employees injured within it," *Pacific Employers*, 306 U.S. at 503, the Court has observed: "Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Id.*

This viewpoint is anything but novel or unusual. In tort cases, like this one, traditional conflict-of-laws principles have long placed special emphasis on the law of the place of injury. *See* McDougal, American Conflicts Law § 121 at 449-51 (5th

ed. 2001); Restatement of Conflict of Laws § 377-383 (1934). Chief Judge Posner has recently made the same point, remarking that "[u]nder the *ancien regime* of conflict of laws . . . [t]he rule was simple: the law applicable to a tort suit was the law of the place where the tort occurred, more precisely the place where the last act, namely the plaintiff's injury, necessary to make the defendant's careless or otherwise wrongful behavior actually tortious, occurred." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844 (7th Cir. 1999). More modern conflict-of-laws rules likewise give great, if not decisive weight, to the place of injury. *See* McDougal, American Conflicts Law §§ 124-125; Restatement (Second) of Conflict of Laws §§ 145, 146-47, 156-60, 162, 164-66 (1971).

The interest possessed by Nevada as the place of injury is reinforced by the fact that plaintiff was (and is) a Nevada citizen. While residence of the plaintiff is not a necessary point of contact, nor perhaps a sufficient one, *see Allstate Ins.*, 449 U.S. at 318-20 (plurality opinion); *id.* at 331 (Stevens, J., concurring in judgment); *id.* at 337 (Powell, J., dissenting), the connection between the State and its citizens does give Nevada an additional interest in assuring compensation whenever those citizens are injured. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens"). Of course, Nevada has a significant legislative interest in the physical and economic well-being of all persons within its borders, and a sovereign right and duty to protect them, but those concerns are stronger still when the injured party is a Nevada citizen *at the time of injury*, and thus more likely to remain in the State afterwards. Furthermore, insofar as the Board may be consciously singling out and targeting Nevada citizens, *see* page 3 *supra*, the State has an obvious interest in taking appropriate measures to assure their freedom from tortious harassment.

These contacts, by themselves, give Nevada a constitutional basis for applying its own law to the torts committed against respondent there. But, in addition, Nevada has significant contacts with the defendant and with its particular acts of misconduct. Although the Board argues as if its actions were only peripherally connected to Nevada, *see* FTB Br. 33-34 n.16, the evidence demonstrates that the Board deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there. *See* pages 2-5 *supra*. Thus, the Board, through its officials, engaged in bad-faith conduct seeking to exact revenues from a particular taxpayer who, it knew, was living in Nevada at the time, repeatedly disclosing confidential information to third parties within and without Nevada. Furthermore, at least one Board official physically invaded respondent's privacy, going to his Nevada house and looking through his mail and trash. These purposeful acts not only supply a basis for exercising personal jurisdiction over the Board, *see Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985),[5] they strengthen Nevada's territorial interest in assuring redress and give rise to important police power concerns about deterrence of wrongful behavior. Whatever the Board may be free to do in California, it cannot take actions in Nevada, or directly affecting Nevada, without becoming subject to the laws of that State. *See generally* Story, *Commentaries on the Conflict of Laws*, §§ 18-19 (2d ed. 1841).[6]

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[5] The Board initially sought to quash the complaint in this case for want of personal jurisdiction, but subsequently withdrew its motion. This case thus raises no question about the rules of personal jurisdiction as they might apply to State defendants.

[6] The Board does not, and could not, claim any expectation that Nevada would recognize complete immunity for its actions. More than a decade before, Nevada had made clear that it would allow compensation for individuals injured by certain acts of sister States, relying in part on the decision in *Nevada v. Hall*. *See Mianecki v. District Court*, 658 P.2d 422, 423-25, *cert. dismissed*, 464 U.S. 806 (1983).

These cumulative interests are more than sufficient to satisfy governing full faith and credit standards. But, in holding that Nevada law should be applied to the intentional tort claims, the Nevada Supreme Court took an additional step: it tailored its analysis to account for the fact that the defendant was a sister State. Thus, to determine whether to defer to California law, the supreme court looked, not to whether Nevada law provides for compensation when the injury is caused by private parties, but whether it does so when the injury is caused by Nevada government officials. Finding that Nevada law barred suits based on the discretionary acts of its own officials, the court concluded that, as a matter of comity, Nevada should apply the comparable California law ostensibly providing immunity for negligent acts of California employees. *See* Pet. App. 11-12. However, because Nevada law did not give absolute immunity to its own officials for intentional torts, the Court went on to conclude that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it decided 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." Pet. App. 12-13.

The Nevada Supreme Court, by engaging in this comparative analysis, thus gave full regard for the fact that California is a sovereign State. In applying full faith and credit principles, its reference point was not the liability of private individuals for tortious conduct, but the liability *of the State itself.* In *Nevada v. Hall*, where the respective position of the two States was reversed, this Court noted with apparent approval that California (the forum State) had looked to its own immunity for similar torts in deciding whether to accord immunity to Nevada (the defendant State) under Nevada law. *See* 440 U.S. at 424. The Full Faith and Credit Clause requires no more.

II. THIS COURT SHOULD DECLINE TO ALTER FULL FAITH AND CREDIT DOCTRINE BY ADOPTING AN UNSUPPORTED NEW CONSTITUTIONAL RULE.

A. The Proposed "New Rule" Is Inconsistent With Full Faith And Credit History And Principles.

The Board dismisses these established full faith and credit principles, arguing that this Court should amend them by adopting a new constitutional rule. This "new rule," however, would work a striking revision of the retained sovereignty of the several States: by requiring immunity for a defendant State, no matter how wrongful its conduct in another State, it would strip away significant legislative authority from the forum States. In the exercise of its lawmaking authority, Nevada has determined that the interests of compensating injured persons and of deterring deliberate wrongdoing are more important than the benefits that might arise from according absolute governmental immunity. *See* Pet. App. 12-13. The "new rule" would order Nevada to make the opposite choice, simply because California (the source of the displacing law) has done so. The result would be to allow California to grant itself a license to act within Nevada's borders without being held accountable under Nevada law.

This redistribution of sovereign power is inconsistent with the most basic understandings of our federal system. That system is based upon a recognition that, having retained all sovereignty not surrendered in the Constitutional plan, *see* pages 13-14 *supra*, the individual States have the sovereign right to decide for themselves how to govern within their territorial boundaries. This Court has observed that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In keeping with that principle, the citizens of a State may decide

that their interests are best served by permitting what other States choose to prohibit, or by prohibiting what other States choose to permit. More particularly, a State may elect to strike a different balance than its neighbors between compensation for individual injury and governmental immunity from liability. "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982).

This Court has repeatedly acknowledged the importance of this lawmaking power. Indeed, the States' independent legislative role in the federal system is of such stature that, in those areas traditionally subject to state regulation, this Court has adopted a working presumption against preemption of state law. *See, e.g., Medtronic*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Although it is accepted that the Federal Government has broad power to restrict state lawmaking, the Court has nonetheless declared that construction of a federal statute begins "with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Any inquiry into federal preemption of state law is "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

Given this understanding, it would be particularly anomalous to have a newly fashioned constitutional rule mandating preemption of state law *by the law of another State*. This Court has pointed out that "since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil*, 486 U.S. at 727; *Phillips Petroleum*, 472 U.S. at 823; *Richards v. United States*, 369 U.S. 1, 15 (1962). It is entirely consistent with that principle, of course, to require a forum State to apply the law of

another State when the forum State has no substantive relationship to the subject matter of the proceeding: in that case, the forum State has no legitimate legislative authority in the first place. But it is very different to tell a State that it must set aside its law in favor of the law of a sister State—law resting on nothing more than a contrary assessment of the relevant interests—even though its own legislative jurisdiction over the matter is unquestioned. As this Court has recently observed, it is not the business of one State to "impose its own policy choice on neighboring States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996).

It is true, of course, that the application of its own law by one State may have an effect on the sovereign responsibilities, even the "core sovereign responsibilities," of another State. But this Court has never held that this fact justifies the displacement of legitimate legislative authority. To the contrary, in *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), the Court expressly rejected an argument that the Full Faith and Credit Clause barred one State from taxing obligations issued by another State, stating: "No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular." 104 U.S. at 594. The Court recognized that taxation of State debt obligations might affect the issuing State's ability to "borrow[] money at reduced interest" (*id.* at 595)—surely an "interference" with "core sovereign responsibilities"—but it nevertheless concluded that the Constitution provided no basis for suppressing the taxing power of another State. *See id.* ("States are left free to extend the comity which is sought, or not, as they please"). *See also State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924) ("[l]and acquired by one state in another state is held subject to the laws of the latter . . . .").

The Full Faith and Credit Clause would be, in fact, an extremely unlikely place to find a significant constitutional

limitation on state legislative authority. Although the Board is correct in saying that the Clause "'altered the status of the States as independent sovereigns,'" FTB Br. 23 (quoting *Estin v. Estin*, 334 U.S. 541, 546 (1948)); *see also Sun Oil*, 486 U.S. at 723 n.1, that general observation—which could be made about a number of constitutional provisions—says nothing about the particular way in which it did so. This Court has made clear, however, that the principal effect of the Full Faith and Credit Clause on the States as "independent sovereigns" was to require them to recognize other state *judgments*, not to reallocate their respective legislative powers. As a consequence, the Court has consistently made a distinction between "the credit owed to laws (legislative measures and common law) and to judgments." *Baker by Thomas*, 522 U.S. at 232. While emphasizing that "[r]egarding judgments . . . the full faith and credit obligation is exacting," 522 U.S. at 233, the Court has found a far less demanding obligation with respect to state laws, holding to the established principle that a State may apply its own law to matters on which it is competent to legislate. *See id.* at 232.[7]

This difference in treatment is well-grounded in the historical record. At the time that the Full Faith and Credit Clause was drafted, the attention of the Framers was primarily on the respect to be given to judgments of sister States. *See Nadelmann, Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 Mich. L. Rev. 33, 53-59 (1957); Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 Memphis State U. L. Rev. 1, 33-39 (1981); *see generally* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L.

[7] The obligation to respect sister-State judgments may, of course, impinge to some extent upon the legislative interests of a forum State. As we discuss, however, that more limited intrusion is supported by the relevant constitutional history combined with the ensuing legislation enacted by Congress pursuant to its powers under the Full Faith and Credit Clause. *See* pages 24-28 *infra*.

Rev. 1 (1945). This was the principal question that the States had confronted during colonial times and during the period governed by the Articles of Confederation (which contained its own full faith and credit provision), with various States having arrived at various solutions. *See* Nadelmann, 56 Mich. L. Rev. at 34-54; Whitten, 12 Memphis State U. L. Rev. at 19-31. The constitutional debate thus took place against a background of indecision about whether other-State judgments were to have only an assigned evidentiary value, or to be given the more authoritative status of domestic judgments. *See* Whitten, 12 Memphis State U. L. Rev. at 31-33.

The treatment of full faith and credit for state laws occupied a distinctly secondary position. The issue appears not to have caused any great controversy during the years preceding the Convention, and discussion of the "public acts" language in the draft Full Faith and Credit Clause was brief and largely unilluminating. *See* Nadelmann, 56 Mich. L. Rev. at 53-59; Whitten, 12 Memphis State U. L. Rev. at 33-39. The most directly relevant piece of the legislative record—a statement by James Wilson of Pennsylvania that "if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all independent Nations" (3 M. Farrand, The Records of the Federation Convention of 1787, at 488 (1911))—is, on its face, addressed to the question whether Congress should be given the power to prescribe the "effect" of the "public Acts, Records, and Judicial proceedings" covered by the draft Clause. William Samuel Johnson of Connecticut then observed that the proposed language "would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State." *Id.* The principal opposition to the proposal, raised unsuccessfully by Edmond Randolph of Virginia, addressed the same point about congressional authority, objecting that this "definition of the powers of the [National] Government was so loose as to give opportunities of usurping all the State powers." *Id.*

Wholly absent in the course of this discussion is any indication that the Full Faith and Credit Clause would necessarily "usurp[]" significant State powers by requiring the States to subordinate their otherwise-applicable substantive laws to the contrary laws of another State.[8]

The brevity (and opacity) of this debate is wholly out of keeping with the theory that, in the Full Faith and Credit Clause, the States were permanently ceding to each other part of their traditional, jealously guarded legislative authority. Furthermore, it appears that the Clause generated no subsequent debate among the States during the process of ratification. *See* Sumner, *The Full Faith and Credit Clause—Its History and Purpose*, 34 Oregon L. Rev. 224, 235 (1955). Having contended at great length over their surrender of certain legislative powers to the federal government, it is utterly implausible to think that the States would agree, in almost total silence, to accept a provision that required them to engage in subservience to the laws of their neighbors. This is especially so in light of the fact that the States had just endured a period in which distrust among the several States, and concern about the unfairness of certain state laws, had been widespread and, for the most part, well-warranted. *See generally* Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1447-48 (1987) (discussing the States' fractious relations under the Articles of Confederation); Sumner, 34 Oregon L. Rev. at 241 ("[a]t the time that the

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[8]Professor Whitten has argued that the historical evidence provides no basis for concluding that the Full Faith and Credit Clause ever compels States to subordinate their own laws. *See* Whitten, 12 Memphis State U. L. Rev. at 62-69. In his view, "the original meaning of the Full Faith and Credit Clause as applied to conflict-of-laws problems was a very narrow one: the clause directly required the states to admit the statutes of other states into evidence only as conclusive proof of their own existence and contents; it did not require the states to enforce or apply the laws of other states; Congress, however, was given exclusive authority under the second sentence of article IV, section 1 to establish nationwide choice-of-law rules for the states." *Id.* at 62-63.

delegates to the Constitutional Convention met there was no unity among the states. The states considered each other as foreign countries").

The Framers, of course, had some familiarity with conflict-of-laws principles, which had gradually become a part of the law of nations. *See generally*, Juenger, *A Page of History*, 35 Mercer L. Rev. 419 (1984). But, even if those emerging principles were properly looked to for an understanding of domestic full faith and credit doctrine, they would not support the "new rule" proposed by the Board: at the time of the Convention, no one would have seriously thought that the law of nations provided grounds for the forced displacement of legitimate forum-State law by the law of another State. The most noted early American commentator, Joseph Story, stressed, as "[t]he first and most general maxim or proposition" underlying the field of conflict of laws, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory." Story, *Commentaries on the Conflict of Laws*, § 18, at 25. This maxim, in turn, gave rise to another: "that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." *Id.* § 23, at 30. Based on these maxims, Story reasoned that, while application of the law of another sovereign was often necessary to advance international commerce and relations, "[n]o nation can be justly required to yield up its own fundamental policy and institutions, in favour of those of another nation." *Id.* § 25, at 31. *See also* Nadelmann, 56 Mich. L. Rev. at 75-81.[9]

[9] The influential Dutch jurist, Ulrich Huber, likewise recognized that "a sovereign may refuse to recognize 'rights acquired' abroad if they would prejudice the forum's 'power or rights.'" Juenger, 35 Mercer L. Rev. at 435. Huber, in turn, had a great influence on English choice-of-law principles. *See id.* at 440.

It is thus not surprising that Congress, having been given express authority in the Full Faith and Credit Clause to declare the effect of properly authenticated "public Acts, Records, and judicial Proceedings," promptly enacted a statute that declared the effect of records and judicial proceedings, but *not* of public acts. *See* Act of May 26, 1790, 1 Stat. 122 (1790); Nadelmann, 56 Mich. L. Rev. at 60-61. This reticence, too, hardly fits with the notion that the Framers intended the Full Faith and Credit Clause to be a wide-ranging vehicle for limiting the States' capacity to establish and enforce their own laws within their own borders. Indeed, for more than 150 years, the federal statute continued to make no mention of the effect of "public Acts." *See* Nadelmann, 56 Mich. L. Rev. at 81-82. And, while the 1948 revision of the United States Code finally changed that, *see* Act of June 25, 1948, 62 Stat. 947 (1948); 28 U.S.C. § 1738, the generally accepted view is that this modification was not intended to reflect any substantive change, but was simply the result of a blunder by the revisers. *See* Whitten, 12 Memphis State U. L. Rev. at 61 ("[t]he revisers obviously did not have any idea what they were doing"); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 19 (1958) ("a notably footless piece of draftsmanship").

This Court, likewise, has generally been careful not to construe the Full Faith and Credit Clause to limit the legislative jurisdiction of the States. Without recounting that history in detail, it suffices to say that, prior to the early 20th century, the Court had largely regarded the Clause as a provision mandating respect for judgments, not as a command for States to defer to sister-State laws. *See* Jackson, 45 Colum. L. Rev. 7 (noting that "cases as to judgments . . . constitute the bulk of full faith and credit litigation"). Furthermore, even after the Court undertook to order forum States to apply the law of other States (under both the Full Faith and Credit Clause and the Due Process Clause), it did so infrequently, and primarily in cases reflecting

(if not stating) the basic proposition that a State *without* legislative jurisdiction may not apply its substantive law in preference to that of a State with legislative jurisdiction. *See* Currie, 26 U. Chi. L. Rev. at 76-77; *see also id.* at 19-76 (reviewing cases).

To be sure, the Court did not always avoid interference with the legislative authority of a forum State. Perhaps the most striking example was the decision in *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), where the Court held that the Full Faith and Credit Clause required a New Hampshire federal court to apply Vermont law in a tort suit filed by the estate of a Vermont worker killed in New Hampshire. That decision—which effectively barred New Hampshire from providing redress for an accidental death within its borders—seemingly did limit its authority with respect to an occurrence over which it undoubtedly had lawmaking power. But *Clapper* did not stand the test of time. Just seven years later, the Court in *Pacific Employers* "limited its holding to its facts," *Hall*, 440 U.S. at 423 n. 23, while announcing that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 306 U.S. at 501. That remains the standard recognized by this Court to the present day. *See Baker by Thomas*, 522 U.S. at 232; *Sun Oil*, 486 U.S. at 722; pages 13-16 *supra*.

B. The Proposed Rule Would Require Courts To Make Subjective, Largely Standardless Judgments.

The "new rule" proposed by the Board not only is ungrounded in history and precedent, but would raise a host of largely unanswerable questions. Although the Board seemingly has abandoned its position (FTB Reply to Brief in Opposition 4-6) that the Court should apply a "balancing test" to decide whether Nevada must apply California law, its current stance—by asking the Court to make a constitutional value judgment

about the benefits of state immunity versus the benefits of compensating individuals and deterring wrongful behavior—is really just a call for balancing in a different guise. Furthermore, the rule is open-ended in a way that will require elaborate, and essentially standardless, inquiries into what is to be categorized as "interfer[ence] [with a] sister State's capacity to fulfill its own core sovereign responsibilities."

The essential premise of the "new rule" is evident from its carefully constructed terms: that, under the Full Faith and Credit Clause, laws providing sovereign immunity for core sovereign actions must always trump the laws of States providing compensation for unlawful acts within their borders. But there is simply no basis on which to elevate *legislatively conferred* sovereign immunity into a position of constitutional supremacy. In *Nevada v. Hall*, of course, this Court held that the States have no inherent right to sovereign immunity in the courts of another State, finding that such immunity was neither recognized as a matter of right at common law, nor provided to States (at the expense of other sovereign interests) in the plan of the Convention. *See* 440 U.S. at 414-21, 424-27; *see also Alden*, 527 U.S. at 738-40. In light of that holding—which the Board has not challenged in either its petition or in its brief on the merits—it is totally implausible to think that the Framers, while making no grant of inter-State immunity as a matter of right, nevertheless intended to force States into recognizing legislatively created immunity defenses through the backdoor mechanism of the Full Faith and Credit Clause.[10] Unsurprisingly, the brief debates about the meaning and effect of the

[10]A group of States, appearing as *amici curiae*, does urge the Court to overrule *Nevada v. Hall* insofar as it held that the States do not have inherent immunity in the courts of other States. *See* Brief *Amici Curiae* Florida *et al.* at 1-19. As we discuss, *see* pages 41-45 *infra*, this issue is not within the Question Presented in this case, and, in any event, *amici* have provided no good reason either for disregarding *stare decisis* or for thinking that *Nevada v. Hall* was wrongly decided.

Clause contain no mention of sovereign immunity at all, much less compelled sovereign immunity in the courts of another State.

The Board also provides no authority from which the Court could declare that the interest in protecting States from liability is somehow intrinsically and invariably superior to the competing sovereign interests in compensating persons for their injuries and in deterring intentional torts. As a general matter, of course, the citizens of each individual State may decide for themselves that immunity for governmental misconduct is needed in order to fulfill the State's "core sovereign responsibilities," thereby subordinating claims for injuries suffered at government hands. The citizens of other States, however, are free to take a different view, concluding that immunity not only would leave injured persons without an effective remedy, but would remove an important incentive for government officials to refrain from acts of wrongdoing. The task of sorting out those competing interests is one that legislatures commonly undertake on a state-by-state basis, but there are no judicial tools available for determining, as a matter of constitutional law, which interest, or combination of interests, is more important.

This absence of judicially manageable standards, in fact, serves to explain why the Court no longer employs a balancing test as part of its general full faith and credit analysis. At one time, in cases decided during roughly a thirty-year period, the Court occasionally indicated that it would decide which of several state laws should apply, as a constitutional matter, "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." *Alaska Packers Ass'n v. Industrial Accident Comm'n of California*, 294 U.S. 532, 547 (1935); *see also Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954); *Hughes v. Fetter*, 341 U.S. 609 (1951). This forced selection of a particular state law, of course, is inconsistent with the now-accepted understanding

that more than one State can constitutionally exercise legislative jurisdiction over a particular matter. *See Phillips Petroleum*, 472 U.S. at 823; *Sun Oil*, 486 U.S. at 727. Even more basically, however, the balancing approach suffered from the fact that there is no such thing as a constitutional "scale of decision" that can measure the "weight" of competing legitimate state interests. *See* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 472-73 (1982); *see also* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 112 (1976) (expressing concern that balancing courts "might simply assign weights, without any determinable standard, to justify the results of cases decided on other premises"). Thus, by the time of the decision in *Allstate Ins. Co. v. Hague*, the practice had fallen into disuse, and all eight participating Justices in that case, speaking in three different opinions, explicitly acknowledged that the Court had "abandoned the weighing-of-interests requirement." *Id.* at 308 n.10 (plurality opinion); *id.* at 322 n.6 (Stevens, J., concurring in judgment); *id.* at 339 n.6 (Powell, J., dissenting). Even in the reconfigured form of a "new rule," there is no reason to breathe life back into that "discredited practice." *See id.* at 339 n.6 (Powell, J., dissenting).

The terms of the proposed rule raise other troublesome questions as well. To begin with, it is not self-evident why the rule requires full faith and credit for "legislatively immunized acts," but not for other state laws that might bear on "core sovereign responsibilities." If the Full Faith and Credit Clause were meant to protect the activities of one State from interference by the laws of another State, it would seem to follow that the rule would extend beyond "legislatively immunized acts," to any acts important to state operations. The Board, in fact, seems to say so itself. *See* FTB Br. 37 (suggesting that its rule would apply to "any number of various programs that are vital to state interests"). That, of course, would raise several problems. First, it would cut an even wider

swath through the legislative jurisdiction of the several States, blocking them from applying their own laws in an ever-expanding number of cases. Second, it would seemingly require the overruling of *Bonaparte v. Tax Court*, where, as we have noted (*see* page 23 *supra*), the Court held that the Full Faith and Credit Clause does not require a State to defer to laws of another State making its debt obligations immune from taxation, even though its refusal to do so would obviously raise the borrowing costs to the issuing State and thereby interfere with the sovereign responsibility of obtaining necessary funds. *See* 104 U.S. at 595. At the very least, therefore, unless the "new rule" has been fashioned simply to fit this case, defendant States may regard it as just a first step towards displacement of any laws that they consider inhospitable to the conduct of their government operations.

It also seems that the proposed rule would permit state legislatures to confer binding immunity, not just on the State itself and its agencies, but on individual state officials and subdivisions, such as counties and cities. The terms of the rule are certainly broad enough to encompass such immunity, and, if the touchstone of the rule is to prevent interference with "core sovereign responsibilities," it rationally could apply to any official or entity designated to carry out important State functions, at least while acting under authority delegated from the State. It is true, of course, that the Eleventh Amendment and related doctrines of sovereign immunity do not typically extend protection to individuals and local governments, *see, e.g., Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 609 n.10 (2001), but the rule proposed by the Board does not—indeed, after *Nevada v. Hall*, could not—find a basis in historic doctrines of sovereign immunity. Rather, it rests on whatever immunity a state legislature chooses to grant with respect to "core sovereign responsibilities," a potentially far-reaching basis for nullifying other States' laws.

These uncertainties are modest, however, compared to the most basic problem with the "new rule": that, even if one can figure out what kinds of laws and entities are covered generally, there is still no standard by which to judge what might constitute "core sovereign responsibilities" or what might be thought sufficient to "interfere[]" with a State's "capacity to fulfill" them. *See* FTB Br. 32 ("there is no clear definition of what constitutes a core sovereign responsibility . . . ."). Every State possesses broad police powers, which are exercised in hundreds of ways, ranging from criminal investigations to state aid programs. Any action in furtherance of those powers could be thought, in one sense or another, to be necessary to the exercise of "core sovereign responsibilities," so that *any* threat of litigation with respect to *any* of them would be regarded as inhibiting state employees from carrying out their jobs. *See* FTB Br. 37 (complaining that "widespread application" of the decision below "could (and perhaps would) interfere with (and likely cripple) the States' ability to conduct any number of various programs that are vital to state interests, *each of which is a core sovereign responsibility*") (emphasis added). Alternatively, a State could argue that any significant award of damages would deprive the State of funds needed to meet its responsibilities, regardless of the particular state action (for example, a traffic accident) that gave rise to the lawsuit in question. If those kinds of arguments are to be accepted, it will mean that a State, just by granting itself immunity, could effectively do whatever it pleased within the borders of other States, without the prospect of being held to account, so long as it was somehow acting within one of its recognized powers. On the other hand, if the rule is to depend on a case-by-case examination of each State activity, and a further inquiry into the extent of possible interference caused by each lawsuit (or class of lawsuits) with respect to that activity, the courts applying the rule would face intractable questions of line-drawing comparable to, if not worse than, those presented by the now-departed weighing-of-interests test.

This case presents an example of just some of these difficulties. Although the Board emphasizes that States have a strong interest in conducting their tax programs, it does not explain, for purposes of understanding its rule, just what programs the States would not have a strong interest in conducting. Moreover, and in any event, this assertion about the importance of tax operations goes to only part of the proposed inquiry: the question, then, is whether the law of Nevada, if applied here, would seriously impede the capacity of California to collect its tax revenues. That seems unlikely if only because the California tax proceeding against respondent remains ongoing in California. Furthermore, the Nevada Supreme Court expressly held that the Board should be allowed immunity under California law for any negligent or good-faith discretionary acts, Pet. App. 11-12, a fact that the Board conspicuously ignores. As a result, Nevada law leaves California free to investigate and prosecute taxpayers in Nevada without any genuine concern that it will face liability for mere misjudgments or for actions amounting to nothing more than an abuse of discretion. The ultimate issue thus comes down, not to whether California can engage in the "normal procedures at its disposal," FTB Br. 33, but to whether California must have the latitude to commit intentional torts, or perhaps to have "breathing space" with respect to the commission of intentional torts, in order to operate its system of tax assessment and collection.

This idea is hard to credit for several reasons. First of all, many States are able to operate their tax systems without across-the-board immunity. While the Board cites to certain States that extend broad protection, FTB Br. 12 n.5, other States provide immunity that stops well short of shielding all misconduct. *See, e.g.*, ARIZ. REV. STAT. § 12.820.01 (2002); OHIO REV. CODE ANN. 2743.02 (Anderson 2002); WASH. REV. CODE § 4.92.090 (2002). Furthermore, many States allow personal suits against state officials for intentional or malicious wrongdoing. *See, e.g.*, ARK. CODE ANN. § 19-10-305(a) (2002); FLA. STAT.

§ 768.28 (2002); MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (2002). The existence of that liability, which obviously acts as a deterrent to tortious acts by State employees, strongly suggests that the States do not regard such behavior as essential to their operations. *See Biscoe v. Arlington County*, 738 F.2d 1352, 1360-61 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (recognition of personal liability for individual officials casts doubt on justification for governmental immunity).

An equally compelling reason to doubt the need for total immunity is that California itself allows actions against the State for misconduct by its tax officials. Thus, the curiously worded immunity statute relied on by the Board, California Government Code § 860.2 (Pet. Br. App. 1-2), applies only to "instituting" proceedings and actions and to acts with respect to the "interpretation or application of any law relating to a tax." *Id.* The California Supreme Court has not construed this language, but even broadly construed, it would hardly seem to cover all operational torts committed by state tax officers. More importantly, other sections of the Code expressly allow a taxpayer to "bring an action for damages," *see* California Government Code § 21021 (FTB Br. App. 11), whenever Board employees have recklessly disregarded published procedures. *Id.* As the Board recognizes, FTB. Br. 11 n.4, this statute would be meaningless if the California immunity statute barred all tax-related claims.[11] Taken as a whole, therefore, the tolerance of various damage actions under the laws of many States, combined with the availability of state-law actions even under

[11] This provision also demonstrates that, contrary to the theory of *Amici Curiae* National Governors Association, *et al.*, an action for damages is not a "collateral[]attack" on administrative tax proceedings. *Id.* at 11. As previously noted, the tax case against respondent is continuing unabated in California. *See* page 2 *supra*; FTB Br. 4.

California law, severely undercuts the Board's position that total immunity is necessary to operation of an effective tax system.[12]

Finally, we note that the "new rule" urged by the Board is utterly boundless: the rule would compel Nevada to recognize immunity for any acts related to core sovereign responsibilities—no matter how despicable or abusive—as long as California was willing to immunize them. Under the terms of the rule, California officials would be able to assert immunity for assaulting Nevada citizens as part of a police investigation, or subjecting those under investigation to libel in Nevada newspapers. Indeed, while the behavior in this case is bad enough, the rule would permit Board auditors, instead of just going through respondent's mail and garbage, to enter his house and rummage through his drawers and files, all without concern that Nevada could order the State to provide compensation for those acts. Or investigators could expressly threaten respondent with further disclosure of his personal and professional information if he persisted in his unwillingness to settle the inflated tax claims, again without fear of exposing the Board to liability. Perhaps the Board thinks this is all well and good, but it is a truly remarkable proposition that, in the face of such actions, the Constitution would render Nevada powerless to apply its own laws and provide relief.

C. The Proposed Rule Is Unnecessary.

The rule proposed by the Board rests, at bottom, on a simple policy argument: that, unless this Court reads its proposed rule into the Full Faith and Credit Clause, state courts will seriously

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[12] If the Board is ultimately advancing only a right to require observance of California law with respect to the *forum*, its full faith and credit argument grows weaker still. This Court has held that the Clause does not bar a State from disregarding a forum selection provision, even when the court is applying the substantive law of another State. *See Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

interfere with the fundamental operations of sister States. The Board disregards, however, the many sources of protection already available to shield States from genuine disruption.

In the first place, principles of comity, as they have for centuries, continue to provide strong assurance that private suits will not unduly interfere with government operations. Because States have never had immunity as of right in the courts of other States, *see Hall*, 440 U.S. at 414-21, it is the doctrine of comity—both before and after formation of the Republic—that has given them protection in state courts other than their own. *Id.* As has long been the case among sovereign nations, *see Hilton v. Guyot*, 159 U.S. at 163-66, sovereign States have traditionally applied the doctrine of comity with a healthy regard for the sovereignty of their sister States. *See Hall*, 440 U.S. at 417-18. This tendency is naturally reinforced by a well-developed self-interest, grounded in the awareness that other States, as equal sovereigns, have the power to grant or withhold comity in their own right.

This regard for the sovereignty of sister States has continued even after the decision in *Nevada v. Hall*. Although many States then expressed concern about uncertainties arising from that decision, *see* Brief of West Virginia *et al. Amici Curiae* in Support of Petition for Rehearing, No. 77-1337 (Oct. Term 1977), at 2-10, recent history shows that state courts have continued to dismiss suits against their sister States. *See, e.g., Reed v. University of North Dakota*, 543 N.W.2d 106 (Minn. Ct. App. 1996); *University of Iowa Press v. Urrea*, 440 S.E.2d 203 (Ga. Ct. App. 1993). Moreover, in cases where state courts have agreed to hear claims against another State, the forum court has often done what the Nevada Supreme Court did below: looked to the immunity of the forum State in determining what acts of the defendant State would be subject to suit. *See, e.g., McDonnell v. Illinois*, 748 A.2d 1105, 1107 (N.J. 2000); *Struebin v. Iowa*, 322 N.W.2d 84, 86 (Iowa), *cert. denied*, 459 U.S. 1087 (1982); *Morrison v. Budget Rent A Car*

Systems, 230 A.D.2d 253, 268 (N.Y. App. Div. 1997); *see also Head v. Platte County*, 749 P.2d 6, 10 (1988) (suit against municipality with state-law immunity). This practice, of course, makes it highly improbable that a defendant State would be exposed to liability that genuinely imperils legitimate government activity. While the States grant themselves different degrees of immunity for government actions, few States are likely to subject themselves to state-law suits that will prevent them from carrying out critical governmental functions.

This history of consideration for defendant States also addresses the concern, expressed by the dissenting Justices in *Hall*, that a forum State would treat a defendant State "just as it would treat any other litigant." *Nevada v. Hall*, 440 U.S. at 428 (Blackmun, J., dissenting). Under traditional principles of comity, and certainly under a practice of looking to forum-State immunity, it will simply not be the case that "State A can be sued in State B on the same terms as any other litigant can be sued." *Id.* at 429 (Blackmun, J., dissenting). As the cases cited by the Board themselves demonstrate, and the decision below confirms, state courts are fully capable of recognizing the sovereign interests of other States, using their own sovereign interests as a benchmark. *See Guarini v. New York*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987); *Xiomara Mejia-Cabral v. Eagleton School*, Mass. Super. LEXIS 353, 10 Mass. L. Rep. 452 (Mass. Sup. Ct. 1999). By regarding state defendants as sovereigns of equal stature, not as private litigants, States are thereby according them the respect to which they are entitled in "our constitutional system of cooperative federalism." *Hall*, 440 U.S. at 424 n.24.

The States also have more formal methods of assuring protection for themselves. If two States have concerns about possible liability in each other's courts, they may arrange between themselves to provide immunity on a reciprocal basis. (This kind of agreement would not alter the federal-state balance and should not require approval by Congress. *See Cuyler v.*

Adams, 449 U.S. 433, 440-41 (1981)). Or, if a number of States share the same overall viewpoint about the need for immunity, they may enter into a larger multi-State agreement, similar to the agreement that established the Multistate Tax Commission. *See generally United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978). These agreements would have the advantage of allowing the signatory States to decide for themselves what legislative authority they are willing to surrender within their borders in return for recognition of more expansive sovereign immunity in the courts of other States. At the same time, the agreements would not force unwilling States to give up their legislative authority, as the constitutional rule advocated by the Board necessarily would do.

In addition to these avenues, the Full Faith and Credit Clause itself provides another: the possibility of legislative action by Congress, declaring the "effect" of state immunity laws in other States. *See Sun Oil*, 486 U.S. at 729 ("it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause"). The Clause, of course, contains an express grant of power to Congress to declare the "effect" of public acts in state courts. As the national legislative body, Congress is well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1988). Moreover, unlike a constitutional holding that would freeze the rights of forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

These alternative methods offer significant safeguards for State defendants, all without permitting one State to unilaterally preempt the legislative jurisdiction of another State merely by passing a law to immunize itself. This Court has previously declined the invitation to "embark upon the enterprise of

constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable." *Sun Oil Co.*, 486 U.S. at 727-28. It should decline that invitation here as well.

III. THIS COURT SHOULD REJECT THE INVITATION OF *AMICI CURIAE* TO OVERRULE *NEVADA V. HALL*.

The Florida *et al. amici curiae* brief raises an issue that the Board does not raise: that the States have inherent sovereign immunity in the courts of other States and that this Court should overrule that part of *Nevada v. Hall* holding to the contrary. This question is not set out in the Question Presented in the petition, nor is it fairly included therein. *See* Sup. Ct. Rule 14.1(a). Rule 14.1(a) of the Rules of this Court plainly states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court," and this Court has said that it will depart from the rule "'only in the most exceptional cases.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (quoting *Yee v. Escondido*, 503 U.S. 519, 535 (1992)). *See also Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992) (Rule 14.1(a) "helps to maintain the integrity of the process of certiorari"). Here, the Board could not have been more clear, in setting forth the Question Presented, that the only question it was raising was whether the Full Faith and Credit Clause required the Nevada courts to apply Section 860.2 of California Government Code. *See* Pet. i. This is a very different question, answered by reference to wholly different historical materials and case law, than the question *amici* now seek to raise. *Amici* may believe that the Board presented the wrong question, but they are not free to redraw the case to their liking.[13]

[13] The issue that *amici* now want to raise was not, in fact, included in the Question Presented in the States' own *amici curiae* brief filed at the certiorari stage. *See* Brief *amici curiae* of Oregon *et al.* at i.

We nonetheless will briefly address their arguments, which fall far short of making a case for reconsidering, let alone overruling, *Nevada v. Hall*. "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*, 483 U.S. 468, 494 (1987)). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," 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.* There is no "compelling justification" here.

The principal argument made by *amici* is based on historical evidence that, at the time of the Convention, independent sovereigns traditionally accorded immunity to other sovereigns in their courts. *See* Brief *Amici Curiae* Florida, *et al.* 5-12. But this argument offers nothing new: this Court explicitly recognized this practice of granting immunity in *Nevada v. Hall*, discussing the same principal authority (*The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) that *amici* now address. *See* 440 U.S. at 417. What the Court in *Hall* also pointed out, however, and what *amici* only briefly try to refute, is the unimpeachable evidence that sovereigns extended this immunity, not as a matter of absolute right, but as a matter of comity. *See* 440 U.S. at 416-17. Chief Justice Marshall made this plain in *The Schooner Exchange* itself (11 U.S. (7 Cranch) at 136), and this Court has held to that view ever since. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[a]s *The Schooner Exchange* made clear, . . . 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"). Moreover, as further proof that immunity among co-equal sovereigns is extended as a matter of comity not right, it is unquestioned that the United States (the sovereign

extending immunity in *The Schooner Exchange*) has since significantly, and unilaterally, *reduced* the amount of immunity that it grants to foreign sovereigns, exercising its own sovereign right to decide the legal consequences of acts within the scope of its legislative competence. *See* 28 U.S.C. §§ 1602 *et seq.*; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). All this history and experience is simply incompatible with an attempt to revive the already-rejected theory that immunity in the courts of other sovereigns could be demanded as a matter of absolute privilege.

Amici also rely heavily on the *Alden* decision, which held that States have sovereign immunity in their own courts even with respect to certain federal claims. *See* 527 U.S. at 711-61. But *amici* simply disregard the parts of the decision that undermine their position. Thus, *amici* do not deal with, or even acknowledge, the fact that the Court in *Alden* expressly distinguished the absolute right of a sovereign to immunity in its own courts from its lack of sovereign immunity in the courts of another sovereign. 527 U.S. at 738-40. Quoting (rather than rejecting) *Nevada v. Hall*, the Court recognized that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738 (quoting *Hall*, 440 U.S. at 416). For that reason, the Court said, "its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.'" *Id.* The Court then reiterated what it had previously determined: that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another . . . ." 527 U.S. at 738.[14]

[14] This statement in *Alden* addresses the proper question: whether the Constitution *granted* States a right to absolute immunity in other States'

The Court in *Alden*, in fact, placed great emphasis on just the point that we make here: that, after formation of the Union, the individual States retained much of their preexisting sovereignty. 527 U.S. at 713-15. Whatever else that sovereignty encompasses, it naturally includes, first and foremost, the residual lawmaking authority necessary for the sovereign to govern within its sovereign limits. As the Court noted in *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136, "[a]ny restriction upon [the jurisdiction of a nation within its own territory], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction...." Reflecting this understanding, and the terms of the Tenth Amendment, the Court has quite correctly expressed its "reluctance to find an implied constitutional limit on the power of the States...." *Alden*, 527 U.S. at 739.

To be sure, the decision in *Alden* detailed considerable evidence that the States, at the time of the Convention, had great concerns about their vulnerability to suit in the newly created federal courts. But that concern cannot be extrapolated wholesale into an equivalent concern about suits in the courts of other States. The States' worries about suit in the courts of the National Government were based, not just on the fact that it was to be a new sovereign with its own system of courts, but on the fact that, under the constitutional plan, it was to be a *superior* one. As a consequence, the principles of mutual comity that had traditionally assured reciprocal immunity among co-equal sovereigns—like the States themselves—would be out of balance: at common law, a superior sovereign had immunity *as of right* in the courts of a lesser one. *See Hall*, 440 U.S. at 414-15. That problem, arising out of the particular problem caused

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courts. In so doing, it effectively disposes of the back portion of *amici's* argument, which is based on the erroneous notion that sovereign immunity as of right did exist before formation of the Union, and thus asks whether it was *abrogated* in the Constitutional plan. *See* Brief *amici Curiae* Florida *et al.* at 12-18.

by creation of a federal sovereign imbued with supremacy over State sovereigns, had nothing to do with the terms of the States' continuing sovereign relations with one another.

In short, *amici* are treading old ground. The States did not have immunity as of right in each other's courts, and nothing in the Constitution, or the plan of the Convention, mandated it by diminishing the States' legislative sovereignty within their own borders. *See Alden*, 527 U.S. at 738. Even if the question were properly before the Court, therefore, there is no reason to revisit *Nevada v. Hall*.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

MARK A. HUTCHISON
HUTCHISON & STEFFEN
Lakes Business Park
Las Vegas, NV 89117
(702) 385-2500

DONALD J. KULA
RIORDAN & MCKINZIE
300 South Grand Avenue
Twenty-Ninth Floor
Los Angeles, CA 90071-3155
(213) 629-4824

H. BARTOW FARR, III
Counsel of Record
FARR & TARANTO
1220 19th Street, N.W.
Suite 800
Washington, DC 20036
(202) 775-0184

PETER C. BERNHARD
BERNHARD, BRADLEY & JOHNSON
3980 Howard Hughes Parkway
Suite 550
Las Vegas, NV 89109
(702) 650-6565

OPP
Mark A. Hutchison (4639)
Hutchison & Steffen
10080 Alta Drive
Suite 200
Las Vegas, NV 89145
(702) 385-2500

Peter C. Bernhard (734)
Bullivant Houser Bailey PC
3883 Howard Hughes Pkwy., Ste. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600

Attorneys for Plaintiff Gilbert P. Hyatt

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiffs,

v.

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

Defendants.

Case No.: A382999

Dept. No.: X

PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO FTB'S PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND

Date of Hearing: November 5, 2008
Time of Hearing: 9:00 a.m. (In Chambers)

(filed under seal by order of the Discovery Commissioner dated February 22, 1999)

Plaintiff Gilbert P. Hyatt ("Plaintiff" or "Hyatt") opposes Defendant Franchise Tax Board of the State of California's ("Defendant" or "FTB") Provisional Motion for Stay Pending Appeal Without Bond (the "Provisional Stay Motion"). Hyatt submits that FTB is not entitled to a stay pending appeal as a matter of right, and that if the Court determines in its discretion that such a stay pending appeal is appropriate, then adequate security should be required in order to protect Hyatt's rights. In addition, the Provisional Stay Motion is premature, since the

FTB correctly recognizes that any stay pending appeal need not be entered until ten days after service of this Court's order(s) on FTB's pending motions under Rules 50 and 59, via a formal Notice of Entry. Because at least some of FTB's arguments overlap, the Provisional Stay Motion need not be decided until after these arguments have been fully briefed and heard by the Court in relation to FTB's Rule 50 and 59 motions.[1]

This Opposition is based upon the papers and pleadings on file, the attached Points and Authorities, as well as any oral argument allowed at the hearing.

Dated this 14 day of October, 2008.

HUTCHISON & STEFFEN, LTD.
Mark A. Hutchison, Esq. (4639)
10080 Alta Drive
Suite 200
Las Vegas, Nevada 89145

BULLIVANT HOUSER BAILEY PC

Peter C. Bernhard, Esq. (734)
3883 Howard Hughes Pkwy.
Suite 550
Las Vegas, Nevada 89169
(702) 669-3600

Attorneys for Plaintiff Gilbert P. Hyatt

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

[1] If the Court is inclined to consider this motion for stay pending appeal *prior to* the full briefing of the comity and other issues in FTB's Rule 50 and 59 motions, Hyatt respectfully requests that the Court set this motion for oral argument, to allow both parties to address these issues completely. Hyatt suggests that the Court simply set this motion for stay pending appeal on November 19, along with the already-scheduled Rule 50 and 59 motions, unless the Court is inclined to deny the instant FTB motion for stay pending appeal without further argument.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

POINTS AND AUTHORITIES

I. INTRODUCTION

The FTB has prematurely moved for a stay, given the pendency of FTB's motions under NRCP Rules 50 and 59. Even if the Provisional Stay Motion needs to be decided before the Rule 50 and 59 motions, the FTB has not satisfied NRCP Rule 62(d) for issuance of a stay, particularly a stay without a bond or other security. Therefore, the Provisional Stay Motion should be denied.

If the Court decides that the FTB is entitled to a stay under NRCP 62(d), FTB should be ordered to provide a supersedeas bond or other adequate security in the amount of the judgment, including pre-judgment interest and adding an appropriate amount of post-judgment interest for the anticipated appellate time period, since NRCP 62 was drafted "to protect the prevailing party from loss resulting from stay of execution of the judgment." *McCulloch v. Jeakins*, 99 Nev. 122, 123, 659 P.2d 302, 303 (1983). The FTB cannot take shelter under the doctrine of comity, which is misplaced here. Furthermore, as the FTB is not an agency of the State of Nevada, it is not exempt from the bond under NRCP 62(e). Neither is the FTB entitled to a waiver or substitution of the full bond amount under the test set forth by the Nevada Supreme Court in *Nelson v. Heer*, 121 Nev. 832, 122 P. 3d 1252 (2005). Therefore, Hyatt is entitled to protect his rights under the judgment, and the FTB should be ordered to post a full supersedeas bond or other adequate security "in an amount that will permit full satisfaction of the judgment." *McCulloch*, 99 Nev. at 123, 659 P.2d at 303.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

II. ARGUMENT

A. The FTB's Provisional Stay Motion is premature and need not be decided until after the Court's consideration of FTB's motions under Rules 50 and 59.

FTB's pending motions under Rules 50 and 59 are currently being briefed and are scheduled for hearing on November 19, 2008. Because many of FTB's arguments in the Provisional Stay Motion are the same as in its Rule 50 and 59 motions, Hyatt respectfully submits that the Court should review the briefs on the Rule 50 and 59 motions, as well as the briefs on this Provisional Stay Motion, before deciding the Provisional Stay Motion. This will avoid any inconsistent rulings on the identical arguments being presented by FTB, while allowing both sides the full and complete opportunity to present their arguments relating to both the Provisional Stay Motion and the Rule 50 and 59 motions.[2]

In addition, as the FTB acknowledges, the Provisional Stay Motion may be unnecessary, depending on the outcome of the FTB's Rule 50 and 59 motions. Although Hyatt does not believe that these FTB motions have merit and will therefore be denied in their entirety, if the Court disagrees and grants any relief to FTB, then there may not be any appeal requiring that any judgment be stayed. Courts should not decide matters that are unnecessary or premature, so Hyatt submits that the Provisional Stay Motion be held and not decided, until after the Court rules on FTB's Rule 50 and 59 motions.

B. The FTB misstates the "law of the case" relative to comity and thereby misapplies the prior rulings of the Nevada Supreme Court and United States Supreme Court in erroneously arguing that the FTB is entitled to be treated as a Nevada state agency relative to the requirement that a bond or other security be posted under NRCP 62(d).

The FTB requests that this Court issue a stay pending appeal under NRCP Rule 62(d), and that no bond or other security be required, arguing that as a matter of comity the FTB must

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[2] The Provisional Stay Motion has been set on this Court's "in chambers" calendar for 9:00 a.m. on November 5, 2008, two weeks before the November 19 oral hearing on FTB's Rule 50 and 59 motions. Hyatt agrees that the existing order providing for a stay pending resolution of the Rule 50 and 59 motions is in effect and will remain in effect until 10 days after notice of entry of a decision on the Rule 50 and 59 motions, so there is no harm to FTB or danger of any Hyatt execution efforts occurring until well after November 19. Therefore, this Court need not make a decision on the Provisional Stay Motion until November 19 (or later), and Hyatt submits that the Court should have the benefit of full briefing by both parties on the common issues raised by FTB in its Provisional Stay Motion and its Rule 50 and 59 motions.

be treated like Nevada and its agencies, which are not required to post security because of the express provisions of NRCP Rule 62(e). The FTB is wrong in regard to its assertion as to the law of the case and its application to the requirement that a bond or other security be provided as a condition of obtaining a stay pending appeal.

The FTB wrongly implies that the Nevada Supreme Court's and United States Supreme Court's respective reviews of this case require that FTB be treated just like a Nevada agency would be treated, for all purposes. More accurately, the Nevada Supreme Court rejected the FTB's various arguments seeking dismissal of this case based on the concepts of full faith and credit, sovereign immunity, choice of law, and failure to exhaust administrative remedies. In regard to comity, the Nevada Supreme Court found it applicable only to Hyatt's single negligence claim, but the Court rejected the FTB's request for comity in regard to Hyatt's intentional tort claims. The Court found that Nevada's interests in "protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" overrode California's policy of immunity for its tax agency. *Franchise Tax Bd. v. Eighth Judicial Dist. Court*, 2002 Nev. Lexis 57 at *11 (Nev. Apr. 4, 2002).

In other words, the Court specifically rejected the FTB's request that, as a matter of comity, it be accorded immunity relative to Hyatt's intentional tort claims. The United States Supreme Court's opinion addressed primarily and substantially the FTB's rejected arguments for immunity based on "full faith and credit." *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003). Only at the end of the unanimous opinion did the Court reference the subject of comity and the manner in which the Nevada Supreme Court applied it in this case. *Id.* at 499. Comity is a voluntary accommodation in which the courts of one state may choose to apply the laws and decisions of another state. It is never mandatory, and both the Nevada Supreme Court and the United States Supreme Court have made clear that comity is something that the forum court is free to grant or deny, in its discretion.

Neither court's ruling in this case, contrary to the FTB's description, requires or even suggests that in all instances, the FTB must be treated as if it were a Nevada state agency. This is simply not the case. Moreover, neither court addressed the FTB's instant request for comity

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

relative to posting security to obtain a stay on appeal of the adverse judgment. This is a very different issue from the FTB's previous pleadings seeking absolute immunity from liability. But the fact that the Nevada Supreme Court rejected the FTB's comity request relative to Hyatt's intentional tort claims in favor of protecting its own citizens from intentional and bad faith conduct by a sister state can only be interpreted as allowing its injured citizens the full benefits of Nevada law, including the NRCP requirements that protect an injured citizen's judgment against a defendant pending appeal.

In addition, California refused to grant comity to Nevada, with respect to a cap on compensatory damages. The California Supreme Court rejected Nevada's request that Nevada's cap on compensatory damages be recognized, for torts committed by Nevada in California. *Nevada v. Hall*, 440 U.S. 410 (1979). This rejection of comity by the California courts toward Nevada was approved by the United States Supreme Court, which held that California was free to decide whether to limit damages against Nevada (by applying Nevada's damages cap in California) or was free to reject Nevada's request for comity in favor of full compensation to California's injured citizen. California chose to reject Nevada's damages cap and not provide Nevada comity on this issue, thereby providing full relief to its own citizen for Nevada's wrongful conduct against that Californian.

California, through the FTB, now requests that Nevada, as a matter of comity, apply all Nevada laws and rules that Nevada has adopted to protect its own agencies, in order to protect California, even though California has refused to grant comity to Nevada. If the FTB succeeds in this argument in Nevada, then California will take advantage of Nevada rules favorable to it (such as NRCP Rule 62), where it commits intentional torts against a Nevada citizen, but it refuses to accept Nevada's favorable laws when Nevada is sued in California for mere negligence. That result is not what the Nevada Supreme Court ruled in this case, nor is it conceivable that it would so rule, given California's refusal to grant comity to Nevada with respect to Nevada's compensatory damage caps. The concept of comity is based on one state's respect of another state. One state's refusal to grant comity on a specific issue makes it virtually

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

certain that the second state will return the disrespect and reject a subsequent request for comity on that same issue by the first state.

Neither comity nor any other theory supports the FTB's argument that it should be excused from posting a bond or other security as a condition of obtaining a stay pending appeal under NRCP Rule 62(d).

1. The Nevada Supreme Court's ruling in this case rejected, not mandated, comity in regard to Hyatt's intentional tort claims.

The FTB erroneously states that the law of the case requires that it be treated exactly like a Nevada state agency. This is not the law of the case. Comity was not the focus of the issues presented to the Nevada Supreme Court in its review of this case, stemming from the FTB's writ petition filed in June of 2000 challenging the court's jurisdiction. Rather, the FTB argued that the Court lacked jurisdiction, citing the doctrines of sovereign immunity, full faith and credit, choice of law, and administrative exhaustion. The Nevada Supreme Court first rejected these arguments by the FTB:

> Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts. Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy. Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction, while Nevada law is presumed to govern with respect to the underlying torts. Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.[3]

In regard to comity, the Nevada Supreme Court explained:

[3] *Franchise Tax Bd.*, 2002 Nev. Lexis 57 at *8.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

> The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations. In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protections and consider whether granting California's law comity would contravene Nevada's policies or interests.[4]

A court's grant of comity is voluntary. It has discretion to grant or deny comity when requested. When granted, it is out of deference and respect to the sister state. When rejected, it is because Nevada has a stronger interest in protecting its citizens. The leading Nevada Supreme Court case on comity described the concept as follows:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. [Citation omitted] The principle is appropriately invoked according to the sound discretion of the court acting without obligation. . . .[W]e believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.[5]

In sum, comity is not something a party, even a sister state, is entitled to receive. The forum state's court, here Nevada, decides whether to grant comity and the scope of its application. There is no automatic application of the doctrine.

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[4] *Id.* at *9.

[5] *Mianecki v. Second Judicial District Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

Here, the grant of comity by the Nevada Supreme Court was extremely limited in scope and certainly did not entail treating the FTB "exactly as . . . a Nevada governmental agency." The Court concluded:

> Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.[6]

Indeed, even the limited comity accorded the FTB did not equate to being treated "exactly" like a Nevada state agency as Nevada, unlike California, has not expressly granted immunity to state agencies for all negligent acts. As the Court explained:

> Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity. We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case.[7]

The Court then rejected in its entirety the FTB's request for comity in regard to the intentional tort claims:

> We believe 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.[8]

These holdings by the Nevada Supreme Court can in no way be construed as requiring this Court to treat the FTB "exactly" like a Nevada state agency. The FTB is simply wrong in arguing to the contrary.

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[6] *Franchise Tax Bd.*, 2002 Nev. Lexis 57 at *9.

[7] *Id.* at *10.

[8] *Id.* at *11.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

2. The United States Supreme Court decision in this case makes only a scant reference to comity and certainly does not hold or even imply that the FTB must be treated "exactly" like a Nevada state agency.

Similar to the Nevada Supreme Court decision, the United States Supreme Court decision in this case addressed the FTB's request for recognition of immunity from all claims, based on the Full Faith and Credit Clause of the Constitution and the California statute providing the FTB absolute immunity. The FTB argued that core sovereign functions, such as taxing, should have absolute immunity. The Court set forth its decision and analysis over several pages concluding that:

> Our past experience with appraising and balancing state interests under the Full Faith and Credit Clause counsels against adopting [the FTB]'s proposed new rule. Having recognized, in *Hall*, that a suit against a State in a sister State's court "necessarily implicates the power and authority" of both sovereigns, 440 U.S., at 416, 99 S.Ct. 1182, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada, were we to deem this lawsuit an interference with California's "core sovereign responsibilities." We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was "integral" or "traditional." [Citation omitted]. [The FTB] has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.[9]

At the end of its decision, the Court devoted a couple of sentences to comity:

> But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. [Citation omitted] The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.[10]

[9] *Franchise Tax Board of California*, 538 U.S. at 498.

[10] *Id* at 499.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

Note, the Court did not say that the Nevada courts must treat the FTB "exactly" as it would treat a Nevada state agency. The Court simply commented, briefly, that the Nevada Supreme Court "sensitively applied principles of comity . . . relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* This comment, at most, relates to comity in the context of sovereign immunity, not with respect to treating FTB as a Nevada agency for all purposes, such as stays on appeal or whether security is required to obtain any such stay.

The FTB attempts to argue that Hyatt is judicially estopped from arguing that the FTB should not be accorded comity based on statements made during oral arguments before the United States Supreme Court and statements in Hyatt's briefing submitted to the United States Supreme Court. But all of the statements and written arguments cited by the FTB dealt exclusively with whether comity was properly granted for immunity *from substantive liability for its tortious acts*, not whether comity requires Nevada to treat California agencies exactly like Nevada treats its own agencies. Hyatt is not judicially estopped from now arguing, correctly, that the prior decisions in this case do not require that the FTB be treated exactly like a Nevada state agency. That is not the law of the case.

C. **NRCP 62(e) applies only to the State of Nevada and there is no public policy justification for including a California agency within this exemption.**

Under NRCP 62(e), "[w]hen an appeal is taken by the State or by any county, city or town within the State, or an officer of agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant." There is no case law in Nevada extending this rule to outside states or state entities, such as the FTB. California Code of Civil Procedure § 995.220 states that:

> Notwithstanding any other statute, if a statute provides for a bond in an action or proceeding, including but not limited to a bond for issuance of a restraining order or injunction, appointment of a receiver, or stay of enforcement of a judgment on appeal, the following public entities and officers are not required to give the bond and shall have the same rights, remedies, and benefits as if the bond were given:
>
> (a) The State of California or the people of the state, a state agency, department, division, commission, board, or other entity of the state, or a state officer in an official capacity or on behalf of the state.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

As such, CCP § 995.220 provides that state and local government entities of California, as well as the U.S. government need not post bond. However, as with NRCP 62(e), this statute does not exempt outside state entities from posting bond. The FTB argues that the public policy behind NRCP 62(e) and Cal. Civ. Proc. § 995.220 requires the inclusion of California in the exemption. Specifically, the FTB states that "since the interests of both Nevada and California are identical concerning whether a state agency is obligated to post a bond to secure a stay pending appeal, this Court must treat the FTB just as it would treat a Nevada governmental agency in the same circumstances..." *Provisional Stay Motion* at 7: 16-19. This argument is flawed because the interest of Nevada in enacting NRCP 62(e) was to exempt Nevada state agencies, just as the interest of California in enacting CCP § 995.220 was to exempt California state agencies. If either Nevada or California wanted to allow for the inclusion of other states in the exemption, the rules would not read "the State" and "the State of California," respectively, but rather "states."

Additionally, the Nevada Supreme Court has held that "federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). The language of NRCP 62(e) is very similar to its federal counterpart, FRCP 62(e).[11] FRCP 62 also "plainly dictates that in the ordinary case execution on a judgment for money should not be stayed unless the party that prevailed in the district court is secured from loss." *U.S. v. Kurtz*, 528 F.Supp. 1113, 1114 (E.D. Pa. 1981). The court should allow for security other than a supersedeas bond only under "extraordinary circumstances." *Id.* at 1115 (citations omitted).

[11] FRCP 62(e) reads: "The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government."

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

Federal courts have construed FRCP 62(e) narrowly so as only to allow a stay without a bond on an appeal by the United States, its officers or its agencies (per the express language of the rule). In particular, federal courts have not allowed a stay without a bond for state government entities or for other entities that may be funded in whole or in part by the United States Government. See *Vacation Village, Inc. v. Clark County, Nevada*, 497 F.3d 902, 914 (9th Cir. 2007) (requiring Clark County to post a supersedeas bond to obtain a stay on appeal); *Leuzinger v. County of Lake*, --- F.R.D. —, 2008 WL 2693624 (N.D. Cal. July 7, 2008); and *Vaughn v. Memphis Health Center*, 2006 WL 2038577 (W.D. Tenn. July 20, 2006) (bond required for entity who received funding from the federal government). In *Leuzinger*, the Court made it clear that the federal rule, which was a procedural rule, preempted any state laws or rules that might allow a state entity to obtain a stay on appeal without a supersedeas bond. 2008 WL 2693624 at *6.

Under the Federal Rules, specifically FRCP 62(e) regarding stays on appeal, the United States does not have to post a bond. However, states unquestionably do have to post bonds, except in the limited circumstances as set forth in FRCP 62(f), which is not applicable in this case. In *Brinkman v. Department of Corrections of the State of Kansas*, 815 F. Supp. 407 (U.S. D. Kan. 1993), the court offered some strong language that a stay on appeal requires a bond from a state or state agency. Specifically, the *Brinkman* court said, "[g]enerally courts are reluctant to waive the bond requirement for a governmental entity unless funds are readily available, such as through a general appropriation, and a procedure is in place for paying the judgment." *Id.* at 409. The federal courts will freely waive the bond requirement where there are funds and a procedure for paying the judgment is already in place. *Dillon v. City of Chicago*, 866 F.2d 902, 905 (7th Cir. 1988).

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

In *Dillon*, Chicago had shown that previously appropriated funds were readily available; indeed, the purpose of these funds was to enable the City to pay judgments without any substantial delay or impediment. *Id.* In *Brinkman*, the fund defendant argued was available was not in fact for the type of claim at issue, and the court declined to waive the bond. The court went on to say, "the defendant [appellant] has the burden of objectively demonstrating good cause why this court should deviate from the general rule of imposing a full supersedeas bond before execution of the judgment is stayed pending appeal." 815 F. Supp. at 410.

Accordingly, the FTB is not exempt from posting a supersedeas bond under NRCP 62(e), and it is required to post bond pursuant to NRCP 62(d) unless the court directs otherwise.

D. **The FTB is required to post bond pursuant to an analysis of the factors set forth in *Nelson v. Heer*.**

In *Nelson v. Heer*, the court adopted five factors to consider in determining when a full supersedeas bond may be waived and/or alternate security substituted: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. 121 Nev. 832, 836, 122 P. 3d 1252, 1254 (2005). These factors are discussed in turn below. However, as Rule 62 serves the dual protective role of establishing appellant's right to a stay and appellee's right to have a bond posted, a full supersedeas bond should almost always be required. *Hamlin v. Township of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998).

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

1. *The Complexity of the Collection Process*

The first *Nelson* factor is the complexity of the collection process. Several courts have declined to waive the bond requirement where the defendant is a state due to the circuitous nature of collection. In *Lightfoot v. Walker*, plaintiff prisoners had brought a civil rights action against the State of Illinois in the underlying lawsuit, challenging the health care system at one of the state prisons. 797 F.2d 505 (7th Cir. 1986). The State of Illinois argued that it should be excused from posting a bond because it had the financial ability to pay the $700,000 judgment awarded the plaintiff. *Id.* at 506. The court equated that argument to a "*non sequitur*," stating that the fact that Illinois had the wherewithal to pay was of no comfort to the plaintiff, given that "the procedure for collecting a judgment against the state is not only cumbersome and time-consuming, but uncertain in outcome, since the judgment cannot be paid unless and until the state legislature votes to appropriate the money necessary to pay it." *Id.* See also *Southeast Booksellers Ass'n v. McMaster*, 233 F.R.D. 456 (D. S.C. 2006) (state officials' argument that the state should be excused from posting a supersedeas bond due to the financial ability to pay was rejected due to the cumbersome, complex, and timely process of collecting a judgment against the state, which created an uncertainty as to the likelihood and manner of payment).

In California, as in Illinois, money to pay judgments comes from state appropriations. See, e.g., *County of San Diego v. State*, 164 Cal.App.4th 580, 594 (2008). Even the FTB admits that "collection of a half-billion dollar judgment would not be routine." *Provisional Stay Motion* at 17: 11-12. Therefore, the collection process could prove quite complex since the FTB could raise budgetary and other obstacles to prevent the prompt payment of Hyatt's judgment, once it becomes final.

2. *The Amount of Time Required to Obtain a Judgment After It is Affirmed on Appeal*

The second *Nelson* factor concerns the amount of time required to obtain a judgment after it is affirmed on appeal. For this factor, the FTB cited *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 159 F.R.D. 509 (E.D. Wis. 1994), where the court granted defendant's request for a stay absent a bond because the defendant could pay the full judgment without unusual

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
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delay. *Provisional Stay Motion* at 18: 12-15. However, the defendant, Milwaukee Metropolitan Sewerage District (MMSD), had submitted undisputed evidence that MMSD had a balance of $83.4 million in a fund maintained by the State of Wisconsin. 159 F.R.D. at 512-13. This investment fund enabled MMSD to pay the judgment within seven days and without any deliberation or legislative vote by MMSD or the State of Wisconsin. *Id.* Here, FTB has not submitted any evidence that a fund exists or that payment could be made in such a timely fashion. Finally, the FTB admits that "the larger a judgment, the more time that might be involved in paying it." *Provisional Stay Motion* at 18: 8-9.

Therefore, the FTB acknowledges that Hyatt could encounter extensive delays in obtaining payment of the judgment, since the FTB provides absolutely no evidence or commitment in the Provisional Stay Motion that Hyatt's final judgment would be paid promptly. Absent such evidence or showing, the FTB cannot satisfy the second factor that a final judgment would not be subject to delays in payment.

3. ***The Degree of Confidence that the District Court has in the Availability of Funds to Pay the Judgment***

The third *Nelson* factor relates to the degree of confidence that the district court has in the availability of funds to pay the judgment. There is no disputing the fact that the State of California has the financial resources to pay the judgment here. With a net worth of $47 billion, sufficient assets are obviously available. However, whether the State will pay this judgment promptly is an entirely different question. As recently as October 8, 2008, the media reported on the difficulties a federal judge is having, in getting California to pay a court-appointed receiver the funds required under a federal court order relating to California's prison system. The court-appointed receiver even argued that Governor Schwarzenergger and State Controller Chiang were in contempt of court for not turning over $8 billion that had been ordered.[12] California's budget difficulties were described by FTB's witness, Michael Genest, the Director of Finance for the State of California, as being "structural" and related to the current economic

[12] See the Associated Press report dated October 8, 2008, as published by CBS News, the San Jose Mercury-News, and at Yahoo.com, copies of which are attached hereto as Exhibit 1.

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3883 Howard Hughes Pkwy., Suite. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

downturn. He testified that California's financial condition "...is very bad at the moment", in terms of the state's general fund.[13] Obviously, the purpose of the bond requirement in NRCP Rule 62(d) is to prevent California's financial problems from becoming those of Mr. Hyatt in trying to collect on his judgment. In this case, after the FTB contested vigorously every possible issue pre-trial, during trial, and now in post-trial motions, one can reasonably predict the efforts California can be expected to take, to avoid satisfying the final judgment in this case, especially if its financial condition worsens and it seeks relief under bankruptcy or other laws. The FTB has not satisfied the third *Nelson* factor.

4. ***Whether the Defendant's Ability to Pay the Judgment is so Plain that the Cost of a Bond Would Be a Waste of Money***

The fourth *Nelson* factor asks whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money. For this factor, it is necessary to distinguish between the *availability* of funds versus the present *ability* to pay. Here, the FTB cited *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986), where the court held that plaintiff-appellant, a public utility company, was not required to post a bond of $181 million as a condition of obtaining a stay of execution of damage judgment pending its appeal. *Provisional Stay Motion* at 19: 28, 20: 1-9. However, the plaintiff, Northern Indiana Public Service Co. (NIPSCO), had assets of more than $4 billion, annual revenues of almost $2 billion, and a net worth of over $1 billion. 799 F.2d at 281. Unlike NIPSCO, the FTB provides no evidence or showing that collecting a judgment will be as easy as executing on a utility or other private entity with substantial assets. Without such evidence or showing by FTB, the Court simply cannot find that the fourth *Nelson* factor has been satisfied, since it lacks any assurance that FTB has the ability and willingness to pay or that it will cooperate in taking steps to ensure that Hyatt's final judgment is paid promptly.

[13] Trial transcript, August 11, 2008, at 111:3-24, a copy of which is attached hereto as Exhibit 2.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite. 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

5. ***Whether the Defendant is in Such a Precarious Financial Situation that the Requirement to Post a Bond Would Place Other Creditors of the Defendant in an Insecure Position***

The fifth *Nelson* factor asks whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. The FTB misinterprets this factor, implying that its stable financial condition militates in favor of waiving a bond (*Provisional Stay Motion* at 20: 18-24), when in fact the converse is true. In *Olympia Equipment v. Western Union*, plaintiff had been awarded $36 million in the underlying antitrust action. 786 F.2d 794 (7th Cir. 1986). The court held that a supersedeas bond need not be posted when the judgment was so large that the bond requirement would put defendant's other creditors in undue jeopardy. *Id.* at 796. The court further expressed its reluctance to execute on the judgment because of the possibility that Western Union would be forced into bankruptcy as a result. *Id.* at 799. Instead, the court affirmed the district court's provision for adequate alternative security in the form of cash, accounts receivables, and security interest. *Id.* The FTB itself adopted the position that the State of California is *not* in a precarious financial condition. *Provisional Stay Motion* at 20: 22-23 (emphasis in original). A bond on a $388 million judgment is merely a drop in the bucket for the State of California, as the judgment itself only constitutes approximately 0.21 percent of California's total assets of $183 billion.

Therefore, requiring FTB to post a supersedeas bond is not going to jeopardize other creditors of California. FTB's arguments that the cost of a bond would be large, and that a fully-collateralized letter of credit would be necessary, are advanced without any declaration or other proof to establish this. In any event, such considerations are not prohibitive, and Hyatt is entitled to have his judgment protected, through posting of a bond or other security in the amount of the judgment.

Consequently, as all five of the *Nelson* factors weigh against the FTB, the Court should require FTB to post a supersedeas bond or other adequate security in the amount of the judgment, pending appeal.

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

E. The FTB is not entitled to a stay pursuant to an analysis of the factors set forth under NRAP 8 for stays in civil cases.

NRAP 8(c) lists several factors for the court to consider in deciding whether to issue a stay in civil cases pending disposition of an appeal: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellant will suffer irreparable or serious injury if the stay is denied; (3) whether respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits in the appeal. These factors are discussed in turn below. These factors go to a defendant's *entitlement* to a stay, rather than to the separate issue of whether security is required (and the amount of such security).

1. Whether the Object of the Appeal Will Be Defeated if the Stay is Denied

The first factor under NRAP 8(c) asks whether the object of the appeal will be defeated if the stay is denied. The object of FTB's appeal will not be defeated if the stay is denied, as the FTB may still raise any defenses or issues ripe for appeal. The FTB maintains that, absent a stay, the object of its appeal will be defeated because Hyatt can then collect on the half-billion dollar judgment and FTB would have no guarantee of obtaining a full refund should it ultimately prevail on appeal. *Provisional Stay Motion* at 21: 16-18. FTB advances this speculation, absent any evidence. The understanding that the money would have to be fully or partially refunded in the event of the FTB's success on appeal attaches to an execution on the judgment now.

Therefore, the Court should deny the stay because doing so does not jeopardize the object of FTB's appeal.

2. Whether Appellant Will Suffer Irreparable or Serious Injury if the Stay is Denied

The second factor under NRAP 8(c) asks whether appellant will suffer irreparable or serious injury if the stay is denied. Usually, the only tangible harms threatened to the parties are increased litigation costs and delays. *Id.* Such litigation expenses, while potentially substantial, are neither irreparable nor serious. *Hansen v. Eighth Judicial Dist. Court ex rel. County of*

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3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

Clark, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000). FTB argues that it will be irreparably harmed if a bond is required, as this will result in paying premiums, obtaining a letter of credit as collateral, and paying an annual fee for the letter of credit. *Provisional Stay Motion* at 21: 19-27, 22: 1-11. However, the sufficiency and amount of the supersedeas bond are secondary, distinct considerations from the issue of entitlement to a stay under NRAP 8. *State ex. rel. Public Service Commission v. First Judicial Dist. Court*, 94 Nev. 42, 44, 574 P.2d 272, 274 (1978).

Additionally, economic loss, in and of itself, does not constitute irreparable harm – "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough" to show irreparable harm. *Hansen*, 116 Nev. at 658, 6 P.3d at 987 (quoting *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Therefore, the Court should deny the stay because FTB will not suffer irreparable or serious injury.

3. ***Whether Respondent Will Suffer Irreparable or Serious Injury if the Stay is Granted***

The third factor under NRAP 8(c) asks whether respondent will suffer irreparable or serious injury if the stay is granted. Hyatt has already had to endure a grueling process to bring this matter to trial, lasting over a decade. He is now 70 years old. As the appeals process could take several more years, granting a stay would further delay Hyatt from obtaining the benefits of his judgment, and it would be impossible to make up for this lost time.

Therefore, the Court should deny the stay because otherwise Hyatt would be denied the benefits of his judgment, and further delays are simply not warranted.

4. ***Whether Appellant is Likely to Prevail on the Merits in the Appeal***

The fourth factor under NRAP 8(c) asks whether appellant is likely to prevail on the merits in the appeal. FTB cites to *Mikohn Gaming* for the proposition that "Hyatt, as the

potential respondent, *must* 'make a strong showing that appellate relief is unattainable.'" *Provisional Stay Motion* at 22: 20-21 (emphasis added). FTB also cites *Mikohn Gaming* in stating that "the Court can deny a stay on this factor *only* 'if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes.'" *Id.* at 22: 22-23 (emphasis added). However, the actual language used by the *Mikohn Gaming* court is not mandatory as "the party opposing the stay motion *can* defeat the motion by making a strong showing that appellate relief is unattainable" and "if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court *should* deny the stay." 120 Nev. at 253, 89 P.3d at 40 (emphasis added).

While the appellant does not always have to demonstrate a probability of success on the merits, the appellant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987. The FTB does not point to a particular issue on appeal that is likely to succeed, nor does it show that the balance of equities weighs heavily toward a stay. Instead, the FTB makes the bald assertion that "it is abundantly clear that there are significant issues calling into question the validity of the judgment." *Provisional Stay Motion* at 22: 26-27. Nowhere in the Motion, however, are those "significant issues" revealed.

Therefore, the Court should deny the stay because there is no indication that the FTB is likely to prevail on the merits of its appeal.

Consequently, a consideration of the NRAP 8(c) factors requires that the Court deny staying the judgment pending appeal.

III. CONCLUSION

Plaintiff respectfully requests that the Court deny FTB's Provisional Stay Motion. Alternatively, Plaintiff requests that FTB be required to provide a supersedeas bond or other

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

adequate security in order to protect Plaintiff's rights, in the full amount of Hyatt's judgment, including pre-judgment interest and an appropriate estimate for post-judgment interest, based on the anticipated time that any FTB appeal may take to resolve.

Dated this 14 day of October, 2008.

HUTCHISON & STEFFEN, LTD.
Mark A. Hutchison, Esq. (4639)
10080 Alta Drive
Suite 200
Las Vegas, Nevada 89145

BULLIVANT HOUSER BAILEY PC

Peter C. Bernhard, Esq. (734)
3883 Howard Hughes Pkwy.
Suite 550
Las Vegas, Nevada 89169
(702) 669-3600

Attorneys for Plaintiff Gilbert P. Hyatt

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of BULLIVANT HOUSER BAILEY PC and that on this 14th day of October, 2008, I caused the above and foregoing document entitled:

PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO FTB'S PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND

to be served as follows:

[X] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas Nevada; and/or

[X] Pursuant to EDCR 7.26, to be sent via facsimile; and/or

[X] to be hand-delivered;

to the attorney(s) listed below at the address and/or facsimile number indicated below:

via facsimile: (775) 788-2020
James A. Bradshaw, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno, NV 89501

via facsimile: (702) 873-9966
Jeffrey Silvestri, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

via facsimile: (775) 786-9716
Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumas Street, Suite 300
Reno, NV 89509

An employee of Bullivant Houser Bailey PC

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **PLAINTIFF GILBERT P. HYATT'S OPPOSITION TO FTB'S PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND** filed in District Court Case No. A 382999 does not contain the social security number of any person.

Dated this 14 day of October, 2008.

HUTCHISON & STEFFEN, LLC
Mark A. Hutchison, Esq. (4639)
10080 Alta Drive
Suite 200
Las Vegas, NV 89145
(702) 385-2500

BULLIVANT HOUSER BAILEY PC

Peter C. Bernhard, Esq. (734)
3883 Howard Hughes Parkway, No. 550
Las Vegas, Nevada 89169
(702) 669-3600

Attorneys for Plaintiff Gilbert P. Hyatt

Bullivant|Houser|Bailey PC
3883 Howard Hughes Pkwy., Suite 550
Las Vegas, NV 89169
Telephone: (702) 669-3600
Facsimile: (702) 650-2995

EXHIBIT "1"

CBS NEWS

BACK | PRINT

Judge Seeks $250M Down Payment For Calif. Prisons

SACRAMENTO, Calif., Oct. 8, 2008

(AP) A federal judge on Wednesday ordered Gov. Arnold Schwarzenegger's administration to say whether California has the $250 million needed to start an $8 billion overhaul of the prison health care system.

U.S. District Judge Thelton Henderson said the administration must also say how and when the state will make the money available to a court-appointed receiver. He set an Oct. 27 hearing for the administration's response.

J. Clark Kelso, the receiver, wants the money immediately to design the first three of seven planned prison medical and mental health centers, which would house 10,000 inmates.

Kelso said he needed more than $3 billion this fiscal year, despite the state's mounting financial problems. State Controller John Chiang reported Tuesday that revenue for the first quarter of the state's fiscal year is down $1.1 billion from projections used in the budget Schwarzenegger recently signed.

The judge said Monday during a hearing in San Francisco that he expects the state to pay the entire cost, despite its fiscal difficulties. In a two-page order, Henderson said he sees the $250 million payment "as an intermediate step short of a contempt finding."

Kelso argued that Schwarzenegger and Chiang were in contempt of court for not turning over the $8 billion. Kelso had asked the judge to order the state to pay only the first $250 million.

"What we got here is a very clear acceptance of what we asked for," Kelso said of Henderson's order. "We are, frankly, taking that first step forward."

Henderson's order said the $250 million was appropriated 18 months ago as part of a $7.4 billion borrowing plan for other prison and jail construction projects.

But state Department of Finance spokesman H.D. Palmer said the administration included $50 million of the money in the current year's budget and had planned to make the remaining $200 million available in the next fiscal year that begins July 1, 2009.

Spokesmen for the administration and attorney general's office, which is representing the state, said they are reviewing the order but likely won't respond until the hearing.

YAHOO! NEWS

Back to Story - Help

Judge seeks $250M down payment for Calif. prisons

Associated Press

By DON THOMPSON, Associated Press Writer
Wed Oct 8, 8:00 PM ET

A federal judge on Wednesday ordered Gov. Arnold Schwarzenegger's administration to say whether California has the $250 million needed to start an $8 billion overhaul of the prison health care system.

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Page 94

assets available to operate from or to expand their operations with. So net worth in the sense that someone takes it home and buys a new car with it, obviously not. But it could be used to further the services of the state.

Q. Mr. Sjoberg, any transfer of the state's resources from the State of California to Mr. Hyatt comes from the public property or the public revenues, doesn't it?

A. Yes, it does.

Q. The burden is ultimately born by the California taxpayers, isn't it?

A. It would be.

MR. BRADSHAW: I'm almost done, Your Honor. I'm just checking my notes real quick.

THE COURT: Sure.

MR. BRADSHAW: Thank you, Mr. Sjoberg.

THE COURT: Mr. Hutchison?

MR. HUTCHISON: Nothing, Your Honor. Thank you very much.

THE COURT: Thank you, sir. You may be excused. Any other witnesses, Mr. Hutchison

MR. HUTCHISON: No, Your Honor. As I indicated, Mr. Sjoberg was our only witness and we've concluded with our witnesses. Thank you.

THE COURT: Mr. Bradshaw?

MR. BRADSHAW: We do have another witness. It's

Page 95

ten minutes to 5:00. If Your Honor would like to break, I could collect my notes for this witness and put them on.

THE COURT: (Jury admonisment.) We'll be back in 15 minutes.

MR. HUTCHISON: Can we address one issue at side bar, please?

(A discussion was held off the record.)

(A short break was taken.)

THE COURT: Mr. Hutchison, I'd like to accommodate your request. I don't know we could finish today even if we stayed late because there's still the issue of closings. If we finish with this first witness, let's say we even went until 5 o'clock.. There's still two more witnesses and then there's the issue not only of cross examination but redirect examination.

MR. HUTCHISON: My cross won't be long with any of these witnesses, Your Honor. I can tell you that.

THE COURT: So I think what we should do is the jury is going to have to come back anyway. I think we should tell them before they leave today that they're going to be coming back Wednesday instead of tomorrow. It would be my hope that we should be able surely by Wednesday, clos of business we should be able to get through the two witnesses perhaps in the morning and have closing arguments in the afternoon and give this case to the jury Wednesday.

Page 96

MR. HUTCHISON: Okay.

MS. LUNDVALL: Thank you for the scheduling information.

THE COURT: Doing the best I can.

MR. BRADSHAW: Would you like the witness on the stand?

THE COURT: It might save a few moments, yes. If we could stop at our normal 4 o'clock, I think the jury would appreciate it, Mr. Bradshaw.

(Jury enters.)

THE COURT: Please be seated, ladies and gentlemen. Counsel will stipulate to the presence of the jury?

MR. HUTCHISON: Yes, Your Honor.

MS. LUNDVALL: Yes, Your Honor.

THE COURT: Mr. Bradshaw, the next witness is?

MR. BRADSHAW: The Franchise Tax Board calls Michael Genest.

THE CLERK: Please raise your right hand and be sworn.

Whereupon,

MICHAEL GENEST,

Having been first duly sworn,

THE CLERK: Please be seated, stating your full name, spelling your last name for the record.

Page 97

THE WITNESS: My name is Michael C. Genest, G-e-n-e-s-t.

DIRECT EXAMINATION

BY MR. BRADSHAW:

Q. Mr. Genest, where do you reside?

A. Sacramento, California.

Q. How long have you been a resident of California?

A. This time 27 years.

Q. Where did you live before that?

A. I lived in Springfield, Illinois, for a while.

Q. Prior to that?

A. San Jose, California, around different parts of California, Napa Valley.

Q. So you're from California basically?

A. Yes.

Q. How are you employed?

A. I'm the director of finance for the State of California.

Q. How long have you held that position?

A. Three years approximately.

Q. How did you obtain that position?

A. Governor Schwartanager asked me to take that job, I was accepted and confirmed by the senate.

Q. So the director of finance is appointed by the

Page 110

Q. As the director of the department of finance, what is your responsibility?
A. My chief responsibility as my business card says I'm the chief fiscal policy advisor to the governor. Certainly that's where my attention is often is with trying to help the governor understand what's going on with our finances and what we can do about it and how to work with legislature in getting those things done.
I also however work extensively with the legislature itself. We have a role of giving them information on the budget. We're sort of a store house of facts about the budget, even though there may be disagreements on policy, we kind of keep score of different people's proposals and so forth in the legislature as well as the governor's own proposals.
Then I also supervise the Department of Finance itself, running the shop.
Q. Having a career involving budget and finance and having been director of the department of finance, the experience you've described, is it accurate to say you're familiar with the financial condition of the State of California at the present time?
A. Yes.
Q. Would you please describe that for the jury.
A. I think the best way to describe our financial

Page 111

situation now is we have a significant budget crisis at the moment. The reason we have that crisis. You have to understand the reason to understand what it is. We have a long term structural budget deficit meaning the way our programs are setup and the way our revenues are setup, out into the future, if we don't do anything about it, we'll be spending more than we take in year after year after year. Obviously that's unsupportable. You can't do that. That's the way things are now. That's our structural problem.
No one can really say how much of our problem is structural that we have to fix for the long term versus how much is just associated with the current economic down turn. Certainly a substantial amount of our current problem is not only we have this structural imbalance we have to address. We also have a down turn in the economy and reduction in our revenue streams. We have both kinds of problems. We have the problems a lot of states have, which it's a slow economy so you have to make adjustments. We have the problem only states who have made mistakes have and that is we have built-up the base of our spending more than we can afford in the long run.
Our financial condition is very bad at the moment. When I say this, I'm speaking in terms of the state's general fund. When we talk about the state's budget or the state budget short fall or the budget crisis that's the fund

Page 112

we're talking about. Because that's where most of the state's money is and that's where most of the discretion about how you might spend the money is.
That's sort of our general pot of money for running government. It's not tied up for anything that can be used for any legal purpose whereas other funds are restricted to certain purposes. When I say we have a budget crisis I'm talking about the general fund. That general fund is probably about 18 billion dollars out of whack next year. When I say next year, I say that because our budget, our fiscal year starts July 1st and we don't have a budget in effect. I'm still operating on the mind-set of working on the budget for next year but now we're in next year. The fiscal year 08-09 budget which began July 1st is the one I'm talking about.
In that year without any changes to our laws or policies we will spend about 18 billion dollars more than we take in. Obviously we're not going to do that because you can't do that. That's where we stand until we fix our budget problem.
Q. You understand that you're here testifying in the matter of Gilbert P Hyatt versus the California Franchise Tax Board?
A. Yes.
Q. You know this trial is in the punitive damage

Page 113

phase?
A. Yes.
Q. Now you know Curt Sjoberg?
A. Sure.
Q. He testified just before you did. He indicated that the state has a budget deficit of 14 billion dollars. Do you have information on that deficit?
A. We put out our budget twice a year. We put it out in January with whatever numbers we have. Then we get close to the end and have some pretty good solid numbers and we revise it. That's called the May revision.
In January we identified a budget problem of 14 and a half billion dollars. Maybe he was speaking of that. In our May revision, we identified a total -- this is a two-year number, a total budget shortfall of 24 billion. I don't want to confuse you, the 18 and the 24. The 24 included things that happened last year. We brought forward from last year into this year more than 4 billion of short fall. We were 4 billion in the hole starting the year. Then to build that up to a reserve we have to add 2 billion because we think a 2 billion dollars reserve is as small as you can essentially get especially (Inaudible). The 18 billion on top of that, that's where you get the 24. Even though we're going to spend 18 billion more this year than we have, if we don't do anything about it, we have to solve

RPLY
JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No. (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT,	Case No.	: A 382999
Plaintiff,	Dept. No.	: X
vs.	Docket No.	: R
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,	**FTB'S REPLY IN SUPPORT OF PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND**	
Defendant.	**Hearing Date: November 5, 2008** **Hearing Time: 9:00 am**	

Hyatt's Opposition encourages this Court and the State of Nevada to become hostile toward a state agency of the State of California, FTB, by requesting that this Court treat FTB **worse** than it would treat a similarly situated Nevada state agency, all in defiance of previous decisions from the Nevada and United States Supreme Courts in this very case, and in defiance of other courts interpreting those decisions exactly like FTB described in its Provisional Motion. This Court should decline to do so.

It must be recalled that no matter how this Court looks at this litigation, significant issues related to the interstate relationship between the people of California and the people of

Nevada are implicated by this case. These important considerations and implications were recognized and valued by both the Nevada Supreme Court and the United States Supreme Court. In his Opposition, Hyatt asks this Court to ignore these considerations and to adopt a policy of outright hostility to a governmental entity of the State of California and its people and its public acts. This is exactly the type of blatant hostility that the United States Supreme Court has been concerned about in its previous jurisprudence – including this case.

To add insult to injury, Hyatt relies upon his often-used strategy of changing his legal position with respect to a particular issue because his previous position is no longer helpful to what he wants in this litigation. Specifically, before the United States Supreme Court Hyatt argued – both in his oral and written arguments – that the doctrine of comity required FTB to be treated like any Nevada state agency would be treated under the specific circumstances of this case. See FTB's Provisional Motion, pp. 9-11. At that time, this argument suited Hyatt's purposes of enabling Nevada's courts to assert jurisdiction over this litigation. In his Opposition, however, Hyatt takes the opposite position. Now, Hyatt argues that FTB should **not** be treated like a similarly situated Nevada agency which is not required to post a bond to obtain a stay pending appeal. Rather, Hyatt argues this Court should treat FTB **differently**, in fact **worse**, than a Nevada state agency in similar circumstances even though the state policies at issue are identical. This is so because treating FTB like a Nevada agency no longer serves Hyatt's purposes in this case. Hyatt's flip-flopping must, for once, be rejected.

Hyatt's Opposition asks this Court to ignore the law of this case, his own judicial admissions, and the law related to comity to come to the conclusion that FTB, a state agency, must be required to post a supersedeas bond in order to obtain a stay pending appeal. Hyatt makes this argument in spite of the fact that **both** California and Nevada expressly exempt their state agencies from having to post such bonds. In fact, there is no Nevada statute, rule, policy, or legitimate interest that requires a state agency to post a supersedeas bond in order to obtain a stay pending appeal – whether that agency is a Nevada agency or an out-of-state agency such as FTB. In fact, Nevada, like California, expressly exempts its own agencies from this requirement. Thus, there is no Nevada interest, and Hyatt has pointed to none, that support a

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PHONE (702) 873-4100 • (702) 873-9966

finding that a sister state agency should be required post such a bond to secure a stay pending appeal.

The law of this case, as established by the Nevada Supreme Court and the United States Supreme Court, is exactly the opposite of Hyatt's position. In particular, the law of this case mandates that this Court treat FTB like it would treat any similarly situated Nevada agency when the state policies at issue are identical. **Based on the law of this case, when the interests and policies of Nevada and California are aligned on a particular legal issue, this Court must apply the doctrine of comity.** This is not just FTB's interpretation of that law. In fact, courts from other jurisdictions that have applied the United States Supreme Court's decision in this case **agree** that applying principles of comity requires a forum state to treat a sister agency in the same way that it would treat its own agency when the state policies are identical. It seems the only one who does not believe that this is the law of this case is Hyatt. Worse still, Hyatt has provided no case law or legal authorities that would permit this Court to ignore or refuse to apply either the law of this case doctrine or the judicial estoppel doctrine to the issues presented in FTB's Provisional Motion. In other words, Hyatt's Opposition is long on argument but short on any citation to legal authority to support his argument.

In sum, the previous decisions from this case define the scope of comity to be afforded to FTB. That scope is defined by the immunities and protections Nevada affords its own government agencies. Since Nevada does not require its own government agencies to post a bond to obtain a stay pending appeal, and since California's policies are identical, FTB should not be required to post a bond to obtain a stay pending appeal.

As to the balance of Hyatt's Opposition, he fails to overcome or rebut FTB's arguments establishing that pursuant to Nelson v. Heer and NRAP 8, FTB is entitled to a stay pending appeal, **without** having to post a supersedeas bond. Hyatt's own evidence presented during the punitive damage phase of this trial establishes that each of the factors provided in Nelson v. Heer and NRAP 8 weigh in favor of a stay pending appeal and waiving the supersedeas bond requirement. As such, FTB's Provisional Motion should be granted on this ground as well.

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PHONE (702) 873-4100 • (702) 873-9966

I. LEGAL ARGUMENT

A. The Relief Requested By FTB's Provisional Motion Is Not Premature.

Hyatt's Opposition begins by asserting that FTB's Provisional Motion should be denied because it is "premature." Hyatt's Opp'n, p. 4. Hyatt contends that FTB's Provisional Motion should not be decided until after the Court has had the opportunity to review the briefing in FTB's Post Trial Motions. Id. FTB's Provisional Motion, however, is not premature and the Court should not wait to resolve the important issues contained herein.

First, Hyatt and FTB agree on one point -- the current stay that has been imposed by the Court pending FTB's Post-Trial Motions shall remain in effect until ten days after the notice of entry of the Court's order deciding those motions is entered. See Hyatt's Opp'n, p. 4, n.2. FTB disagrees, however, that it would be premature for this Court to rule upon the issues presented by the current motion before ruling on FTB's Post-Trial Motions.

In this instance, assuming FTB does not prevail on the post-trial motions, the stay that is currently in place will expire ten days after the service of written notice of entry of the order denying those motions is entered. Even if FTB filed a motion for stay pending appeal on the very same day that this notice was entered, by rule, Hyatt would have ten days from the date he was served with the motion to file his opposition. See EDCR 2.20(b). Thus, the current stay would expire on the same day Hyatt's opposition would be due. This would result in a situation in which no stay of the judgment would be in effect until the Court had the opportunity to rule on the instant motion.[1] As such, FTB filed the instant motion at this time to avoid this result.

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[1]If FTB's had waited to file the instant motion until after the Court made a ruling on FTB's Post-Trial Motions, as suggested by Hyatt, FTB would have had to request that the Court enter an order shortening time. See EDCR 2.26. This, however, was not an appropriate option for two reasons. First, the Court is not required to grant requests for orders shortening time. Id. If the Court refused FTB's request, the stay would have expired before briefing on FTB's Provisional Motion was complete, as explained above. Moreover, even if the Court granted FTB's request to shorten time, this would have put the Court and the parties in the position of briefing and considering the complicated issues presented by FTB's Provisional Motion without sufficient time to fully review and consider these important issues.

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In addition, it was prudent for FTB to file this Provisional Motion now to ensure that the parties and the Court had adequate time to fully brief and consider the complicated issues presented herein. It should be recalled that Hyatt has repeatedly represented to this Court that this is not an ordinary case. This is an accurate statement to the extent it applies to the procedural history of this litigation, which has been anything but ordinary. Rather, the procedural history has been long, arduous, and complicated. FTB's Provisional Motion requires this Court to directly consider and review this complicated procedural history. Thus, filing this motion as soon as possible was required to allow the parties and the Court to fully brief and consider these issues.

More importantly, contrary to Hyatt's Opposition, it would not be premature for this Court to rule on FTB's Provisional Motion prior to considering FTB's Post-Trial Motions. In this instance, as soon as this Court rules on FTB's Provisional Motion, the losing party (whether it be FTB or Hyatt) will have the ability to file an immediate writ to the Nevada Supreme Court seeking review of that decision. NRAP 8(a). In order for the Nevada Supreme Court to have adequate time to consider such a writ **prior to the expiration of the current stay**, this Court must enter its decision related to FTB's Provisional Motion before the current stay expires. In other words, if this Court accepts Hyatt's invitation to wait to make a determination related to FTB's Provisional Motion until after ruling on FTB's Post-Trial Motions, the parties and the Court will once again be presented with a situation in which the current stay will expire before the Nevada Supreme Court has an adequate opportunity to consider and rule upon the propriety of a stay pending appeal. If that occurs, and FTB is not successful with its post-trial motions, Hyatt could begin to collect on the judgment before either this Court or the Nevada Supreme Court has had the opportunity to make an appropriate ruling. Therefore, it was not premature for FTB to file the instant motion and more importantly, it is not premature for this Court **to decide** the issues presented herein at this time.

B. Hyatt's Arguments Related To The Law Of The Case Are Legally And Factually Unsupported.

Due to the confusing nature of Hyatt's Opposition, FTB finds it necessary to re-state

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exactly what FTB's Provisional Motion seeks to ensure that consideration of the arguments and response is properly oriented. Specifically, FTB's Provisional Motion requests that this Court apply the principles of comity, which, based on the law of this case and the alignment of both states' policies concerning no bond needed to obtain a stay pending appeal, requires this Court to treat FTB the same as it would treat a similarly situated Nevada agency. Thus, FTB requests that this Court enter a stay pending appeal without requiring FTB, a state government agency, to post a supersedeas bond. FTB's argument is based upon the fact that under both California and Nevada law, a state government agency is exempted from having to post a bond to secure a stay on appeal. See NRCP 62(e); Cal. Civ. Pro. Code § 995.220.

In order to avoid FTB's request, Hyatt argues that the law of this case does not require the application of the principle of comity. In particular, Hyatt argues that the law of this case does not require this Court to treat FTB the same as it would treat a similarly situated Nevada state agency. Hyatt's Opp'n, pp. 5-11. To support this proposition, Hyatt makes a three-fold argument. First, Hyatt claims that neither the Nevada Supreme Court nor the United States Supreme Court determined that this Court must treat FTB like a similarly situated Nevada agency because the comity issue was not really the focus of these appellate decisions. Id. at 7-11. This is incorrect. The quintessential holding of each of these decisions was the fact that the district court should have applied the principle of comity, **using Nevada's treatment of its own state agencies as the benchmark for this analysis**. Moreover, contrary to Hyatt's assertions, other courts relying upon the United States Supreme Court decision in this case have determined that the principles of comity **require that the forum state treat a sister state the same way it would treat its own agencies**. Hyatt's Opposition ignores these other authorities entirely.

Next, Hyatt claims that this Court is not required to apply comity in this instance because this principle is not a mandatory doctrine. See Opp'n, p. 8. Hyatt, however, misses the essential point of FTB's Provisional Motion. Comity is required in this case for two reasons. First, the law of the case doctrine mandates the application of comity to the issues in this litigation. In addition, judicial estoppel prevents Hyatt from claiming that FTB be treated differently than a Nevada state agency would be treated. Hyatt has provided no case law or legal

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authorities which would absolve this Court from applying these legal doctrines in this case.

Finally, Hyatt argues that Nevada v. Hall, 440 U.S. 410 (1979) mandates that this Court not treat FTB the same as its own government agencies. Hyatt's Opp'n pp 6-7. Specifically Hyatt argues:

> California, through the FTB, now requests that Nevada, as a matter of comity, apply all Nevada laws and rules that Nevada has adopted to protect its own agencies, in order to protect California, even though California has refused to grant comity to Nevada. If the FTB succeeds in this argument in Nevada, then California will take advantage of Nevada rules favorable to it (such as NRCP Rule 62), where it commits intentional torts against a Nevada citizen, but it refuses to accept Nevada's favorable laws when Nevada is sued in California for mere negligence. That result is not what the Nevada Supreme Court ruled in this case, nor is it conceivable that it would so rule, given California's refusal to grant comity to Nevada with respect to Nevada's compensatory damage caps. The concept of comity is based on one state's respect of another state. **One state's refusal to grant comity on a specific issue makes it virtually certain that the second state will return the disrespect and reject a subsequent request for comity on that same issue by the first state.**

Id. (emphasis added). Hyatt's argument is silly. If Hyatt were correct, then why did our Nevada Supreme Court grant comity to FTB and mandate the district court to dismiss Hyatt's negligence and discretionary acts claims? In fact, Hyatt's comity argument misses the entire point of FTB's Provisional Motion, and his argument shows a fundamental misunderstanding of the Nevada Supreme Court's prior ruling in this case. FTB's Provisional Motion does not seek a blind application of Nevada law in favor of FTB. Rather, the motion seeks application of a **California** statute, tempered by consideration of Nevada's public policies established by Nevada law. In other words, FTB seeks application of California's statute allowing a stay pending appeal without a bond, because this statute, when compared with Nevada's similar law, does not offend or contravene Nevada's public policy.

This is precisely the analysis used by the Nevada Supreme Court in its prior decision in this case. With regard to Hyatt's claim for recovery based on negligent acts and discretionary acts the Nevada Supreme Court determined that the California statute giving FTB immunity from lawsuits in California **should** apply in this Nevada lawsuit. Why? Because (1) good relationships between sister states should be fostered, and this is accomplished by application of the doctrine of comity, and (2) California's immunity statute for FTB did not contravene

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Nevada's statute giving immunity to Nevada government agencies for negligent and discretionary acts. Under both statutes, citizens of California and Nevada are precluded from recovering against Nevada state agencies and FTB for negligent or discretionary acts. Thus, the Nevada Supreme Court determined that Nevada's public policy – under which Nevada citizens are barred from recovering against a Nevada state agency for negligent or discretionary acts – was not offended or contravened by application of the California immunity statute for FTB, in a Nevada lawsuit filed by a Nevada citizen against FTB. This was the only reason why the Nevada Supreme Court **issued a writ mandating the district court to apply comity and to dismiss the claims based on negligent and discretionary acts.**

Hyatt contends, however, that in Nevada v. Hall, California essentially snubbed its nose at Nevada by refusing to recognize Nevada's statutory immunity. Hyatt contends that Nevada courts should now **retaliate** against California by refusing to apply comity in the present case. Hyatt fails to understand that the California courts in Nevada v. Hall merely applied the same fundamental concept of comity that the Nevada Supreme Court applied in the present case, i.e., that a forum state should recognize another state's laws applicable to suits against the other state **if the other state's laws do not offend or contravene the forum state's own public policies.** In Nevada v. Hall, the California courts observed that Nevada law provided immunity for government agencies, but California law provided no such general immunity for its own government agencies. As such, Nevada's law, which limited the rights of its own citizens, contravened and offended California's broader public policy of allowing it citizens to recover full damages against California agencies.

Nothing in any of the decisions by the California Court of Appeal or the California Supreme Court in Nevada v. Hall even remotely suggests that California would deny comity to Nevada in all cases. The California courts merely held that in the specific circumstances in that case, Nevada law offended and contravened California public policy and therefore would not be applied.

By its very decision in the present case, the Nevada Supreme Court has **rejected** the idea of **retaliation** against California. The Nevada Supreme Court rendered a decision that fostered

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the important relationship between the two states by giving express recognition in the form of comity to California's immunity law, to the extent that California's law did not offend or contravene Nevada's law. Therefore, the Nevada Supreme Court ordered the district court to dismiss Hyatt's claim based on negligence and discretionary acts because California's specific immunity statute favoring FTB did not offend Nevada's public policy to that extent. If the Nevada Supreme Court had wanted our courts to retaliate against California for refusing to grant immunity to Nevada in Nevada v. Hall, the Nevada Supreme Court would certainly not have applied comity and ordered mandatory dismissal of Hyatt's negligence and discretionary acts claims. Hyatt's Opposition offers no explanation as to why the Nevada Supreme Court would order dismissal of these claims, based on comity, while at the same time wanting our judiciary to retaliate against California because of California's denial of comity 30 years ago in Nevada v. Hall.

1. The Law Of This Case Mandates The Application Of Comity.

In order to overcome the arguments presented in FTB's Provisional Motion, Hyatt's Opposition attempts to rewrite the procedural history of this litigation, once again. Hyatt's Opp'n, pp. 4-11. In doing so, Hyatt asserts that the holdings of the Nevada Supreme Court and the United States Supreme Court do not "require" this Court to treat FTB like it would treat a similarly situated Nevada state agency. Id. In short, this argument is incorrect. This is exactly what all courts require when applying the comity doctrine and this is exactly what the Nevada Supreme Court and the United States Supreme Court did – at Hyatt's behest.

As a starting point, it must be recalled that comity is a principle whereby the courts of one jurisdiction give effect to the laws and judicial decisions of another state out of deference and respect and to promote harmonious interstate relationships. See Mianecki v. Second Judicial Dist. Court, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983). In determining whether to grant comity to another state's laws, the forum state must determine whether the application of the sister state's laws would contravene any of the policies or interests of the forum. Id. In cases, like the case at bar, where one state agency has been sued in the court of another state, a clear principle has emerged: the forum state looks to the manner in which its own state agencies

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PHONE (702) 873-4100 • (702) 873-9966

would be treated under the same or similar circumstances and provides that same treatment to the sister state agency. See e.g., Schoeberlein v. Purdue University, 544 N.E.2d 283, 288 (Ill. 1989) (granting comity, after determining that treatment of out-of-state agency would be the same treatment given an in-state agency under the same circumstances); Solomon v. Supreme Court of Florida, 816 A.2d 788, 789-90 (D.C. Cir. 2002) (applying comity, D.C. court treated Florida bar the same way the D.C. bar would be treated under similar circumstances); McDonnell v. State of Illinois, 748 A.2d 1105, 1107-08 (N.J. 2000) (explaining that some courts have declined to grant comity to out-of-state law because it would require treating out-of-state agency differently than in-state agency); Sam v. Sam, 134 P.3d 761 (N.M. 2006) (applying two-year statute of limitation that applied to New Mexico state agencies to an Arizona state agency sued in New Mexico); Hansen v. Scott, 687 N.W.2d 247 (N.D. 2004) (applying same level of sovereign immunity accorded to a North Dakota state agency to a Texas state agency sued in North Dakota).

The rationale for this rule is simple. By treating the sister state agency the same as an in-state agency, no interests or policies of the forum state are undermined, but at the same time, the sister state agency is accorded heightened respect and more deference than just any other ordinary litigant. See Hansen, 687 N.W.3d at 251 (determining that application of same level of immunity to Texas agency afforded to North Dakota agency does not compromise public policy of North Dakota); Sam, 134 P.3d at 768 (same). Thus, the purpose of comity – to encourage harmonious interstate relationships and encouraging a spirit of cooperation between the states – is satisfied. Id. Contrary to Hyatt's Opposition, this is exactly the rule that was applied in this case by the Nevada Supreme Court and United States Supreme Court – at Hyatt's request.

Recall, the Nevada Supreme Court expressly held that the district court had a mandatory duty to apply the principles of comity to Hyatt's negligence claims. Exhibit 2, p. 7. In reaching this conclusion, the Nevada Supreme Court expressly engaged in a comparative analysis of governmental immunities that would extend to a Nevada state agency under the facts and circumstances of this case in contrast to the complete immunity that would be extended to FTB under California law. Id. The Nevada Supreme Court concluded, applying principles of comity,

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that FTB could be subject to liability in Nevada **only to the same extent that a similarly situated Nevada agency could be held liable**. Id. Thus, the Nevada Supreme Court concluded that the district court should have dismissed Hyatt's negligence claims on the basis of comity because similarly situated Nevada state agencies could not be held liable for their discretionary acts. Id. Conversely, however, the Nevada Supreme Court determined that the district court correctly concluded that FTB could be subject to liability in Nevada for its intentional torts because similarly situated Nevada agencies were not immune from liability for their intentional misconduct. Id.

The United States Supreme Court expressly affirmed this decision. Franchise Tax Board v. Hyatt, 538 U.S. 486, 499, 123 S.Ct. 1683 (2003). In doing so, the United States Supreme Court expressly held that, "[t]he Nevada Supreme Court sensitively applied **principles of comity** with a healthy regard for California's sovereign status, **relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis**." Id. (emphasis added). Thus, the United States Supreme Court expressly upheld the Nevada Supreme Court's application of comity, because in applying this principle the Nevada Supreme Court correctly treated FTB the same way that it would have treated its own state agencies. In fact, the United States Supreme Court expressly noted, that based on the Nevada Supreme Court's proper application of comity principles, it was not presented "**with a case in which a State has exhibited hostility to the public acts of a sister state.**" Id. (internal citations and quotations omitted.) The rule of law adopted by these decisions regarding the application of comity is the law of this case and must be followed by this Court. See Hsu v. County of Clark, 173 P.3d 724, 728 (Nev. 2007) (rule of law adopted by appellate court must be followed in subsequent proceedings in litigation.)

FTB's interpretation of the rule relied upon by the United States Supreme Court's decision is the same interpretation taken by other courts that have subsequently examined and relied upon that decision. For example, the North Dakota Supreme Court's interpretation of the rule expressed by the United States Supreme Court is identical to FTB's interpretation. Hansen v. Scott, 7 N.W.2d at 250-51. In Hansen, the North Dakota Supreme Court, relying expressly

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upon rule utilized by the United States Supreme Court in Franchise Tax Board v. Hyatt, held that when applying the doctrine of comity it was required it to apply the same immunity from suit to a Texas state agency that it would apply to a North Dakota state agency sued under the same or similar circumstances. Id.

The New Mexico Supreme Court also agreed with FTB's interpretation in Sam v. Sam.[2] 134 P.3d at 766. In Sam, the New Mexico Supreme Court examined Franchise Tax Board v. Hyatt in attempting to determine whether New Mexico should give comity to an Arizona statute of limitation applicable to Arizona state agencies in a lawsuit filed against the Arizona agency in New Mexico. 134 P.3d at 766. Relying in part upon Hyatt, the Sam court agreed with FTB,that under the principles of comity, it must treat the Arizona agency the same way that it would treat its own state agencies under the same or similar circumstances. Id. at 768. Thus, although the court did not apply the Arizona statute of limitations, the New Mexico court did apply a New Mexico statute of limitations to the Arizona state agency which was only applicable to New Mexico state agencies – rather than New Mexico's general limitations period applicable to private civil litigants. It seems the only one who does not believe that the United States Supreme Court applied that same rule is Hyatt.

Hyatt attempts to distance himself from these determinations by claiming that the comity issues resolved by these courts were not central to these decisions and therefore not "law of the case." See Hyatt's Opp'n, pp. 5-11. Hyatt asserts that these decisions merely represent the Nevada Supreme Court's and the United States Supreme Court's rejection of FTB's arguments related to sovereign immunity, full faith and credit, choice of laws, and exhaustion of administrative remedies. Id. at p. 5. In fact, Hyatt goes so far as to state that these courts

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[2] It is important to note that FTB's Provisional Motion provided an extensive analysis of this decision that explained in detail the rule applied by the New Mexico Supreme Court. See FTB's Provisional Motion, pp. 11-12. Hyatt's Opposition makes no mention of this decision and makes no attempt to distinguish the rule announced in that decision from the case at bar.

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"rejected" the application of comity in this litigation and therefore this Court need not apply this doctrine in this context. Id. at 5, 7-11.

Nothing could be further from the truth. As the Court can plainly see, the quintessential holding of each of these two decisions revolves **directly upon the application of comity** – and the rule described above. First, the Nevada Supreme Court determined that the district court **was mandated to apply** principles of comity to this litigation and dismissed Hyatt's negligence claim. See Exhibit 2, p. 7. The United States Supreme Court expressly upheld the Nevada Supreme Court's application of comity on this issue. Franchise Tax Board, 538 U.S. at 499. In so holding, both of those courts expressly determined that **principles of comity** must be applied to this case to the extent comity does not interfere with a Nevada state policy or interest. Exhibit 2; Franchise Tax Board, 538 U.S. at 499. Thus, when this Court is presented to with an issue related to the application of comity, these decisions expressly mandate the manner in which this Court must apply that doctrine – i.e., this Court must treat FTB the same as it would treat a Nevada state agency.

The mere fact that other issues were argued or presented to these courts for review does not lessen or undermine the core holding of these decisions. In other words, simply because the parties made additional arguments or raised other issues before these courts does not change the fact that this Court must follow the rule related to comity that was created by these decisions.

2. The Law Of The Case Doctrine And Judicial Estoppel Mandate The Application Of Comity In This Case.

Hyatt's Opposition also argues that the law of the case doctrine does not apply because the issue related to a bond pending appeal was not previously raised before the Nevada Supreme Court or the United States Supreme Court. Opp'n, pp. 5-6. Based on this assertion, Hyatt argues that this Court is not required to apply comity in this instance. Id. Hyatt then claims that this Court is not required to apply the judicial estoppel doctrine because his previous arguments related to comity only addressed FTB's substantive liability. Id. at 11. In other words, Hyatt believes that the doctrine of comity is like a light switch that can be turned on and off at the Court's whim. Hyatt's arguments misconstrue the law of the case and judicial estoppel doctrines

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and must be rejected.

As to Hyatt's law of the case assertions, Hyatt provides no legal authority to support his narrow interpretation of the application of this doctrine. See Opp'n, pp. 5-6. Hyatt's Opposition does not cite to any case, statute, or rule that establishes that the law of the case doctrine applies in such a narrow context. Id. Therefore, Hyatt's argument fails on this basis alone.

Even if this argument is considered on the merits, however, the law of the case doctrine is not so narrow. "Law of the case" is a judicially created doctrine, the purpose of which is to prevent re-litigation of issues that have been decided. See Gould, Inc. v. U.S., 67 F.3d 925, 927-928 (Fed.Cir. 1995). In Nevada, the law of the case doctrine makes an appellate court's decision on a **rule of law** binding in subsequent proceedings. Wheeler Springs Plaza LLC v. Beemon, 119 Nev. 260, 71 P.3d 1258, 1262 (Nev. 2003) (citing Bd. of Gallery of History v. Datecs Corp., 116 Nev. 286, 289, 994 P.2d 1149, 1150 (2000)). Thus, **when an appeals court states a rule of law** necessary to its decision, the **rule is the law of the case** and "must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal." LoBue v. State, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976). Thus, when a different factual scenario is presented to the district court related to a legal issue that has already been determined by the appellate court, the district court is required to apply that **rule of law** to the new factual scenario. Id. That is exactly the case here.

In this instance, as noted at length above, the Nevada Supreme Court and United States Supreme Court determined that the principles of comity must be applied to this litigation as it proceeded – these courts determined the "**rule of law**" that must be applied by the district court when subsequently addressing questions of comity in this case. Exhibit 2; Franchise Tax Board, 538 U.S. at 499. Based on this rule of law, these Courts determined that the manner in which the district court was required to apply the doctrine of comity mandates that the district court

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rely upon the treatment of Nevada state agencies as the "**benchmark**" in determining the treatment to be accorded to FTB in this litigation. Id. [3]

Next, Hyatt argues that judicial estoppel does not apply to his previous statements because his previous statements only related to "substantive liability for tortious acts." Hyatt's Opp'n, p. 11. But once again, Hyatt has provided **no** legal authority or citations to support his narrow interpretation of the judicial estoppel doctrine. Id. In addition, Hyatt's Opposition makes no attempt to rebut or address the substantial case law related to this issue cited by FTB's Provisional Motion. Thus, Hyatt's argument on this point should likewise be rejected on these bases alone.

Additionally, Hyatt's interpretation of the judicial estoppel is totally incorrect. As detailed in FTB's Provisional Motion, Hyatt argued extensively, in both his written and oral submissions to the United States Supreme Court, that the Nevada Supreme Court correctly applied the doctrine of comity in this case because it treated the FTB the same as it would have treated a similarly situated Nevada state agency. See FTB's Provisional Motion, pp. 9-10; Exhibit 3, Hr'g Tr. 2/24/2003, pp. 9-10, 33, 46; Exhibit 4, Hyatt's Resp't Br. 1/21/2003, pp. 20, 38-39. In fact, Hyatt explicitly argued that when applying the comity doctrine, the Nevada courts were **required** to treat FTB the same way that these courts would treat a Nevada state agency. Id. Based on these unequivocal arguments, upon which Hyatt prevailed, Hyatt is judicially estopped from now taking the opposite position before this Court. Marcuse v. Del Webb Communities, Inc., 163 P.3d 462, 468-69 (Nev. 2007).

As explained in FTB's Provisional Motion, judicial estoppel precludes a party from assuming a position in a legal proceeding that **contradicts, or is inconsistent with, a previously asserted position on which the party prevailed.** In fact, the entire purpose of this

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[3] Hyatt's assertion that this Court is not required to apply the comity doctrine in this instance because application of comity doctrine is "voluntary" and "discretionary" is incorrect. Opp'n, pp. 8. In this case, the application of comity to the issues presented in FTB's Provisional Motion is mandated because of the law of the case doctrine and judicial estoppel. Therefore, Hyatt's claims that this Court can simply decline to apply comity in this context is legally wrong.

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doctrine is "to prohibit the deliberate shifting of position to suit exigencies of each particular case that may arise concerning the subject matter in controversy" and to protect the integrity of the judicial system. Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 550, 396 P.2d 850 (1964) (quoting 31 C.J.S. Estoppel § 121 at 649, 650). This doctrine "looks to the connection between the litigant and the judicial system, preserving the integrity of the courts by preventing litigants from 'playing fast and loose with the courts.'" Chaffee v. Kraft General Foods, Inc., 886 F.Supp. 1164, 1168-69 (D.N.J. 1995), quoting Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992); Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990).

As noted in FTB's Provisional Motion, there are five criteria that must be met in order for judicial estoppel to apply under Nevada law. Marcuse.,163 P.3d at 468-469. Contrary to Hyatt's claims, none of these elements requires the context of the previous arguments to be identical to the context of the latter arguments before judicial estoppel will apply.

Moreover, Hyatt's argument misses the point of FTB's Provisional Motion. FTB's Provisional Motion only requests that this Court apply the doctrine of comity and treat FTB the same way that it would treat a similar Nevada state agency since the policies of both states concerning government agencies and bonding requirements is identical. **That is exactly the context in which Hyatt made his arguments to the United States Supreme Court.** Specifically, Hyatt argued that the Nevada Supreme Court properly applied the doctrine of comity in this case because it treated FTB the same as it would treat a Nevada state agency. Exhibit 3, Hr'g Tr. 2/24/2003, pp. 9-10, 33, 46; Exhibit 4, Hyatt's Resp't Br. 1/21/2003, pp. 20, 38-39. It does not matter that the question before the Court related to the Court's jurisdiction. The issue that was under discussion related to the application of **comity**. Based on the doctrine of judicial estoppel, Hyatt cannot flip-flop on this position now. Rather, Hyatt must be judicially estopped from taking an inconsistent position at this point in the litigation.

Here, as a Nevada state agency would not be required to post a bond to secure a stay pending appeal and neither would a California state agency in California. Based on the application of comity and judicial estoppel, FTB must likewise be relieved of having to post such a bond in this case.

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C. Hyatt's Assertion That FTB Must Post A Supersedeas Bond In This Case Ignores The Comity Doctrine And Invites This Court To Take An **Actively Hostile** Position Against The State Of California.

Hyatt's Opposition asserts that this Court cannot apply NRCP 62(e) to this case because it only "applies to the State of Nevada." Hyatt's Opp'n, p. 11. Based on this, Hyatt asserts that FTB must be required to post a supersedeas bond in order to secure a stay pending appeal. Hyatt's arguments must be rejected for several reasons.

First and foremost, Hyatt's claim that NRCP 62(e) does not apply to FTB ignores the fundamental precept of the comity doctrine.[4] As noted above, the comity doctrine is "an accommodation policy, in which the courts in one state voluntarily gives **effect to the laws and judicial decisions of another state** out of deference and respect." Exhibit 2, p. 7; Mianeki, 99 Nev. at 98. That question has already been decided – Nevada will, and has, granted comity to FTB. Thus, the specific question is whether this Court will give comity to California's law, Cal. Civ. Pro. Code § 995.220, which is identical to NRCP 62(e), and exempts California state agencies from having to post a supersedeas bond in order to obtain a stay pending appeal. Mianeki, 99 Nev. at 98. FTB's Provisional Motion does not simply request that this Court apply NRCP 62(e).

Hyatt's Opposition likewise entirely ignores the fact that when determining whether to grant comity to another state's law, the forum state must determine whether the application of the sister state's laws would contravene any of the policies or interests of the forum. Id. In this case, the Nevada Supreme Court and United States Supreme Court have dictated the rule that this Court must apply in determining whether the application of California's law contravene any Nevada policy or interest – this Court must treat FTB the same as it would treat a Nevada state agency when the state policies are the same. Exhibit 2, p. 7; Franchise Tax Board, 538 Nev. at 499.

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[4] To the extent that their requirements either mirror or parallel the comity doctrine, they also apply to full faith and credit and due process considerations.

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In this instance, both California law and Nevada law are identical. Under NRCP 62(e), a Nevada state agency is not required to post a supersedeas bond in order to obtain a stay pending appeal. California law is identical on this point. Cal. Civ. Pro. Code § 995.220. Nevada and California's interests and public policies are the same. Treating FTB the same as it would treat a Nevada agency under these circumstances does not contravene the policies and interests of Nevada, and therefore mandates that this Court waive the bonding requirement in this instance. In short, as noted by FTB's Provisional Motion, whether this Court applied Cal. Civ. Pro. Code § 995.220 or NRCP 62(e), the result would be the same – no bond would be required in order to secure a stay pending appeal. Hyatt's Opposition completely ignores these issues.

At a more basic level, Hyatt's arguments must be rejected because these arguments violate basic public policy. In his Opposition, Hyatt not only argues that FTB should be treated **different** from a similarly situated Nevada state agency, but Hyatt takes his assertions one step further. Hyatt argues that FTB should be treated **worse** than a similarly situated Nevada state agency. In making these arguments, Hyatt asks this Court to ignore both California and Nevada law which would exempt their respective agencies from posting such a bond pending appeal. With these arguments, Hyatt encourages this Court to take an **actively hostile** policy against California in spite of there being no Nevada policy support this position. This is highly improper.

Although the United States Supreme Court has stated that the comity doctrine is not required by the United States Constitution, the United States Supreme Court has strongly intimated that this may not be the case where one state adopts a policy that is hostile to the public acts of another state. See Carroll v. Lanza, 349 U.S. 408, 413, 75 S.Ct. 804 (1955). In fact, in this very case, the United States Supreme Court affirmed the Nevada Supreme Court's decision because this was **not** a case where Nevada had adopted a policy of hostility to the public acts of California. Franchise Tax Board, 538 U.S. at 499.

Here, Hyatt asks this Court to adopt an openly hostile policy toward California and its public acts. Specifically, Hyatt asks this Court to refuse to give comity to California's statutory law that explicitly exempts California state agencies from having to post a bond

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pending appeal, in spite of the fact that no Nevada public policy or interest would be contravened by not requiring such a bond. And in fact, Nevada public policy is in direct alignment with California law on point. NRCP 62(e). If this Court were to accept Hyatt's position, this Court would completely undermine the notions of cooperative federalism between California and Nevada and the harmonious relationship between the citizens of our two states. See Nevada v. Hall. 440 U.S. 410, 429, 99 S.Ct. 1182 (1979) (Blackmun, J., dissenting).

Moreover, accepting Hyatt's position would rise to the level of a constitutional violation under the United States Constitution. Cf. Carroll, 349 U.S. at 413 (comity not constitutionally mandated but leaving open issue as to whether a constitutional violation would occur if state was openly hostile to public acts of sister state); Franchise Tax Board, 538 U.S. at 499 (same). Thus, this Court must reject Hyatt's invitation to adopt a unilateral policy of overt hostility toward California and the public acts of that state.

D. Hyatt's Opposition Failed To Overcome FTB's Showing That The Nelson v. Heer Factors Are Satisfied In FTB's Favor.

Even if this Court were willing to accept Hyatt's position that this Court should decline to apply comity in this instance, contrary to Hyatt's Opposition, FTB is still entitled to a stay pending appeal without having to post a supersedeas bond pursuant to the Nelson v. Heer factors.

Before FTB addresses these specific factors, however, FTB must point out that Hyatt's Opposition ignores the core policy issues related to the issue presented by FTB's Provisional Motion. First, Hyatt ignores the fact that by adopting the Nelson v. Heer factors, the Nevada Supreme Court expressly adopted a policy that encourages the district courts to grant stays pending appeal **without** requiring the appealing party to post a full supersedeas bond in all circumstances. 121 Nev. 1252, 122 P.3d 1252 (2006). Rather, the Nevada Supreme Court expressly rejected the restrictive test from McCullogh v. Jenkins, 99 Nev. 122, 659 P.2d 302 (1983), which made it extremely difficult for the district courts to waive the bonding requirement. Id. Thus, Nelson v. Heer establishes a policy in Nevada encouraging the district courts to waive the bonding requirement pending appeal in the appropriate cases – a point Hyatt

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ignores.

Second, Hyatt ignores the general purpose underlying bonding requirements. The purpose of a supersedeas bond is to "protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from" a stay pending appeal. Nelson, 121 Nev. at 835; See Southeast Booksellers Assoc. v. McMaster, 233 F.R.D. 456 (D.S.C. 2006). However, where the judgment creditors' interests in collecting the judgment are not at issue, as in those cases where the judgment debtor can pay the judgment and will remain solvent during an appeal, a bond is not and should not required. Southeast, 233 F.R.D. at 458.

Therefore, based on the Nevada Supreme Court's pronouncement that stays pending appeal can and in appropriate cases should be granted without requiring a full supersedeas bond, this Court must consider whether a bond is required to protect Hyatt's interests in this case. Hyatt has provided no argument or evidence that FTB cannot pay the judgment or that it will become insolvent during the appeal. In fact, if this Court accepts the evidence that **Hyatt** produced during the punitive damage phase of the trial as true, FTB's ability to pay the judgment and the State of California's solvency are not even at issue. As a result, Hyatt has failed to establish that **any** of the Nelson v. Heer factors militate against waiving the bond requirement in this case.

1. Complexity of Collection Process.

As to the first Nelson v. Heer factor, Hyatt's only argument in Opposition is that collecting on the judgment in this case will be complex because it will require a state appropriation. Opp'n, p. 15. Hyatt then goes so far as to say, without any evidentiary support, that "the collection process could prove quite complex since FTB could raise budgetary and other obstacles to prevent the prompt payment of Hyatt's judgment." Id. Hyatt's assertions are both wrong and unsupported.

In support of these assertions Hyatt relies on a litany of cases that stand for the proposition that the bonding requirement should not be waived if the collection process of the judgment is too complex – such as when a state appropriation is the only means in which the

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judgment can be collected. Id. at 15. These cases, however, are distinguishable and do not mandate the conclusion that the collection process will be unduly complex in this case.

Although it is generally true, that a state appropriation would be required to pay Hyatt's judgment, unlike the cases relied upon by Hyatt, a state appropriation is not the only manner in which Hyatt's judgment could arguably be paid. FTB maintains a general fund for appropriations. See Exhibit 5, at ¶ 2, Michelle Fallon Affidavit. Within FTB's general fund appropriations, FTB has the authority to pay awards and judgments. Id. at ¶ 4. Therefore, unlike Lightfoot v. Walker, 797 F.2d 505 (7th Cir. 1986), where there was only a state appropriations mechanism available to satisfy the judgment at issue, there is a separate mechanism that Hyatt could attempt to utilize to satisfy his judgment. Exhibit 5.

Moreover, even if a state appropriation were required to be utilized in this case, the appropriation process in California is not as cumbersome or complex as the appropriation processes discussed in the case law relied on by Hyatt. In California, there are basic mechanisms in place to ensure generally that the collection of judgments is swift and manageable. See Exhibit 6, generally. The Director of Finance for the State of California has averred that under California procedures, a judgment can be paid out of the California State Treasury once the appropriation is made by the California State Legislature. See Exhibit 6, ¶ 4, Aff. of Michael Genest. This process is generally unremarkable. And in fact, during trial, the Director of Finance testified that the State of California's ability to pay is sound. See Rough Trial Tran., 8/11/2008, pp. 128-129. Hyatt has provided no evidence to indicate or suggest that such an appropriation would not be forthcoming in this case. More importantly, Hyatt has provided no evidence of any instance in which the State of California refused to pay a legally valid and enforceable final judgment or engaged in any shenanigans to avoid the payment of such a judgment as his Opposition suggests will occur in this case. See Opp'n, p. 16.

What must not be overlooked, however, is the actual likelihood that Hyatt would have any problem obtaining a state appropriation for his judgment. The Court must recall that Hyatt is no ordinary litigant. Hyatt, unlike a typical litigant, has extensive contacts and personal relationships with various California State Legislators. In fact, Hyatt testified that he talked to

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some his friends in the California State Legislature about this case. See Rough Trial Tran. 5/15/2008, pp. 88-95. Moreover, pre-trial Hyatt identified dozens of California State Legislators to whom he had personally discussed the details of this case. See Def's Trial Exhibit 3051. Based on these relationships, it is highly unlikely that an appropriation for Hyatt would not be introduced or immediately forthcoming from these members of the California Legislature.

However, even if such a state appropriation were not immediately forthcoming, California law provides for specific contingencies to ensure the prompt payment of legally valid and enforceable final judgments. First, if an appropriation is not made, the California Attorney General will report the judgment to the Chairperson of the either the Senate Committee on Appropriations or the California State Assembly Committee on Budget, who will then introduce the required appropriating legislation. Id. at ¶ 5.

In the extremely rare circumstance that the State Legislature declines to adopt the required appropriation to pay a judgment, a party can request that a California court order payment of the judgment to be paid from an existing, available, and reasonably related appropriation. Id. at ¶ 6.

Thus, Hyatt's Opposition has not identified any part of this collection process that would be cumbersome or overly complex.

2. Time Required To Obtain Judgment After Affirmance.

As to the second Nelson v. Heer fact, Hyatt only argues that "FTB has not submitted any evidence that a fund exists or that payment could be made in a timely fashion." Opp'n, p. 16. This, however, is incorrect. Hyatt ignores the evidence that he presented during the punitive damage phase of trial. Hyatt's evidence detailed the State of California's **ability to pay** the current judgment based on the fact that California is the "8th largest economy in the world," "California has $47 billion in net assets," "California has $35 billion in unrestricted assets," and "it generates $143 million per day" in tax revenue. See Rough Trial Tran., 8/11/2008, pp. 63-94 (examination of Kurt Sjoberg). In addition, Hyatt testified to his many connections in California's State Legislature. See Rough Trial Tran. 5/15/2008, pp. 88-95. As a result, there is no evidence – and Hyatt has presented none -- to suggest that FTB does not have the ability to

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make swift and prompt payment of Hyatt's judgment – regardless of whether his judgment is paid out of the different funds described above or through the appropriations process. As such, Hyatt's argument on this point is unavailing.

3. Degree of Confidence In FTB's Ability To Pay.

Hyatt's Opposition entirely misinterprets the next Nelson v. Heer factor. Opp'n, p. 16-17. To clarify, this factor deals solely with the **availability** of funds that will enable the FTB to pay the judgment at hand. See Nelson, 121 Nev. at 836. Hyatt's Opposition, however, attempts to change the focus of this factor to the question of "whether FTB will pay" the judgment. Opp'n, p. 16. This is not the issue presented by this factor.

When the issue is properly focused upon whether the State of California and FTB have **available funds to pay** Hyatt's judgment, even Hyatt concedes that FTB and the State of California have sufficient funds and assets available. Hyatt's Opp'n, p. 16. For example, Hyatt concedes that his own evidence at trial established that California currently has $47 billion in assets. Rough Trial Tran. 8/11/2008, pp. 69-73. At the time judgment was entered in this case on September 8, 2008, the total judgment that had been entered, including interest equaled approximately $490 million. See Judgment, filed 9/8/2008. This represents only one-tenth of one percent of California's net assets. Moreover, Hyatt does not contest or even address his own evidence that Hyatt used at trial to establish the availability of money and assets to pay this judgment which has been adequately detailed above. Therefore, Hyatt's Opposition fails to rebut the evidence presented by FTB on this point.[5]

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[5] The only "evidence" Hyatt presents in order convince this Court that FTB "will not pay" Hyatt's judgment is an inadmissible, hearsay newspaper article addressing media reports of the State of California's failure to pay certain funds to a court-appointed receiver currently overseeing California's prison system. First, this Court cannot consider this article as evidence. As the Court will recall, during trial the Court excluded all evidence related to newspapers and magazine articles related to Hyatt as inadmissible. See Court's Order denying FTB's Motion in Limine re: Admit Documents Evidencing Hyatt's Public Figure Status dated 3/28/2008. Moreover, even if considered, this "evidence" does not having anything to do with whether there are **available** assets and funds to pay Hyatt's judgment if it is affirmed on appeal.

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4. Whether FTB's Ability To Pay Judgment Is So Plain That The Cost Of The Bond Would Be A Waste Of Money.

Based on the same evidence relevant to the third Nelson v. Heer factor, FTB's ability to pay Hyatt's judgment is not at issue. See FTB's Provisional Motion, p. 19. Hyatt's own evidence, which FTB accepts as true for purposes of this motion, plainly shows the astronomical amount of assets and funds available to the State of California to pay Hyatt's judgment. See Rough Trial Tran. 5/15/2008, pp. 88-95. Hyatt's Opposition did not contest this evidence. Opp'n, p. 17.

Thus, the only question that remains with respect to this factor is whether or not requiring FTB post a bond would be a "waste of money." Nelson, 121 Nev. at 836. Hyatt's Opposition does not even address this issue. Rather, Hyatt's Opposition simply re-states his arguments relative to the first Nelson v. Heer factor, i.e., that collecting on his judgment will be "complex." Opp'n, p. 17. This, however, has nothing to do with FTB's "ability to pay" and more importantly, whether requiring a bond would be a "waste of money."

In light of FTB's uncontested ability to pay the judgment, there is no question that requiring FTB to post a bond in this case would be a waste of money. In this instance, in order to post a bond pending appeal, FTB will be required to obtain a bond from a bonding company. As stated in the affidavit of Lynda Emmons, a specialist in obtaining bonds under these circumstances, FTB may be be required to obtain a bond that could be as much as one and a half times the amount of the judgment. Exhibit 7, at ¶ 4(b), Aff. Lynda Emmons, Account Specialist Stetson Beemer.[6] At the time the judgment was entered in this case, the total judgment equals approximately $490 million. See Judgment filed 9/8/2008. Based on this amount and accrued post-trial interest, FTB may be required to obtain a bond in the amount of **approximately $740**

[6] Hyatt's Opposition asserted that FTB's arguments regarding the cost of bond had to be rejected because there was no "declaration" or proof establishing these facts. Opp'n, p. 18. While FTB disagrees with Hyatt's assertion, FTB offers the affidavit of Lynda Emmons which conclusively establishes these facts. Exhibit 7.

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million. Id. at ¶ 7. In order to obtain such a bond, FTB would also be required to provide 100% collateral in the form of an irrevocable letter of credit from one of the highest rated banks in the country. Id. at ¶ 4.

Critical to the analysis of this factor, however, is the amount of the annual bond premium that FTB and the people of the State of California will be required to pay in order to obtain the bond. In this case, the bond premium required would be between three to five percent of the total bond amount. Id. at ¶ 4(c). Based on the above figures, the bond premium FTB could be required to pay would be anywhere between approximately **$22 million to $37 million annually** to maintain the bond throughout the course of the appeal. Id. at ¶ 7. **These bond premiums are non-refundable and may never be recovered by FTB or the State of California in the event FTB is successful on appeal** (other than perhaps recovery from Hyatt under NRAP 39(e)). Id. at ¶ 7. Thus, assuming that the appeal takes two years to complete, the taxpayers of the State of California will be required to pay between **$44 million and $74 million** in non-refundable bond premiums if FTB is required to post supersedeas bond. It cannot be emphasized enough: **The money required to pay these bond premiums will have to come from taxpayers' funds**. Given FTB's clear ability pay this judgment if it is affirmed, the innocent taxpayers of the State of California should not be saddled with paying these sums pending appeal. This would be a waste of the taxpayers' money. Equally important, these are sums that Hyatt may be required to reimburse to FTB if it is successful on appeal.

Recall, the purpose of a supersedeas bond is to provide the judgment creditor with the security that his judgment will be paid. Nelson, 121 Nev. at 835. FTB can pay the judgment if it is affirmed. Hyatt proved that himself. Therefore, requiring FTB to post a supersedeas bond, which would require the taxpayers of California to pay these astronomical bond premiums, when there is no legitimate fear that FTB can not pay the judgment, does not further the purpose of a supersedeas bond pending appeal.

5. Defendant Is Not In A Precarious Financial Situation.

Hyatt's Opposition admits the substance of his own evidence on this issue and admits that FTB is not in a "precarious financial situation." Hyatt's Opp'n, p. 18. The Opposition

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
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argues, however, this factor cannot be evaluated in favor of FTB because he claims that none of FTB's other creditors will be placed in an insecure position. Hyatt's Opp'n, p. 18. This misses the point. Hyatt's own evidence shows that FTB is not in a precarious financial situation and that FTB is able to pay the judgment. Therefore, Hyatt cannot show that he will suffer any harm if the requirement of a supersedeas bond is waived.

Therefore, each and every one of the Nelson v. Heer factors weighs in FTB's favor and dictates that a stay should be granted pending appeal without the requirement of a bond.

E. Hyatt's Opposition Failed To Establish That The NRAP 8 Factors Require A Bond Pending Appeal In This Case.

Hyatt's Opposition has also failed to rebut the NRAP 8 factors. Therefore, each of these factors alone establishes that FTB is entitled to a stay pending appeal without having to post a supersedeas bond.

1. The Object Of The Appeal Will Be Defeated If A Stay Is Denied.

First, Hyatt Opposition fails to rebut the obvious fact that the purpose of FTB's appeal will be entirely defeated if a stay is not granted pending appeal. NRAP 8(c). Without a stay, FTB will be required to pay an approximately half billion dollar judgment, when the propriety of the colossal damage award is one of the primary issues that will be presented on appeal. Once Hyatt is paid these sums, there is no guarantee that Hyatt will return the money and Hyatt's Opposition has provided no such assurances.

2. FTB Will Suffer Irreparable Harm If A Bond Is Required.

Moreover, contrary to Hyatt's Opposition, FTB will be irreparably harmed if a bond is required in this litigation. Hyatt's Opp'n, p. 19. Although Hyatt's Opposition asserts that "economic harm alone is not enough" to establish irreparable harm for purposes of this factor, Hyatt is sadly mistaken. Id. Here, if FTB is required to post the required supersedeas bond, FTB and the State of California will be required to pay between **$22 million and $37 million per year** annually in bond premiums. See Exhibit 7, ¶ 7. These bond premiums are non-refundable. In addition, FTB will be required to provide a bonding company with collateral consisting of

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

100 percent of the bond. Id. at ¶ 4.

This is not typical "economic harm" or mere litigation expenses in the form of additional attorneys fees and costs. See Hansen v. Eight Judicial Dist. Court, 116 Nev. 650, 658, 6 P.3d 982 (2000).[7] FTB is not a typical private litigant, who can go to the ATM machine to withdraw the needed funds to pay these additional expenses. In this instance, it is taxpayer funds and money that will have to be used in order to pay these bond premiums. This is tens of millions of dollars in taxpayer money that could otherwise be spent on schools, roads, social welfare programs, and other like government functions that may be lost – forever – if FTB is required to post a bond on appeal. Contrary to Hyatt's Opposition, paying millions of taxpayer dollars in non-refundable bond premiums is a quintessential example of irreparable harm.

3. Hyatt Will Suffer No Harm If A Stay Is Entered Without A Bond.

Hyatt's Opposition has failed to show that he will be irreparably harmed if a stay is granted pending appeal. Hyatt's Opp'n, p. 20. Admittedly, Hyatt is seventy years old. However, Hyatt's argument that he will be "deprived" of the benefits of his judgment is unwarranted. Hyatt's argument appears to be that he won't receive his millions of dollars right now – presumably this harms him because he likewise will not be able to spend it right now. This ignores the fact that Hyatt is already a multi-millionaire and is hardly in need of the money.

This is not a case in which the plaintiff suffered extensive personal injuries which required costly and ongoing medical care and expenses. In fact, in this case, Hyatt did not put on any evidence at trial related to medical expenses that he incurred as a result of FTB's alleged conduct. Moreover, Hyatt is no ordinary seventy year old. He appears to be in excellent health.

---

[7] It should be noted that the question presented in Hansen is not applicable to the irreparable harm that is at issue here. In Hansen, the Nevada Supreme Court was attempting to determine whether simply refusing to grant a stay would cause the appealing party irreparable harm. 116 Nev. at 658. That is not the issue here. In this case, the issue is whether requiring FTB to post a half billion dollar supersedeas bond in order to obtain a stay will FTB cause irreparable harm. These two issues are totally different.

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

Accordingly, although Hyatt won't receive his judgment if a stay is entered, he will hardly suffer any harm by not receiving it.

4. Whether Appellate Is Likely To Prevail On The Merits.

Finally, Hyatt's Opposition claims that FTB did not establish this element because FTB did not "point to any particular issue on appeal that is likely to succeed." Hyatt's Opp'n, p. 21. First off, FTB has submitted a **191-page post-trial motion** that details the significant legal errors that infected this trial. See 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 Alternate Motion For New Trial And Other Relief Pursuant to NRCP 59, filed September 17, 2008, which FTB incorporates herein by reference. Several of these issues, particularly the issues related to the award of punitive damages against a state agency, allowing FTB to be held liable for its discretionary conduct, allowing the various claims to be submitted to the jury in spite of insufficient evidence to support those claims are but a few of the very serious errors that FTB contends occurred during this trial which FTB believes will mandate reversal of the judgment. But in addition to the errors at trial, there were various legal errors that were committed pre-trial that will likely be presented on appeal all of which have a very high likelihood of success on appeal. For example, the Court's various denials of FTB's motions for partial summary judgment each required the dismissal of Hyatt's various claims prior to trial. These are but a few of the various serious legal errors that can and will be presented on appeal. Hyatt has failed to show that FTB's appeal will be frivolous or that this motion was filed for a dilatory purpose. Mikoln Gaming Corp. v. McCrea, 120 Nev. 248, 89 P.2d 36 (2004). Therefore, this element has been satisfied in FTB's favor.

Contrary to Hyatt's Opposition, each of the NRAP 8(c) factors supports the entry of a stay of the judgment in this case pending an appeal, without the posting a supersedeas bond.

II. CONCLUSION

Hyatt's Opposition utterly failed to rebut or establish that FTB should be required to post a supersedeas bond in order to secure a stay pending appeal. If this Court were to accept Hyatt's arguments, this Court would be adopting a policy of outright hostility to Nevada's sister State of

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

California. The interests of the State of Nevada and the interstate relationship between the citizens of our two states mandate that this Court decline Hyatt's invitation. Therefore, FTB respectfully requests that this Court grant FTB's Provisional Motion and enter a provisional order that if the Court denies FTB's motions for judgment as a matter of law and for a new trial, execution or other enforcement of the judgment will be stayed pending any appeal, without a bond.

Dated this 29th day of October, 2008.

McDONALD CARANO WILSON LLP

By: _____

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102
Telephone No. (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant
Franchise Tax Board of the State of California

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **FTB'S REPLY IN SUPPORT OF PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND** on this 29th day of October 2008 by hand delivery upon the following:

Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **FTB'S REPLY IN SUPPORT OF PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND** on this 29th day of October, 2008 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.
Hutchison & Steffen
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Donald Kula, Esq.
Perkins Coie
1620 - 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90404-4013

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumb Street, Suite 300
Reno, NV 89519

COURTESY COPY:
The Honorable Jessie Walsh
Regional Justice Center
200 Lewis Street
Las Vegas, NV 89155

An Employee of McDonald Carano Wilson LLP

McDONALD·CARANO·WILSON
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

Exhibit 5

AFFT
JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No. (702) 873-4100

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Defendant.	Case No. : A 382999 Dept. No. : X Docket No. : R **AFFIDAVIT OF MICHELLE FALLON** **Hearing Date: November 5, 2008** **Hearing Time: 9:00 am**

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, MICHELLE FALLON, affirm under penalty of perjury that the assertions contained in this affidavit are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this affidavit. If called as a witness, I would be competent to testify to these facts.

2. I am employed by the State of California, Franchise Tax Board and my employment classification is Budget Officer (Administrator III). My responsibility includes managing the budgeting functions for the Franchise Tax Board. This includes authority to request the State Controller to make disbursements from the Franchise Tax Board's budgeted General Fund appropriations.

3. This affidavit is provided in support of Franchise Tax Board's Motion for Stay Execution/Enforcement of Judgment Pending Resolution of Appeal.

4. The Franchise Tax Board has within its approved Budget Act State Operations General Fund appropriations authority to pay for awards and judgments.

5. To the extent that money is available, the Franchise Tax Board has the ability to pay on its judgments.

Dated this 28th day of October 2008.

By Michelle Fallon
Michelle Fallon

SUBSCRIBED and SWORN before me
this 28th day of October 2008, by Michelle Fallon, proved to me on the basis of satisfactory evidence to be the person who appeared before me.

NOTARY PUBLIC

LANESE S. WRIGHT
Commission # 1703111
Notary Public - California
Sacramento County
My Comm. Expires Nov 4, 2010

Exhibit 6

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No. (702) 873-4100

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Defendant.

Case No. : A 382999
Dept. No. : X
Docket No. : R

AFFIDAVIT OF MICHAEL C. GENEST

Hearing Date: November 5, 2008
Hearing Time:

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, Michael C. Genest, affirm under penalty of perjury that the assertions contained in this affidavit are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this affidavit. If called as a witness, I would be competent to testify to these facts.

2. I am the Director of Finance for the State of California. I am the executive officer of the Department of Finance which serves as the Governor's chief fiscal policy advisor.

3. This affidavit is provided in support of Franchise Tax Board's Motion for Stay Execution/Enforcement of Judgment Pending Motion for Stay Pending Appeal.

4. Funds may be paid from the California State Treasury to satisfy a tort judgment upon appropriation of funds for that purpose by the California Legislature.

5. In the event that no appropriation for the payment of a tort judgment exists, or any such appropriation is insufficient, California law provides that the California Attorney General shall report the judgment to the Chairperson of either the Senate Committee on Appropriations or the Assembly Committee on Budget, and that the chairperson cause to be introduced legislation appropriating funds for the payment of the judgment.

6. In rare past instances when the State Legislature has declined to adopt the legislation proposed through the above-described process, or otherwise appropriate funds to pay a lawful court order, California State courts have ordered payment from an existing, available and reasonably-related appropriation. See, for example, *Mandel v. Myers* (1981) 29 Cal.3d 531.

7. The State of California's budget for fiscal year 2008-09 included authorization for expenditures from the State's General Fund in the amount of 103.4 billion.

Dated this 20th day of October 2008.

JAYNE FINKBONNER
Commission # 1695571
Notary Public - California
Sacramento County
My Comm. Expires Jul 17, 2009

By _____
Michael C. Genest

SUBSCRIBED and SWORN before me
this 20 day of October, 2008.

_____
NOTARY PUBLIC

Exhibit 7

AFFT
JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No. (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. : A 382999 Dept. No. : X Docket No. : R **AFFIDAVIT OF LYNDA EMMONS** **Hearing Date: November 5, 2008** **Hearing Time: 9:00 a.m.**

STATE OF NEVADA)
) ss.
COUNTY OF CARSON CITY)

I, LYNDA EMMONS, affirm under penalty of perjury that the assertions contained in this affidavit are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this affidavit. If called as a witness, I would be competent to testify to these facts.

2. I am currently employed as a senior account executive for ISU Stetson Beemer Insurance Company ("Stetson Beemer") and I have been employed by Stetson Beemer for 10

years. In addition to my account executive duties, I also manage the Carson City office of Stetson Beemer. Prior to my employment with Stetson Beemer, I was employed with Alpine Insurance Associates for 16 years. In my work experience, I have had extensive experience handling all lines of insurance. In my many years of experience in the insurance industry, I have also gained extensive experience placing and securing bonds of all kinds, including obtaining and securing appeal bonds and release of lien bonds.

3. In this capacity, I was contacted by attorneys for the Franchise Tax Board for the State of California ("FTB") and was asked to provide the general criteria that would be required of FTB in order for it to secure a bond pending appeal in this case.

4. The following is the general criteria, per the markets available for this particular bond, that would be required of FTB in order to obtain a bond pending appeal.

a. First, the bonding companies will require 100% collateral in the form of an irrevocable letter of credit from one of the highest rated banks, i.e., Bank of America, Wells Fargo.

b. Second, the bond amount required would be one and a half (1 ½) times the current judgment, which includes all amounts of compensatory damages, punitive damages, attorneys fees as damages, prejudgment interest, and any accrued post-judgment interest to date.

c. Finally, if a bond is secured, FTB will be required to pay an annual non-refundable bond premium of between three (3) and five (5) percent of the total bond amount.

5. A judgment in this matter was entered September 8, 2008 in the amount of $490,421,013.81. This judgment includes amounts for all compensatory damages, punitive damages, and pre-judgment interest accrued up to August 27, 2008. Post-trial interest has continued to accrue on the amount of this judgment.

6. Based on the amount of the judgment entered on September 8, 2008 and the addition of post-judgment interest through October 2008, Stetson Beemer has calculated that the total bond amount that FTB would be required to secure in this case would be approximately $738,173,799.00.

7. Based on this total bond amount, FTB would be required to pay an annual non-refundable bond premium in order to maintain this bond throughout the pendency of appeal. In this instance, a three percent annual non-refundable bond premium based on the total amount of the bond would be $22,145,213.97 per year. A five percent annual non-refundable bond premium on the total amount to this bound would be $36,908,689.95 per year. Therefore, FTB would have to pay a non-refundable bond premium on the required bond of between $22,145,213.97 and $36,908,689.95 annually. This bond premium would be paid on a yearly basis for as long as the bond is held by the court and is non-refundable, even if FTB is successful in reversing the judgment on appeal.

8. The facts as stated in this affidavit are based upon criteria required by the bonding company that I have secured to provide this bond.

Dated this 28th day of October, 2008.

By _____
LYNDA EMMONS, CIC
Senior Account Executive
ISU Stetson Beemer Insurance

SUBSCRIBED and SWORN before me
this 28th day of October, 2008

_____
NOTARY PUBLIC

JULIE WADE-SANFORD
Notary Public - State of Nevada
Appointment Recorded in Lyon County
No: 08-6852-12 - Expires June 4, 2012

STIP
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No. (702) 873-4100

FILED
2008 NOV 21 P 2:26
CLERK OF THE COURT

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT,

Plaintiff,

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Defendant.

Case No. : A 382999
Dept. No. : X
Docket No. : R

STIPULATION AND ORDER RE:

(1) HEARING DATE FOR (a) FTB'S MOTION TO RETAX COSTS, (b) FTB'S PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND, and (c) FTB'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY, AND CONDITIONALLY MOTION FOR NEW TRIAL PURSUANT TO NRCP 50 AND ALTERNATIVE MOTION FOR NEW TRIAL AND OTHER RELIEF PURSUANT TO NRCP 59; and

(2) EXTENSION, IF NECESSARY, OF PRESENT STAY OF EXECUTION/ENFORCEMENT OF JUDGMENT WITHOUT BOND PENDING POSSIBLE REVIEW BY NEVADA SUPREME COURT

Hearing Date: n/a
Hearing Time: n/a

Plaintiff Gilbert P. Hyatt ("Hyatt") and defendant Franchise Tax Board of the State of California ("FTB"), stipulate and agree as follows:

(1) ~~At the Court's request~~, the November 19, 2008 hearings on FTB's (a) Motion to Retax Costs, (b) Provisional Motion for Stay Pending Appeal Without Bond, and (c) Motion for Judgment as a Matter of Law or Alternatively and Conditionally Motion for New Trial Pursuant to NRCP 50, and Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59 ("Post-Trial Motion"), may be scheduled for Wednesday, ~~December 17, 2008 at 9:00 a.m.~~ January 14, 2009 @ 10 a.m.

(2) If the Court denies FTB's Post-Trial Motion, either in whole or in part, and FTB's Provisional Motion for a Stay Pending Appeal Without Bond, either in whole or in part, then FTB may file its writ and/or motion with the Nevada Supreme Court seeking a stay of execution/enforcement pending appeal without bond within 15 days after service of written notice of entry of the district court's order denying FTB's Provisional Motion for a Stay Pending Appeal Without Bond. Hyatt shall timely file an opposition, if any, and FTB may file a reply brief, if allowed. If FTB files its writ and/or motion with the Nevada Supreme Court within such time, the present stay of execution/enforcement of judgment without bond dated September 16, 2008 shall remain in place until 10 days after service of written notice of entry of the Nevada Supreme Court order(s) disposing of FTB's request for a stay pending appeal without bond, or until further order of either the Nevada Supreme Court or the district court. If FTB does not file its writ and/or motion with the Nevada Supreme Court within such time, then

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McDONALD·CARANO·WILSON
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

the present stay, if not yet expired, will continue in accord with the Court's September 16, 2008 Order. This stipulation is not intended to modify the September 16, 2008 Order; the sole purpose of paragraph 2 of this stipulation concerns the timeframe after expiration of the stay presently in force.

Dated: November 20, 2008
McDONALD CARANO WILSON LLP

PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102
Telephone No. (702) 873-4100

Attorneys for Defendant Franchise Tax Board of the State of California

Dated: November 20, 2008
BULLIVANT HOUSER BAILEY PC

PETER C. BERNHARD (NSBN 734)
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169
Telephone No. (702) 669-3600

Attorney for Plaintiff Gilbert P. Hyatt

ORDER

IT IS SO ORDERED.

Dated: 11-21-08

JESSIE WALSH
DISTRICT COURT JUDGE

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Appellant,

v.

CASE NO: 53264

GILBERT P. HYATT,

Respondent

/

FILED

FEB 18 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Malone
DEPUTY CLERK

APPENDIX
TO
MOTION FOR STAY PENDING APPEAL WITHOUT BOND

VOLUME 2

ROBERT L. EISENBERG (NSBN 0950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Suite 300
Reno, Nevada 89509
775-786-6868

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDonald Carano Wilson LLP
2300 West Shara Avenue, Suite 1000
Las Vegas, Nevada 89102
702-873-4100

ATTORNEYS FOR APPELLANT

09-04178

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

v. **CASE NO:_____**

GILBERT P. HYATT,

Respondent

_____/

APPENDIX TO MOTION FOR STAY PENDING APPEAL WITHOUT BOND

VOLUME 2

ROBERT L. EISENBERG (NSBN 0950)
Lemons, Grundy & Eisenberg
6005 Plumas Street, Suite 300
Reno, Nevada 89509
775-786-6868

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDonald Carano Wilson LLP
2300 West Shara Avenue, Suite 1000
Las Vegas, Nevada 89102
702-873-4100

ATTORNEYS FOR APPELLANT

INDEX TO APPENDIX TO MOTION TO STAY WITHOUT BOND

LEMONS, GRUNDY
& EISENBERG
PROFESSIONAL CORPORATION
005 PLUMAS STREET
THIRD FLOOR
NO, NV 89519-6069

NO.	DOCUMENT	DATE	VOL.	PAGE NOS.
9.	FTB's Provisional Motion for Stay Pending Appeal Without Bond	09/30/08	2	238 - 393
10.	Plaintiff Gilbert P. Hyatt's Opposition to FTB's Provisional Motion for Stay Pending Appeal Without Bond	10/14/08	2	394 - 425
11.	FTB's Reply in Support of Provisional Motion for Stay Pending Appeal Without Bond	10/29/08	2	426 - 465
12.	Stipulation and Order re: (1) Hearing Date for (a) FTB's Motion to Retax Costs, (b) FTB's Provisional Motion for Stay Pending Appeal Without Bond, and (c) FTB's Motion for Judgment as a Matter of Law or Alternatively, and Conditionally Motion for New Trial Pursuant to NRCP 50 and Alternative Motion for New Trial and Other Relief Pursuant to NRCP 59; and (2) Extension, If Necessary, of Present Stay of Execution/Enforcement of Judgment Without Bond Pending Possible Review by Nevada Supreme Court	11/21/08	2	466 - 468
13.	Transcript of Hearing on Post-Trial Motions heard January 29, 2009		3	469 - 582
14.	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	02/03/09	3	583 - 584
15.	Order Granting, in Part, FTB's Provisional Motion for Stay Pending Appeal Without Bond	02/09/09	3	585 - 589
16.	Notice of Appeal	02/10/09	3	590 - 608
17.	List of Issues		3	609 - 612

LEMONS, GRUNDY
& EISENBERG
A PROFESSIONAL CORPORATION
005 PLUMAS STREET
THIRD FLOOR
ENO, NV 89519-6069

MOT
JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Telephone No.: (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant Franchise Tax Board of the State of California

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA. Defendants.	Case No. :	A 382999
	Dept. No. :	X
	Docket No. :	R

FTB's PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND

Hearing Date:
Hearing Time:

MCI

Pursuant to NRCP 62(d), defendant Franchise Tax Board ("FTB") provisionally moves for a stay of execution/enforcement pending appeal, without a supersedeas bond, to become effective if the Court denies FTB's post-trial motions for judgment as a matter of law or for a new trial. FTB requests that the stay pending appeal take effect immediately upon expiration of

the NRCP 62(b) stay pending post-trial motions, which is presently in effect pursuant to the Court's order of September 16, 2008, and which expires ten days after service of written notice of entry of orders ruling on FTB's post-trial motions.

McDONALD CARANO WILSON LLP

9-30-08

By: Pat Lundvall

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102
Telephone No. (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant
Franchise Tax Board of the State of California

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD.

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **FTB'S PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND** on for hearing before the above-entitled Court on the 5 day of NOV, 2008, at the hour of 9AM Chambers in Department X or as soon thereafter as counsel may be heard.

McDONALD CARANO WILSON LLP

By: /s/ Pat Lundvall

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102
Telephone No. (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant
Franchise Tax Board of the State of California

POINTS AND AUTHORITIES

I. INTRODUCTION.

During the punitive damages phase at trial, plaintiff Gilbert P. Hyatt ("Hyatt") himself presented evidence of what he described as the State of California's net worth or net assets. FTB disputed this evidence. But for the limited purposes of this provisional motion dealing with whether a stay of execution/enforcement should issue pending appeal without a supersedeas bond, FTB acknowledges Hyatt's evidence on this issue. Hyatt's own expert witness, Kurt Sjoberg, gave testimony establishing that Hyatt is entirely secure in his ability to recover from FTB if the judgment is upheld. Specifically, Sjoberg testified that the State of California is the eight largest economic entity in the world, with total assets of $183 billion, net assets (i.e. net worth) of $47 billion, unrestricted cash and investments "in order to pay obligations" of $35.3 billion, and income tax revenues of $143 million per day on average. Ex. 1 (Rough Trial Tr., Aug. 11, 2008, 69-73). Hyatt's expert witness Sjoberg further testified:

> **It is my opinion that the general financial status of the State of California is strong. We have significant assets. We have resources to draw from. And we have demonstrated the ability to weather economic downturns.** They do not have long term affect upon us. There's a dip here and there but we always come out with some form of increase at the end, as those trend lines revealed.

Ex. 1 (Rough Trial Tr., Aug. 11, 2008, 81:23-82:4) (Emphasis added.) Considering the fact that Hyatt's own evidence established that he is already fully secure with his judgment if it is upheld, there is no reason whatsoever to require FTB to obtain a supersedeas bond pending an appeal.

FTB has filed post-trial motions, which include, among other things, motions for a judgment in FTB's favor and/or an order granting a new trial. If the Court grants either of these motions, the underlying money judgment will necessarily be vacated, and FTB would not need a stay of execution/enforcement. However, if the Court denies, in whole or in part, those motions, then it is likely that FTB may appeal. In that event, FTB wants to ensure that there is a stay of execution/enforcement of the judgment at all times, i.e., during the transition period between the time of notice of entry of the Court's ruling on the post-trial motions and the time of filing the appeal, and during the entire time of the appeal itself.

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

Accordingly, in this motion FTB is seeking a provisional order granting a stay pending appeal without bond, to become effective only if the Court denies FTB's motions for a judgment as a matter of law and/or for a new trial. In that event, FTB requests that the stay pending appeal become effective immediately upon expiration of the stay presently in effect, so that a stay is in place at all times.

II. ENTITLEMENT TO A STAY OF EXECUTION/ENFORCEMENT WITHOUT BOND.

A. NRCP 62(b) and NRAP 8.

There are three relevant time frames relating to stays of enforcement of a judgment. First, there is an automatic ten-day stay after notice of entry of judgment, pursuant to NRCP 62(a). Second, there can be a stay of enforcement pending the disposition of certain post-trial motions, pursuant to NRCP 62(b). This time frame is prior to an appeal from the judgment. And third, after post-trial tolling motions are resolved, there can be a stay of enforcement of the judgment pending an appeal, pursuant to NRCP 62(b).

The present motion only deals with the third time frame, i.e. a stay pending appeal. This falls within NRCP 62(d), which provides:

> (d) *Stay upon appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time filing the notice of appeal. The stay is effective when the supersedeas bond is filed.

Rule 62(d) applies to a motion for a stay in the district court. If a stay pending appeal is sought from the Nevada Supreme Court, such a motion is governed by NRAP 8, which states that a stay "may be conditioned upon the filing of a bond or other appropriate security in the district court", [subdivision (b)], and which provides a list of factors applicable to the motion [subdivision (c)].

There can be no serious dispute that FTB should be given a stay of execution/enforcement of the one-half billion dollar judgment in this case pending an appeal. The only real dispute which has been articulated by Hyatt is whether FTB should be required to post a bond pending an appeal, and if so, the amount of the bond.

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

B. Nevada and California Both Recognize That Government Entities Need Not Post Supersedeas Bonds For Stays.

1. NRCP 62(e) and Cal. Civ. Proc. §995.220.

Like almost all states, Nevada and California both have rules and statutes recognizing that public entity judgment debtors should not be required to post supersedeas bonds or other security for stays of execution or enforcement of judgments. Nevada's provision is contained in NRCP 62(e), which states:

> *(e) Stay in favor of the state or agency thereof.* When an appeal is taken by the State or by any county, city or town within the State, or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

Similarly, California Code of Civil Procedure § 995.220 states:

> **Bond in action of proceeding; public entities and officers not required to give**
>
> Notwithstanding any other statute, if a statute provides for a bond in an action or proceeding, including but not limited to a bond for issuance of a restraining order or injunction, appointment of a receiver, or stay of enforcement of a judgment on appeal, the following public entities and officers are not required to give the bond and shall have the same rights, remedies and benefits as if the bond were given:
>
> (a) The State of California or the people of the state, a state agency, department, division, commission, board or other entity of the state, or a state officer in an official capacity or on behalf of the state.
>
> * * *

(Emphasis added.)

These laws are based on a recognition that a public entity will have the ability to pay a judgment, and that the requirement of a bond or other security will often be disruptive to efficient functioning of a government. Courts have recognized that requiring a government entity to post an appeal bond has the dual negative effect of interfering with government's ability to perform its public functions and deterring it from appealing judgments against it. See Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys., 715 P2d 1131, 1133 (Wash. 1986) (granting stay to public entity without bond).

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

Laws waiving bonds for public entities also recognize that a government should not be saddled with wasteful and unnecessary expenses and burdens involved with obtaining a bond, paying a premium for a bond, and providing the bonding company with mandatory collateral (usually 100 percent) consisting of government-owned property, thereby preventing the government form being able to use its collateral/property until the bond is exonerated. Cf. City of S. San Francisco v. Cypress Lawn Cemetery Ass'n., 14 Cal Rptr. 323, 327 (Ct. App. 1992) (statute recognizing that public good is best served by excusing governments from bond requirements, and by reducing expenditure of public funds for bonds).

2. The public policies of NRCP 62(e) and Cal. Civ. Proc. §995.220 should apply in this case.

Hyatt will argue that NRCP 62(e) and Cal. Civ. Proc. §995.220 are not applicable here, because, based on a technical reading of these laws, they only apply to government entities of the state in which the judgment was rendered. Hyatt will argue that neither provision deals with a judgment in one state rendered against a government entity from another state. Hyatt's argument should be rejected for several reasons.

Since the interests of both Nevada and California are identical concerning whether a state agency is obligated to post a bond to secure a stay pending appeal, this Court must treat FTB just as it would treat a Nevada governmental agency in the same circumstance and not require a bond from FTB to secure a stay. The law of this case and the doctrine of judicial estoppel demand that result. FTB reminds the Court of the procedural history and Hyatt's representations made in this litigation which mandate that result.

a. The history of this case.

i. Nevada and United States Supreme Court decisions.

Certain issues in this case have already been reviewed by the Nevada Supreme Court and by the United States Supreme Court. One of the early issues was whether the Nevada district court was required to apply California statute that provides full sovereign immunity to FTB. FTB argued that Hyatt's lawsuit should be dismissed for lack of subject matter jurisdiction, due to FTB's complete immunity under California law. Judge Saitta did not grant

McDONALD·CARANO·WILSON LLP
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PHONE (702) 873-4100 • (702) 873-9966

FTB's motion to dismiss, and FTB filed a writ petition in the Nevada Supreme Court. On June 13, 2001, the Nevada Supreme Court granted the petition and issued a writ of mandamus directing the district court to grant summary judgment in FTB's favor. [1]

Hyatt petitioned for rehearing. On April 4, 2002, the Nevada Supreme Court granted rehearing and vacated the previous order. Ex. 2. In the new order, the court held that the Nevada district court action would survive but that the negligence claim must be dismissed. In reaching this result, the court considered whether California's statutory immunity should apply pursuant to the doctrine of comity. The court recognized the important policy behind comity, namely, that the courts in one state will give effect to the laws of another state "out of deference and respect, to promote harmonious intestate relations." Ex. 2 (Order at 7).

To determine whether comity should apply, the Nevada Supreme Court analyzed whether California's complete immunity statute would contravene Nevada's own policies and interests. To make this determination, the court compared the immunity allowed to Nevada government entities, with the immunity allowed to California government entities. The court observed that under Nevada statutes, our government entities enjoy immunity for most discretionary acts and functions, including negligence acts. Ex. 2 (Order at 7). Likewise, California has granted FTB such immunity. Accordingly, the court held Nevada and California interests were similar with respect to Hyatt's negligence claim, and that application of immunity for FTB on the negligence claim did not offend Nevada's own interests. As such, the court ordered that the negligence claim should be dismissed pursuant to application of California's immunity statute. Id.

The court then turned its attention to Hyatt's claim based on intentional torts. The court noted that California's immunity statute for FTB applies to such claims, but under Nevada

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[1] The Nevada Supreme Court did not originally rule on the jurisdictional grounds raised in the writ petition. Instead, the court's ruling was based on a determination that, as a matter of law, Hyatt failed to meet his burden to produce sufficient facts to establish a genuine issue of fact on his claims against FTB. As such, the court ruled that the district court should have granted summary judgment to FTB.

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

statutes, there is no immunity for such claims. The court observed 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. (emphasis added). The court then held that Nevada's interests in protecting its citizens from intentional torts and bad faith acts committed by government employees outweighed California's interest in giving FTB complete immunity. Thus, the court allowed these claims to avoid dismissal. In effect, the court determined that FTB should be treated in the same manner as a similarly situated Nevada government agency, and that a Nevada citizen should receive the same rights against a California agency as the citizen would received against a Nevada agency.[2]

FTB appealed to the United States Supreme Court, which affirmed in Franchise Tax Bd. of California v. Hyatt, 538 U.S. 488, 123 S.Ct. 1683 (2003). At oral argument, one of the Justices observed that the Nevada Supreme Court essentially held: "The law we apply to tax collectors who act in this state is the same as we apply to Nevada tax collectors." Ex. 3, Hr'g Tr., Feb. 24, 2003, 9-10. A short time later during oral arguments, Hyatt's counsel argued that under the principle of comity, states tend to look at their own immunity in determining whether an outside sovereign should receive the same immunity. Ex. 3, Hr'g Tr., Feb. 24, 2003, 33 (an "emerging principle of comity, is they [states] have tended to look at their own immunity to see what kinds of suits could be brought against them and to try, then, to grant to the – to the outside sovereign that same type of immunity"). Id.

Shortly thereafter, Justice Stevens inquired of Hyatt's counsel as to whether comity asks the question: "What would I do if the tables were reversed?" Id. at 46. He then asked whether

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[2] The Nevada Supreme Court's order relied on Mianecki v. District Court, 99 Nev. 93, 685 P.2d 422 (1983), where the State of Wisconsin was sued in a Nevada court. Wisconsin claimed complete immunity under Wisconsin law. The Mianecki court observed that Wisconsin's liability stemmed from its employee's non-discretionary act, i.e., an "operational" act, and that if a Nevada state employee had engaged in such conduct, there would be no immunity for Nevada in a lawsuit in our state. As such, the court refused to provide the State of Wisconsin with immunity that would have been unavailable to the State of Nevada itself in a Nevada lawsuit. Mianecki, therefore, stands for the proposition that a sister state sued in Nevada should be treated the same as Nevada itself would be treated.

McDONALD·CARANO·WILSON LLP
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PHONE (702) 873-4100 • (702) 873-9966

one sovereign should "generally treat the other sovereign the way they would want to be treated themselves." Id. Hyatt's counsel responded: "That's correct, Justice Stevens." Id. In fact, Hyatt's counsel went even further, explaining that "we want to treat the other sovereign as we do treat ourselves, not just as we want to be treated." Id. (emphasis added). Counsel for Hyatt then conceded that the position Hyatt was asserting on the comity issue was: "We [Nevada] are treating the other sovereign [California] the way we treat ourselves." Id.

Hyatt's position that the governments of California and Nevada should be treated identically in a Nevada court was not limited to his oral arguments. He took the same position in his written Respondent's Brief in the United States Supreme Court. For example, his brief noted that "state courts are fully capable of recognizing the sovereign interests of other States, using their own sovereign interests as a benchmark." Ex. 4 Resp't Br., Jan. 21, 2003 at 39 (emphasis added). Hyatt further recognized that the Nevada Supreme Court's "reference point was not the liability of private individuals for tortious conduct, but the liability of the State itself." Id. at 20 (emphasis in original). Finally, Hyatt cited numerous state cases in support of the proposition that forum courts have "often done what the Nevada Supreme Court did below: looked at immunity of the forum State in determining what acts of the defendant State would be subject to suit." Id. at 38 (emphasis added).

Thus, in both written and oral argument before the United States Supreme Court, **Hyatt's counsel expressly took the position that a California entity being sued in Nevada should be treated the same way in a Nevada court as a Nevada government entity would be treated.** This was the foundation of Hyatt's argument that the United States Supreme Court should affirm the Nevada Supreme Court's order of April 4, 2002. The United States Supreme Court agreed, affirming the Nevada Supreme Court's order in its entirety, and concluding 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." Hyatt, 438 U.S. at 499 (emphasis added).

In summary, Hyatt took the position that (1) a California government entity in a Nevada lawsuit should not be given broader immunity than a Nevada government entity would receive

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

in the same case, and (2) as a citizen of Nevada, Hyatt was entitled to the same rights and remedies (no more and no less) than he would be allowed against a Nevada entity in a Nevada court. His position prevailed, both in the Nevada Supreme Court and in the United States Supreme Court.

ii. Sam v. Sam.

The United States Supreme Court's decision in Hyatt v. FTB was recently applied by the New Mexico Supreme Court in the context of a statute of limitations dispute involving public entity immunity. In Sam v. Sam, 134 P.3d 761 (N.M. 2006), an Arizona state employee negligently drove over and killed his son while in New Mexico. Just under three years later, the son's estate filed a suit in New Mexico against the Arizona state agency for whom the driver worked. Arizona had a one-year statute of limitations for actions against a government entity. New Mexico had a two-year statute for actions against New Mexico government entities, and a general three-year statute for claims against other non-government defendants. An intermediate court of appeals determined that Arizona's one-year government entity statute of limitations did not apply in the New Mexico case, and New Mexico's two-year statute likewise did not apply because it was only applicable to New Mexico government entities. Thus, the intermediate court of appeals held that New Mexico's general three-year statute applied, and the case could proceed.

The New Mexico Supreme Court reversed. The Sam court ruled that New Mexico's shortened two-year statute of limitations for New Mexico government entities reflected the public policy of that state, which would apply instead of Arizona's even shorter one-year statute. Nevertheless, neither state had a public policy or state interest in a limitations period longer than two years for any government entity defendants. Thus, although the Sam court applied New Mexico's two-year limitations, which literally only applied to New Mexico government entities, this application still resulted in dismissal of the action against the Arizona entity. Id. at 765-68.

The Sam court's analysis tracked important comity considerations. The Sam court noted that comity refers to the "spirit of cooperation" in which one state approaches the resolution of a

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

case touching on the laws and interests of another state. Id. at 766. The Sam court relied on Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182 (1979), recognizing a strong presumption that another state's law will apply to that state unless such law violates a legitimate public policy of the forum state. Id. at 765-66. This presumption that comity will apply is based on the "intimate union of these states, as members of the same great political family," and the "deep and vital interests which bind them so closely together." Id. The Sam court then looked to Hyatt, noting the United States Supreme Court's holding that "not only was it appropriate for Nevada to grant California immunity, but also to only grant to California what it deemed appropriate for itself." Id. at 468 (emphasis added). In other words, the Sam court applied New Mexico's two-year statute of limitations to the Arizona government entity sued in a New Mexico court, because this limitations period would be applicable to one of New Mexico's own government entities if sued in the same court.

iii. Public policy relating to the bond requirement here.

In the present case, the issue concerning whether a bond should be required is nearly identical to the issue in Sam. Here, Nevada and California have both expressed clear and unambiguous identical public policies and interests – that a government entity should not be required to post a bond or other security as a prerequisite to obtaining a stay of execution on a judgment against the entity. Nevada's policy does not conflict with California's. In the interest of fostering the relationship between Nevada and California, comity should be applied unless Nevada has a strong interest in refusing to recognize California's statute. There is no such interest.

There is also no reason to believe that the Nevada Supreme Court would decline to apply the public policy expressed in NRCP 62(e) simply because that rule, on its face, only waives the bond requirement for Nevada state agencies. As in Sam, the question here is not resolved simply by looking at the technical language of the forum state's rule. Rather, the question relates to the public policy expressed in the forum state's rule, and whether the public policy in the forum state's rule would be offended by application of the foreign sovereign's law.

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

Indeed, the Nevada Supreme Court has already performed an identical analysis in its April 4, 2002 order, in which the Nevada Supreme Court needed to determine whether Hyatt's claim based on negligent acts could survive. The court looked to the public policy expressed in NRS 41.032, namely, the policy that government agencies should be immune from liability for such acts. This Nevada statute, of course, only applies to Nevada agencies. Nonetheless, the Nevada Supreme Court applied the public policy expressed in the statute. In doing so, the court determined that Nevada's public policy of protecting its own agencies from liability for such acts is similar to California's public policy. As such, Nevada's public policy was not offended by application of California's immunity statute, at least with regard to Hyatt's allegations of negligence against FTB. Hyatt's negligence claim was therefore dismissed, despite the fact that NRS 41.032, on its face, only protects Nevada agencies.

Similarly, NRCP 62(e) expresses the public policy that government bodies should not be required to post a bond for a stay pending appeal. This is the same policy expressed in C.C.P. §955.220. The mere fact that NRCP 62(e) only applies to Nevada agencies is not determinative. The public policy expressed by that rule is not offended by application of California's identical law. Accordingly, the public policies expressed in NRCP 62(e) and C.C.P. §955.220 should apply to relieve FTB of the burden of posting a bond or other security as a prerequisite to obtaining a stay of execution or enforcement of the half-billion dollar judgment.

b. The law of the case doctrine.

An appellate court's decision becomes "the law of the case" and must be adhered to throughout the subsequent progress of the case, both in the district court and upon any subsequent appeal. Bd. of Gallery of History v. Datecs Corp., 116 Nev. 286, 288-89, 994 P.2d 1149 (2000). The Nevada Supreme Court's ruling in an appeal is subject to the "law of the case" doctrine in later proceedings, and this doctrine cannot be avoided by more detailed and precisely focused arguments. State v. District Court, 121 Nev. 225, 112 P.3d 1070 (2005).

"The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." Hsu v. County of Clark, 173 P.3d 724 (2007). The law of the case doctrine is designed to

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest. Id. The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and the protection of the court's integrity.[3] Id.

The law of the case doctrine cannot be avoided by a new argument made after the previous appellate proceedings. In Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), the defendant's conviction had been affirmed in a previous appeal, which resolved an issue dealing with whether his guilty plea was voluntary. In a subsequent petition for post-conviction relief, the defendant raised the issue again, fine tuning his argument. In the second appeal, the Hall court held that the law of the case doctrine applied. "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316.

In the present case, both the Nevada Supreme Court and the United States Supreme Court have ruled on the issues of comity and Full Faith and Credit. These rulings establish that FTB, as a California government agency, should be treated in the same manner as a similarly situated Nevada government agency. These rulings are the law of the case. As such, FTB should be entitled to the same no-bond right to stay pending appeal which a Nevada agency would be entitled under NRCP 62(e).

c. Judicial estoppel.

Judicial estoppel applies when the following five criteria are met: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. Marcuse v. Del Webb

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[3] The Hsu court recognized a narrow exception to the law of the case doctrine. This exception applies when the controlling law of this state is substantively changed during the pendency of a remanded matter at trial or on appeal. Id. This exception is not applicable in the present case.

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PHONE (702) 873-4100 • (702) 873-9966

Communities, Inc., 163 P.3d 462, 468-69 (2007). The central purpose of judicial estoppel is to guard the judiciary's integrity. Id.

In the present case, Hyatt contended in the Nevada Supreme Court and the United States Supreme Court that FTB's request for compete immunity, under California law, should be rejected. In doing so, Hyatt took the position in both high courts that Nevada should grant immunity and comity to California only to the extent that Nevada would treat itself. As noted above, during oral argument at the United States Supreme Court, Hyatt's counsel argued that under the principle of comity, states tend to look at their own immunity in determining whether an outside sovereign should receive the same immunity. Justice Stevens asked whether, if the tables were reversed, one sovereign would "generally treat the other sovereign the way they would want to be treated themselves." Hyatt's counsel immediately responded "that's correct," and counsel then elaborated upon that position, arguing that "we want to treat the other sovereign as we do treat ourselves, . . ." Ex. 3, Hr'g Tr., Feb. 24, 2003 at 46. Hyatt's counsel then took the position: "We [Nevada] are treating the other sovereign [California] the way we treat ourselves." Id.

Hyatt was successful, convincing both the Nevada Supreme Court and the United States Supreme Court that complete immunity should be rejected for FTB, based on the understanding that California would not be treated worse than Nevada itself would be treated. Having prevailed in his position, Hyatt is now subject to judicial estoppel. All of the requirements for this doctrine are satisfied. Hyatt should be estopped from changing his position and arguing now that California is not entitled to the same fundamental protections to which Nevada would be entitled if the tables were turned.

Accordingly, the Court should apply either NRCP 62(e) or C.C.P. §995.220, or both, and the Court should grant a stay pending appeal without a bond.

C. Even if NRCP 62(e) and C.C.P. §995.220 Do Not Apply, A Bond Should Not Be Required Here, Pursuant To Nelson v. Heer.

In Nelson v. Heer, 121 Nev. 832, 122 P.3d 1252 (2005), the court adopted a new test that must now be employed in considering security requirements for a stay pending appeal. In that

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PHONE (702) 873-4100 • (702) 873-9966

case, Heer sued Nelson and obtained a monetary judgment in the amount of $330,000. The district court granted a stay of the judgment pending appeal, but conditioned the stay upon the posting of a supersedeas bond. Nelson requested permission to post alternate security instead of a supersedeas bond, but the district court rejected her request. Nelson then filed a motion with the Nevada Supreme Court, requesting that the stay be conditioned upon alternate security rather than a supersedeas bond.

The Nelson court began its analysis by observing that "[t]he purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay." Id. at 835. Thus, "a supersedeas bond should not be the judgment debtor's sole remedy, especially where other appropriate, reliable alternatives exist." Id. The court further stated that "the focus is properly on what security will maintain the status quo . . . not how 'unusual' the circumstances of a given case may be." Id. at 835-36.

Accordingly, the Nelson court rejected the old restrictive "unusual circumstances" test set forth in McCulloch v. Jeakins, 99 Nev. 122, 659 P.2d 302 (1983), and the court adopted a new five-factor test for determining when a full supersedeas bond may be waived and/or alternate security may be substituted: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. Id. at 836.

The issue in Nelson involved whether alternative security – i.e., some form of security other than a bond, such as security in the form of real property – should be allowed. Thus, it is somewhat unclear whether Nelson applies in a case where the sole issue is whether the judgment creditor should be required to post any bond at all, and if so, the amount of the bond.

McDONALD·CARANO·WILSON LLP
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Nevertheless, we will evaluate the Nelson factors, because even if these factors do apply here, the factors result in a conclusion that no bond should be required.

One point is clear from Nelson: NRCP 62(d) does not require a supersedeas bond in the full amount of the judgment prior to a stay being entered in every case. Additionally, by rejecting the "unusual circumstances" and "rare circumstances" tests in McCulloch, it was clearly the Nelson court's intent to ease restrictions previously imposed in stay/bond cases.

1. Complexity of collection process.

The first Nelson factor relates to the complexity of the collection process. There is no evidence of unusual complexity in the "collection process" in the present case. Hyatt decided to file his lawsuit in Nevada. He is not entitled to greater collection rights on his judgment than he would have in any other state. Although collection of a half-billion dollar judgment would not be routine, there is no unusual complexity that justifies burdening FTB with the requirement of posting a bond.

More important, there is no reason to believe that if the judgment is affirmed after all appellate challenges, Hyatt will be forced to go through complex non-voluntary collection procedures to obtain his money. The Court should not presume that the judgment debtor here will somehow deplete or hide its assets to avoid liability on the judgment. After all, the judgment debtor here is a government. It is not a private judgment debtor. Hyatt need not be concerned that FTB will set up off-shore bank accounts, create bogus corporations, or flee to Florida, like O.J., to shield money from a judgment creditor. Hyatt will not need to garnish money in government bank accounts, auction off state bridges, execute on Cal Trans snow-removal vehicles, or otherwise proceed through the sometimes difficult and time-consuming collection efforts necessary when dealing with a private judgment debtor. The judgment debtor here is an agency of the State of California, which is right next door, and which, as Hyatt's expert testified at trial, is the eighth largest economic entity in the world.

In determining appropriate factors in this context, the Nelson court adopted the framework set forth in Dillon v. City of Chicago, 866 F.2d 902 (7th Cir. 1988). Nelson, 121 Nev. at 836. In that case the court stayed execution of a judgment without requiring a bond

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from a solvent public entity, where there was no evidence of any likelihood of a substantial delay or other difficulty in collecting the judgment in the event of an affirmance on appeal. 866 F. 2d at 905. Like Dillon, in the present case Hyatt presented no evidence of any unusual delay or difficulty in collecting the judgment if it is affirmed.

2. Time required to obtain judgment after affirmance.

The second Nelson factor is the amount of time necessary to obtain the judgment after an affirmance. Here, the amount of time for Hyatt to obtain his money on the judgment, if it is affirmed on appeal, does not weigh heavily in favor of requiring a bond. Obviously, the larger a judgment, the more time that might be involved in paying it. But as discussed regarding the first factor, this case involves a judgment debtor consisting of an agency of the State of California. There is no reason to believe that the amount of time for FTB to pay the judgment after an affirmance would be so long that a half-billion dollar bond should be required. See S.A. Healy Company v. Milwaukee Metro. Sewerage Dist., 159 F.R.D. 508 (E.D. Wis.1994) (court granted stay without bond where government entity could pay full judgment without unusual delay or difficulty).

3. Confidence in the ability to pay the judgment.

As to the third Nelson factor, i.e., the availability of funds to pay the judgment, the Court need only look to Hyatt's own evidence presented at the punitive damages phase of the trial. At that time Hyatt's was seeking a huge punitive damages award, and Hyatt's goal was to convince the jury that the State of California is a wealthy cash cow with virtually unlimited assets. Hyatt's own expert witness testified that the State of California has total assets of $183 billion; a net worth of $47 billion; cash and investments "in order to pay obligations" of $35.3 billion; and income tax revenues of $143 million per day. Ex. 1, Rough Trial Tr., Aug. 11, 2008, 69-73. Hyatt's expert witness further testified that "It's my opinion that the general financial status of the State of California is strong. We have significant assets. We have resources to draw from. And we have demonstrated the ability to weather economic down turns." Ex. 1, Rough Trial Tr., Aug. 11, 2008, 68:23-69:3. Although this evidence was contested, it is clear that the jury accepted Hyatt's position regarding the State of California's financial status, as evidenced by

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the jury's award of $250 million in punitive damages. Hyatt can hardly be heard to argue now that the third Nelson factor should be resolved against FTB.

4. Waste of money on cost of a bond.

The fourth factor is whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money. As to the defendant's ability to pay, this is the same as the third factor, discussed immediately above.

Rule 62(d) contemplates cases in which stays will be granted without bonds, where the judgment debtor has considerable assets and there is no proof of a likelihood of harm to the judgment creditor. For example, in Fed. Pharm. Serv., Inc. v. Am. Pharm. Ass'n., 636 F.2d 755 (D.C. Cir. 1980), a stay was granted under the similar federal rule, without a bond, because the judgment debtor's net worth was 47 times amount of the judgment (and the judgment debtor was a long-term resident with no intent to leave). In Arban v. West Publ'g Corp., 345 F.3d 390, 409 (6th Cir. 2003), a stay without a bond was affirmed because there was a vast disparity between annual revenue of the judgment debtor ($2.5 billion) and the amount of the judgment (approximately $225,000). Here, Hyatt's own expert testified that the State of California has a net worth of $47 billion, which is nearly 90 times more than the judgment. Hyatt's expert also established a vast disparity between California's annual revenue ($52 billion per year from state income tax alone) and the amount of the judgment (slightly less than one-half billion dollars).

Furthermore, there can be no dispute that the cost of a bond would be a waste of money. The annual premium on a supersedeas bond is usually between one and three percent of the amount of the bond. **Thus, FTB would be required to pay at least $5 million, and perhaps as much as $15 million, for a bond. Additionally, bonding companies usually require the judgment debtor to provide 100 percent collateral consisting of letters of credit or other assets, in addition to the premium.** In light of the financial ability to pay the judgment, as established by Hyatt's own expert's testimony, the cost of a bond would be a complete waste of money.

As noted above, the Nelson court adopted a framework set forth in the Seventh Circuit's Dillon opinion. Dillon, in turn, relied on Northern Indiana Pub. Serv. v. Carbon

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County Coal, 799 F.2d 265 (7th Cir. 1986), in which commercial litigation resulted in a verdict of $181 million against a public utility. The trial court in that case granted a stay of execution without a bond. The Seventh Circuit affirmed, noting that the appeal bond would be almost $2 million annually, and "that is not small change." 799 F.2d at 281. In ruling that the utility should not be required to post a bond on the $181 million judgment, the court stated: "NIPSCO [the utility] has assets of more than $4 billion, revenues of almost $2 billion a year, and a net worth of more than $1 billion. A public utility, it is in no financial jeopardy, it is not about to place its assets beyond the reach of this judgment creditor, and it is, in short, good for the $181 million." Id.

In this case, Hyatt's expert testified that the State of California has assets of $183 billion, personal income tax revenues of more than $52 billion per year, and a net worth of $47 billion. Hyatt's expert also testified that the State of California is in no financial jeopardy: "It is my opinion that the general financial status of the State of California is strong." Ex. 1, Rough Trial Tr., Aug. 11, 2008, 81:20-82:4. As in Northern Indiana Pub. Serv., FTB is not about to place assets beyond the reach of this judgment creditor. Accordingly, the cost of a bond, in the amount of somewhere between $5 million and $15 million per year, would be a complete waste of money.[4]

5. Defendant's lack of a precarious financial condition.

The final Nelson factor deals with whether the defendant is in a precarious financial situation. Once again, we simply refer to Hyatt's own evidence on this point. Hyatt should be bound by the position he took at the punitive damages phase regarding the State of California's financial situation. Hyatt's own expert testified that the State of California is not in a precarious financial condition. Ex. 1, Rough Trial Tr., Aug. 11, 2008, 81-82 (Hyatt's expert: "It's my opinion that the general financial status of the State of California is strong.")

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[4] It is noteworthy that if the judgment is reversed, Hyatt will be required to reimburse FTB for the millions of dollars paid by FTB for premiums on the supersedeas bond, pursuant to NRAP 39(a) and (e) (costs are taxed against respondent if judgment reversed; taxable costs include premiums paid for supersedeas bonds).

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PHONE (702) 873-4100 • (702) 873-9966

Therefore, all of the five factors in Nelson weigh in FTB's favor and dictate that a stay should be granted without requiring the California state agency to post a bond.

D. NRAP 8 Factors.

NRAP 8 governs any motion filed in the Nevada Supreme Court for a stay pending appeal. Subdivision (c) of NRAP 8 provides a list of factors to be considered by "this court" (i.e., the Nevada Supreme Court) in determining whether a stay pending appeal should. Although the NRAP 8(c) factors technically apply only to Nevada Supreme Court motions, these factors are instructive in this situation.

1. The object of the appeal will be defeated if a stay is denied.

The first factor in NRAP 8(c) is whether the object of the appeal will be defeated if the stay is denied. This factor really does not relate to whether a bond should be required. Instead, this factor relates to the issue of whether execution on the judgment should be stayed at all, with or without a bond. It is apparent, however, that the object of FTB's appeal will, in all likelihood, be defeated in the absence of a stay. Without a stay, Hyatt will be able to collect on the half-billion dollar judgment, and there will be no restrictions on his use and enjoyment of the money. If the judgment is ultimately set aside, reversed or significantly reduced, the money will have already been paid, Hyatt may have spent it or otherwise disposed of it, and obtaining a full refund from him will probably be impossible.

2. FTB will suffer irreparable harm if a bond is required.

The second factor under NRAP 8(c) is whether the appellant will suffer irreparable or serious harm if the stay is denied. In the present case, this factor essentially mirrors the first factor, i.e., whether the object of the appeal will be defeated. If execution on the judgment is not stayed, the money will be paid and FTB will be irreparably harmed. Moreover, if FTB is required to pay million of dollars in premiums per year on the bond, during the entire time of the appeal, FTB will be further harmed, because this money will not be refundable from the bonding company. If the judgment is reversed, reimbursement from Hyatt of the $5 million to $15 million per year in premiums will be difficult, if not nearly impossible, to obtain.

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PHONE (702) 873-4100 • (702) 873-9966

Additionally, as explained above, bonding companies require collateral security before they will issue supersedeas bonds. To obtain a bond, a judgment debtor usually must provide the bonding company with collateral consisting of 100 percent of the amount of the bond. Such collateral is usually in the form of an irrevocable letter of credit from a bank or other large financial institution. These institutions typically require the judgment debtor to have sufficient funds on deposit; the funds on deposit are not accessible during the time in which the letter of credit is in effect; and the institutions charge a significant annual fee for the letter of credit. Thus, to obtain a bond, FTB will be required to pay millions of dollars per year in premiums for the bond, FTB will need to obtain a letter of credit as collateral for the bond; the State of California will lose access to millions of dollars in funds on deposit for the letter of credit; and FTB will need to pay an annual fee for the letter of credit.

3. Hyatt will not suffer irreparable harm from a stay without a bond.

The third factor under NRAP 8(c) is whether the respondent will suffer irreparable or serious injury if the stay is granted. Here, Hyatt's own evidence at the punitive damages phase establishes that he will suffer no irreparable harm from a stay, even if a bond is not required. Hyatt's evidence was that California has billions of dollars, and Hyatt's evidence was that if the judgment is affirmed, California will have more than enough money to pay the judgment.

4. Prevailing on the merits.

The final factor is whether the appellant is likely to prevail on the merits in the appeal. To defeat a stay on this factor, Hyatt, as the potential respondent, must "make a strong showing that appellate relief is unattainable." Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 89 P.2d 36 (2004). In particular, the Court can deny a stay on this factor only "if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes." Id.

In the present case, it would be impossible to include in this motion all of the potential issues that might be raised in an appeal, or to brief the potential appellate issues in this motion. Based solely on FTB's post-trial motions, however, it is abundantly clear that there are significant issues calling into question the validity of the judgment.

McDONALD·CARANO·WILSON LLP
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PHONE (702) 873-4100 • (702) 873-9966

Taking all of the NRAP 8(c) factors into consideration, it is obvious that the judgment must be stayed pending an appeal, and it is equally obvious that the judgment should be stayed without a bond.

III. CONCLUSION.

The requirement of a supersedeas bond in this case is wholly unsupportable. The huge judgment against Nevada's sister state of California should be stayed without a bond. Therefore, FTB respectfully requests the Court to enter a provisional order that if the Court denies FTB's motions for judgment as a matter of law and for a new trial, execution or other enforcement of the judgment will be stayed pending any appeal, without a bond.

Dated this 30 day of September, 2008.

McDONALD CARANO WILSON LLP

By: _____

JAMES W. BRADSHAW (NSBN 1638)
PAT LUNDVALL (NSBN 3761)
CARLA HIGGINBOTHAM (NSBN 8495)
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102
Telephone No. (702) 873-4100

ROBERT L. EISENBERG (NSBN 0950)
LEMONS, GRUNDY, & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
Telephone No.: (775) 786-6868

Attorneys for Defendant
Franchise Tax Board of the State of California

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served a true and correct copy of the foregoing **FTB's PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND** on this 30th day of September, 2008 by hand delivery upon the following:

Peter C. Bernhard, Esq.
Bullivant Houser Bailey PC
3883 H. Hughes Parkway, No. 550
Las Vegas, Nevada 89169

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that I served true and correct copies of the foregoing **FTB's PROVISIONAL MOTION FOR STAY PENDING APPEAL WITHOUT BOND** on this 30th day of September, 2008 by depositing said copies in the United States Mail, postage prepaid thereon, upon the following:

Mark A. Hutchison, Esq.
Hutchison & Steffen
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Donald Kula, Esq.
Perkins Coie
1620 – 26th Street
Sixth Floor, South Tower
Santa Monica, CA 90401-4013

Robert L. Eisenberg
Lemons, Grundy & Eisenberg
6005 Plumb Street, Suite 300
Reno, NV 89519

COURTESY COPY:
The Honorable Jessie Walsh
Regional Justice Center
200 Lewis Street
Las Vegas, NV 89155

An Employee of McDonald Carano Wilson LLP

244801

McDONALD·CARANO·WILSON LLP
2300 WEST SAHARA AVENUE • SUITE 1000 • LAS VEGAS, NEVADA 89102-4354
PHONE (702) 873-4100 • (702) 873-9966

EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT, Plaintiff, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, and DOES 1-100, inclusive, Defendants.	Case No. A382999 Dept. No. XVIII

AUGUST 11, 2008

DRAFT TRANSCRIPT

REPORTED BY: HOLLY J. PIKE, CCR NO. 680, RPR, CSR

concern the current financial condition of the State of California?

A. It involves only that to which the budget, the proposed budget addresses that.

Q. Have you, in forming your opinion, have you reviewed the May, 2008-2009 revised governor's budget?

A. Yes, I did.

MR. BRADSHAW: Thank you, Your Honor. Our objections are as previously noted

THE COURT: Noted for the record. Motion is granted.

MR. HUTCHISON: Thank you, Your Honor.

Q. Mr. Sjoberg, you've now been qualified again as an expert in this case to render now opinions about the general financial conditions of the State of California. I'd like to go ahead and go through that now with you. Now we looked at the document that's you reviewed in preparing for your opinion today. Do you in fact have an opinion as to the financial condition of the State of California?

A. I do.

Q. Can you please express that to the juror. In fact did you prepare a summary slide of that, sir?

A. Yes. Overall, the point that I'm going to address is that I believe the State of California has substantial assets and resources and, in my experience and the

experience that's demonstrated by data which I'll share with you, has the resilience, if you will, to weather economic down turns.

Starting with something I mentioned when I was here last and the State of California is the eighth largest economic entity in the world. Only the countries, major countries are larger than we are, U.S. and Germany and China and so forth.

California at the end of the fiscal year at June 30, 2007, had 35 billion dollars of liquid assets, that is to say unrestricted cash and investments.

Beyond the amount of assets that the state has, it also has the ability to generate revenue or to make funds available either by cutting programs back, by increasing taxes, or by issuing bonds that are available on wall street and of course because the ratings are sufficiently high for investment grade, they are sold.

Q. When you say investment grade bonds, what does that mean just in terms of those of us who aren't financial experts?

A. Well, California's rating is A plus. There are three major rating bureaus and they each have a slightly different set of ratings. But it's in the A range in all three rating bureaus. It's not the highest it could be. It's been hire in the past. Anything above A is considered

investment grade.

Below that, the B range, the triple B range gets into what would almost be defined as junk bonds during the era of that kind of activity. So essentially any investment in those bonds could go into a retirement fund or other area of that sort.

Q. Does that mean because California has such a good bond rating they can go out and borrow money quite easily from wall street?

A. They can borrow money quite easily.

Q. In addition to that you've got tax increases and other spending cuts. Now when you say in your opinion number 2, liquid assets of 35 billion, what do you mean liquid assets?

A. As I'll show you in the balance sheet, they're within the asset that's the state holds are assets which it characterizes as unrestricted cash and unrestricted investments. So there's flexibility upon where those funds could be spent.

Q. Then you say that the State of California has the eighth largest economy in the world and has 47 billion in net assets. Can you explain what you mean by net assets?

A. Net assets in the corporate world would be net worth. When one takes all their assets, subtracts the liabilities from those assets and what's left over is its

net worth. In fact, in government accounting it would be net assets.

Q. Your fourth opinion deals with the fact that California is in a budget deficit, but in fact it's happened before and they've recovered in the past; is that right?

A. Currently the state is facing a budget deficit of about 14 billion dollars. There have been greater deficits in the past as recent as 2003 when the budget deficit was 35 billion.

What these data will show that even in years with deficits the state recovers in a very quick time period.

Q. Some of your last opinion deals with the actual personal income tax revenue that the FTB generates. Did you look at that as well?

A. Yes. This number comes from the fiscal year-ending June 30, 2007. It was over 52 billion dollars a year, that's personal income tax revenues. If one were to divide that by 365 to get an idea of about how much that is equivalent to, it's equivalent to 14 $3 million a day.

Q. Now I'd like to spend just a little bit of time with these opinions and then we'll be done, Mr. Sjoberg. Let's take a look at your opinion about California's net worth and their assets. What documents did you take a look at for purposes of rendering that opinion?

A. The net worth discussion is focused on the

financial audit opinions from the year 2001 through 2007.

Q. Why don't we pull up the next graph, John, if you would, please. State of California's total assets. Explain to the jury what this shows based on the documents you reviewed.

A. The green line is the total asset line, which again is as I said are before liabilities are subtracted. As you can see over the period of six years, starting with 2002, the assets of the state have trended upward. They started at 90 billion and are at 183 billion at year-end 2007.

Again, you subtract the liabilities from that to get a net worth number which I'm calling net assets. Then you see that number has dipped to a negative in 2003, a negative 15 billion, but has recovered from that period to be in the 40 billion dollars range, including the 47 billion

Q. The last available numbers from the State of California show a net worth or a net asset value of 47 billion dollars; correct?

A. Right.

Q. Did you also take a look at this idea of having a cash and investments on hand in order to pay obligations. This is a chart that you prepared; is that correct?

A. That's correct.

Q. Can you explain to the jury what this chart shows?

Again this is based on the financial documents and records of the state you reviewed; is that correct?

A. Based upon the audited financial statements of the state. Again in billions, the line starts in 2002 with unrestricted cash and investments of 24.5 billion. Dipped for a couple of years as you see and then trends upward and concludes with 35.3 billion in the year 2007.

Q. These unrestricted cash and investments, that's different than, I take it, restricted cash and investments; is that right?

A. Absolutely. Restricted in a sense there is a specific purpose already identified for those assets. There have been promises made if you will in the past as to how those assets will be utilized.

Q. This 35 billion dollars number deals with unrestricted cash and investments; is that correct?

A. That's correct.

Q. Did you also take a look at state employment data in rendering your opinions?

A. I did.

Q. We've got a chart that shows this. Tell the jury what you took a look at in reviewing the state employment data and what conclusions you drew from those?

A. The information on this bar graph reveals the number of full time equivalent or if you will if there are

doesn't come in equally every single day. It's focused on April of course because of personal income tax. The peak is in April. The amount per day in April would be way beyond comparison.

But for purposes of understanding how you would flatten that average, this is the representation of those three days.

Q. If you were to take the total amount of personal income taxes that were collected last year and equate it to a day, that's what we're talking about here. In a day it's going to be 14 $3 million. In three days they're going to collect 4 $30 million. In five days 717 million dollars?

A. Just simple multiplication, yes.

MR. HUTCHISON: Your Honor, I would offer exhibit 783

MR. BRADSHAW: We made our objections

THE COURT: Very well. Noted for the record. The item will be admitted

MR. HUTCHISON: Thank you.

Q. Mr. Sjoberg will you briefly summarize for the jury your opinions concerning the financial condition and health of the State of California?

A. It's my opinion that the general financial status of the State of California is strong. We have significant assets. We have resources to draw from. And we have

demonstrated the ability to weather economic down turns. They do not have long term affect upon us. There's a dip here and there but we always come out with some form of increase at the end, as those trend lines revealed.

MR. HUTCHISON: Thank you, Mr. Sjoberg.

Thank you, Your Honor.

THE COURT: Very well. Mr. Bradshaw?

CROSS-EXAMINATION

BY MR. BRADSHAW:

Q. Good afternoon, Mr. Sjoberg.

A. Good afternoon.

Q. On April 23rd I said I have no more questions of you. That didn't turn out to be true, so if you don't mind, I'll ask you a few more. Okay?

A. Of course.

Q. You indicated you reviewed the governor's budget for 2007-2008 and we're talking fiscal years; right?

A. Correct.

Q. Fiscal year runs from when to when?

A. The beginning is July 1st of any year and it ends at the subsequent June 30.

Q. So we just saw the end of a fiscal year?

A. I didn't hear you.

Q. June 30th was the end of the fiscal year, the

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 35549
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.	No. 36390

FILED

APR 04 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF MANDAMUS IN PART IN DOCKET NO. 36390, AND GRANTING PETITION FOR A WRIT OF PROHIBITION IN PART IN DOCKET NO. 35549

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district

court's determination that certain documents were not protected by attorney-client, work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

On June 13, 2001, we granted the petition in Docket No. 36390 on the basis that Hyatt did not produce sufficient facts to establish the existence of a genuine dispute justifying denial of the summary judgment motion. Because our decision rendered the petition in Docket No. 35549 moot, we dismissed it. Hyatt petitioned for rehearing in Docket No. 36390 on July 5, 2001, and in response to our July 13, 2001 order, Franchise Tax Board answered on August 7, 2001. Having considered the parties' documents and the entire record before us, we grant Hyatt's petition for rehearing, vacate our June 13, 2001 order and issue this order in its place.

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. We further conclude that, except for document FTB No. 07381,

which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition[1] in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt—a long-time California resident who moved to Clark County, Nevada—to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents.

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[1]Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. Wardleigh v. District Court, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995).

The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an amicus curiae brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

We may issue an extraordinary writ at our discretion to compel the district court to perform a required act,[2] or to control discretion exercised arbitrarily or capriciously,[3] or to arrest proceedings that exceed the court's jurisdiction.[4] An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law.[5]

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[2]NRS 34.160 (mandamus).

[3]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus).

[4]NRS 34.320 (prohibition).

[5]NRS 34.170; NRS 34.330.

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information.[6] A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief.[7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy.[8]

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity.[9] Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment.[10] California has expressly provided its state taxation agency, Franchise Tax Board,

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[6]Wardleigh, 111 Nev. at 350-51, 891 P.2d at 1183-84.

[7]Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

[8]Id.

[9]NRS 41.031; Cal. Const. Art. 3, § 5; Cal. Gov't Code § 820.

[10]See NRS 41.032(2); Foster v. Washoe County, 114 Nev. 936, 941, 964 P.2d 788, 791 (1998); State, Dep't Hum. Res. v. Jimenez, 113 Nev. 356, 364, 935 P.2d 274, 278 (1997); Falline v. GNLV Corp., 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991).

with complete immunity.[11] The fundamental question presented is which state's law applies, or should apply.

Jurisdiction

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts.[12] Second, the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy.[13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction,[14] while Nevada law is presumed to govern with respect to the underlying torts.[15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

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[11]See Cal. Gov't Code §860.2; Mitchell v. Franchise Tax Board, 228 Cal. Rptr. 750 (Ct. App. 1986).

[12]Nevada v. Hall, 440 U.S. 410, 414-21 (1979).

[13]Id. at 421-24.

[14]Id. at 414-21.

[15]Motenko v. MGM Dist., Inc., 112 Nev. 1038, 1041, 921 P.2d 933, 935 (1996).

Comity

The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations.[16] In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protection, and consider whether granting California's law comity would contravene Nevada's policies or interests.[17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity.[18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. An investigation is generally considered to be a discretionary function,[19] and Nevada provides its agencies with immunity

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[16]Nevada v. Hall, 440 U.S. at 424-27; Mianecki v. District Court, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983).

[17]Mianecki, 99 Nev. at 98, 658 P.2d at 425.

[18]Cal. Gov't Code § 860.2; see Mitchell, 228 Cal. Rptr. at 752.

[19]Foster, 114 Nev. at 941-43, 964 P.2d at 792.

for the performance of a discretionary function even if the discretion is abused.[20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

Intentional Torts

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, 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. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe 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.[21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

Docket No. 35549

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court

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[20]NRS 41.032(2).

[21]See Mianecki, 99 Nev. at 98, 658 P.2d at 425.

decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

The deliberative process privilege does not apply because the documents at issue were not predecisional; that is, they were not precursors to the adoption of agency policy, but were instead related to the enforcement of already-adopted policies.[22] And if the privilege were to apply, it would be overridden by Hyatt's demonstrated need for the documents based on his claims of fraud and government misconduct.[23]

The attorney-client privilege does not apply because Franchise Tax Board did not demonstrate (1) that in-house-counsel Jovanovich was acting as an attorney, providing legal opinions, rather than as an employee participating in the audit process,[24] or (2) that the communications between Ms. Jovanovich and other Franchise Tax Board employees were kept confidential within the agency.[25]

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone

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[22]See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-68 (D.C. Cir. 1980).

[23]See In re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997).

[24]See Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981); United States v. Chen, 99 F.3d 1495, 1501-02 (9th Cir. 1996); United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996); Texaco Puerto Rico v. Department of Consumer Aff., 60 F.3d 867, 884 (1st Cir. 1995).

[25]See Coastal States, 617 F.2d at 862-64.

conversation between Franchise Tax Board attorneys Jovanovich and Gould should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is protected by the attorney work-product privilege.[26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.[27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved by the district court's final judgment.

Conclusion

We conclude that the district court should have declined to exercise jurisdiction over the negligence claim as a matter of comity. Accordingly, we grant the petition in Docket No. 36390 in part; the clerk of this court shall issue a writ of mandamus directing the district court to grant Franchise Tax Board's motion for summary judgment as to the negligence claim. We deny the petition in Docket No. 36390 with respect

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[26]See Wardleigh, 111 Nev. at 357, 891 P.2d at 1188.

[27]Clark County Liquor v. Clark, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

We vacate our stay of the district court proceedings.

It is so ORDERED.[28]

Maupin, C.J.

Young, J.

Shearing, J.

Agosti, J.

Leavitt, J.

[28]The Honorable Nancy Becker, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Nancy M. Saitta, District Judge
California Attorney General
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP/Las Vegas
McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP/Reno
Bernhard & Leslie
Hutchison & Steffen
Riordan & McKenzie
Thomas K. Bourke
Marquis & Aurbach
Clark County Clerk

ROSE, J., concurring in part and dissenting in part:

I would not grant comity to the petitioners in this case and would grant immunity only as given by the law of Nevada. In all other respects, I concur with the majority opinion.

In Mianecki v. District Court,[1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign immunity, we stated:

> In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. The principle is appropriately invoked according to the sound discretion of the court acting without obligation. "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

Based on this very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a

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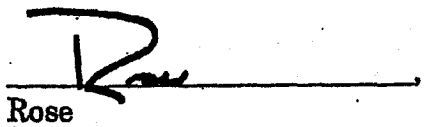
[1]99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983) (internal citations omitted).

grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past.[2]



Rose, J.

Rose

[2]Nevada v. Hall, 440 U.S. 410, 418 (1979).

EXHIBIT 3

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - x

FRANCHISE TAX BOARD OF :

CALIFORNIA, :

Petitioner, :

v. : No. 02-42

GILBERT P. HYATT, ET AL. :

- - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, February 24, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

FELIX LEATHERWOOD, ESQ., Deputy Attorney General, Los Angeles, California; on behalf of the Petitioner.

H. BARTOW FARR, III, ESQ., Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

[11:02 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 02-42, Franchise Tax Board of California versus Gilbert Hyatt.

Mr. Leatherwood.

ORAL ARGUMENT OF FELIX LEATHERWOOD

ON BEHALF OF PETITIONER

MR. LEATHERWOOD: Mr. Chief Justice, may it please the Court:

Respondent has prompted the Nevada courts to extend their authority over California's tax process. The Nevada court has said at Joint Appendix 138, "the entire process, of FTB audits of Hyatt, including the FTB's assessment of taxes and the protests, is at issue in this case," end quote. This has been said to mean, at Joint Appendix 138, that the tax process is under attack.

This lawsuit interferes with California's capacity to administer these taxes. The administration of taxes is a core, sovereign responsibility from which all functions of State Government depend. It is protected by immunity laws of common-law torte lawsuits, like the kind presented by Respondent.

California has invoked the protection of its immunity laws, but the Nevada courts have allowed

respondents laws to proceed, not by extending full faith and credit. And this refusal threatens our constitutional system for cooperative federalism in violation of Article IV, Section 1 of the United States code.

THE COURT: Mr. Leatherwood, may I ask you a threshold question? Some of your friends in this case have -- inviting an overruling of Nevada against Hall. Of course, California was favored by that decision. Do you join in the plea to overrule Nevada v. Hall, or do you say this case is different because it involves four sovereign functions?

MR. LEATHERWOOD: Justice Ginsberg, we do not join in the chorus to overrule Nevada v. Hall. This case is different. This case goes to footnote 24 of Nevada v. Hall. It's our feeling that Nevada v. Hall is good law in the sense it does -- it does not implicate another state managing another state's core sovereign function. It's -- Nevada v. Hall was strictly an automobile accident.

THE COURT: The comparison would be between the university, education, which was the -- which was the defendant, and the tax authorities. Both of those, education and tax, seem core. Or if you're going to compare the torte itself, it would be a comparison between negligent driving, on the one hand, and going into another state and committing -- you know, peering through windows,

going through garbage, totally wrongly getting all the neighbors to reveal private information, et cetera. So comparing the particular acts, what's the difference, or comparing sovereign functions, what's the difference?

MR. LEATHERWOOD: I mean, compared -- I thank you, Your Honor -- in comparing the sovereign functions --

THE COURT: Education versus tax.

MR. LEATHERWOOD: Yeah, and driving an automobile in another state's -- on another state's highway --

THE COURT: That's not the sovereign function.

MR. LEATHERWOOD: That's not --

THE COURT: I'm saying that --

MR. LEATHERWOOD: -- the sovereign function.

THE COURT: -- it seems like that's apples and oranges to me. That is, in the one case, we're looking at the acts they're complaining of, and here the plaintiff is complaining of acts that took place in Nevada that were miles outside what would be reasonable. I'm not saying he's right, but that's his complain. In Nevada v. Hall, they were complaining about negligent driving. So what's the difference there?

Or, alternatively, in Nevada v. Hall, it was a driver who worked for a university, and here it is an investigator who works for the tax board. So what's the

difference there?

MR. LEATHERWOOD: Well, to answer the Court's question directly, the most significant difference is that the tax function is much more significant than the education function.

THE COURT: Well, that's -- that would be a very difficult premise for us to say, that education is somehow secondary.

MR. LEATHERWOOD: Well --

THE COURT: You're saying Nevada can't have a great university -- can have a great university by keeping its people within its own borders. They can't go to California to get information to solicit, to recruit students? That would be a very difficult decision for us to write on that premise.

MR. LEATHERWOOD: No, Your Honor, I would agree with you that that would be a difficult --

THE COURT: For the State of California to argue that education is not a core state function is, to me, rather astounding.

MR. LEATHERWOOD: No, Your Honor, I'm not arguing that education is not a core sovereign function. What arguing is that taxation is an essential core sovereign function since that education cannot move forward --

THE COURT: Well, Mr. --

MR. LEATHERWOOD: -- to provide taxation.

THE COURT: -- Leatherwood, we -- this court tried to follow a core state function test under the Tenth Amendment. And in Garcia, kind of gave it up, didn't it, as being an unworkable thing. Now, why would we want to resurrect that here? And why is it that you don't say, "Well, if the Court wants to overrule Nevada v. Hall, that's fine; I'll win." I mean, I don't understand your position. You're asking us to go back to a test that we rejected under the Tenth Amendment in Garcia, but you don't want to say, "Sure, if you want to overrule Nevada v. Hall, be my guest."

MR. LEATHERWOOD: Yes, Your Honor. Justice O'Connor, what we are attempting to say here is that this case is more analogous to this court's jurisprudence in the area of the Federal Tax Injunction Act along the line of fair assessment -- the fair assessment cases, where the court has directed that the Federal Government will back off on trying to manage state taxes.

THE COURT: There you have a specific act of Congress that tells the Federal Government to back off. And I don't believe you have any such thing here.

MR. LEATHERWOOD: But we do have the Full Faith and Credit Clause, which directs that a state is to

recognize the public acts of another state. And we do have an immunity law applicable here, and this directs that Nevada should respect the immunity laws of the State of California. And the immunity law, in this particular instance, provide absolute immunity for conduct as undertaken in a tax audit. Anything that's associated with tax audit, is protected.

THE COURT: But Nevada did recognize California law to the extent it was similar to Nevada's -- that is, saying you had immunity from the negligent acts. And then it went on to say, "No, you don't have immunity from intentional acts, even though California law does give immunity from intentional acts." But surely you wouldn't go to the extreme that you would say someone could come over to Las Vegas from California and just beat up somebody because they haven't paid their taxes, would they?

MR. LEATHERWOOD: Absolutely, I agree with the Court on that point. The --

THE COURT: Why not?

MR. LEATHERWOOD: -- the extension of that --

THE COURT: Why do you agree on that point? I don't understand that?

MR. LEATHERWOOD: Because the extension of our immunity law does not cover physical tortes or tortes --

THE COURT: Oh.

MR. LEATHERWOOD: -- outside the scope --

THE COURT: I see.

MR. LEATHERWOOD: -- of course, the scope of the acts that are incidental to --

THE COURT: I see. So under California law, there would be -- that would be actionable; whereas, under Nevada law, here, what they're doing is actionable. You just want to use the California standard rather than the Nevada standard.

MR. LEATHERWOOD: Well, in fact, Your Honor, if they would use the Nevada standard, use the same standard that Nevada applies to its own taxing agencies, then this case would be on a hold*. What Nevada has done in this particular case is that it has gone outside its own precedent and applied a different standard to California taxing agencies, and it's not --

THE COURT: But that's not what they're -- the Nevada court said, "we're going to treat the tax collectors from anywhere who come in to our state and act here, and we're going to" -- the Nevada Supreme Court said, "We're going to apply our rule, and our rule is negligence is immunity; intentional, there isn't." So you're asking us to discredit or disbelieve the Nevada Supreme Court when it said, "The law we apply to tax

collectors who act in this state is the same as we apply to Nevada tax collectors."

MR. LEATHERWOOD: Your Honor, I am not asking this Court to not believe the Nevada Supreme Court. But what I'm saying is that Nevada has published precedent, as recent as 1989, where it requires that a taxpayer forego bringing a lawsuit until they -- until there has been -- until there's a resolution of all statutory procedures.

THE COURT: Oh, but this -- but Nevada Supreme Court, I thought, made very clear that what they were dealing with is tortous conduct, harassing conduct. They, in fact, refused -- Nevada Supreme Court refused to decide where this man was domiciled, because that would interfere with the ongoing procedure in California on the tax liability. I thought that the Nevada Supreme Court had made it clear that they were dealing with the way their resident is being harassed and not with where he was domiciled on a magic date.

MR. LEATHERWOOD: Your Honor, what has happened in this particular case, 97 percent of the conduct that occurred during the course of this audit occurred in California. And, quite naturally, what Nevada is -- what Nevada is doing is permitting Mr. Hyatt to go behind the actual torte and make a collateral attack on the tax itself.

THE COURT: Well, that may be, but the that isn't the issue that we've got in front of us here. I mean, the question in front of us is not how far can the Nevada courts go in reviewing California's tax practice. The issue before us is, among others, in a claim of torte against your -- your operative in Nevada, for the manner in which the tax is collected is their absolute immunity. And, you know, maybe the Nevada courts are going too far in discovery, but that's not the issue in front of us.

MR. LEATHERWOOD: I would absolutely agree with the Court that the issue whether or not Nevada was obligated to apply our immunity laws with respect --

THE COURT: All right.

MR. LEATHERWOOD: -- with respect to conduct undertaken incidental to this audit.

THE COURT: May I go back to Justice Stevens' question, because I'm not sure of your answer to it? What if the State of California passed a statute tomorrow morning saying the use of thumbscrews in tax collection is authorized? Is -- would your answer to Justice Stevens' question be that -- or wouldn't your answer to Justice Stevens' question be that if you went into Nevada and you used thumbscrews, you would be entitled, on your theory, to absolute immunity? Isn't that correct?

MR. LEATHERWOOD: Your Honor, no. What I'm

saying is that, under that particular theory, I do not think that you could pass law in the State of California that will essentially sanction a crime, and there was no crime committed within the course of this audit.

If the -- if an auditor commits an intentional torte, such as a burglary or a trespass in Nevada or California, it's our position that that particular conduct is not incidental to --

THE COURT: It doesn't matter. I mean, we're trying to get the -- we're trying to get the analysis of it, and I'm having exactly the same problem. Imagine that, you know, California did say there is absolute immunity, even if you beat somebody up, absolute torte immunity. Okay? Even for beating people up. Now, suppose they did have that; you could prosecute it as a crime. Now you're in Nevada, and they say, the plaintiff, "He beat me up. He came across the state line, down from Lake Tahoe. He was in a bad mood, lost too much money at the casino, and he beat me up." All right? Now, can Nevada bring that lawsuit or not? That's, I think, what Justice Stevens' question was.

MR. LEATHERWOOD: Well, I understand that, Your Honor. My position is that even though that law does not exist in California --

THE COURT: Yes.

MR. LEATHERWOOD: -- but applying --

THE COURT: If it did.

MR. LEATHERWOOD: -- applying it -- my -- our particular theory --

THE COURT: Yes.

MR. LEATHERWOOD: -- that, yes, we -- then Nevada would be obligated under the Full Faith and Credit Clause to apply that particular law. But --

THE COURT: And, therefore, you could not bring the lawsuit in Nevada about somebody beating somebody up.

MR. LEATHERWOOD: If --

THE COURT: If that were the law in California.

MR. LEATHERWOOD: -- if that were -- if that was the case. But --

THE COURT: Yeah, okay.

MR. LEATHERWOOD: -- in this particular case, that's illegal in California and that's illegal in Nevada.

THE COURT: So how, then, do we reconcile that position, where we're back to our starting place, with the fact that he could bring an action if on his way down from Lake Tahoe in the state car, he happened to drive a little negligently and ran somebody over? I mean, that's Nevada v. Hall, just reverse the states.

MR. LEATHERWOOD: No, and we're agreeing with Nevada v. Hall.

THE COURT: I know. So this is why we're having a problem. It's clear that if our tax collector, on his way down from Lake Tahoe, runs over a Nevada resident, the Nevada resident can sue and apply Nevada law.

MR. LEATHERWOOD: Yes, I --

THE COURT: You say, if, in fact, that same tax collector beats up somebody, and the California law is that you cannot sue, Nevada cannot apply its own law.

MR. LEATHERWOOD: That's not what I'm saying, Your Honor. I'm saying if that conduct -- if that conduct is connected to the actual audit itself, then it's protected. But what I'm saying, I cannot possibly see, under any possible theory, that a beating, that it -- that breaking into someone's house could actually be part of the assessment -- tax assessment process. If an auditor engages in that kind of behavior, the auditor is not covered under the absolute immunity. That is outside the scope of that --

THE COURT: Okay.

MR. LEATHERWOOD: -- (inaudible)*.

THE COURT: And is the reason that the answer is different in the two cases, the reason that there is something special about tax collection or is the reason that there is a closer connection in the hypo of the beating up for tax collection than the driving the

automobile for tax collection?

MR. LEATHERWOOD: Well --

THE COURT: Which is it? Is it the nature of the tax collection or the nature of the activity which leads to the torte liability?

MR. LEATHERWOOD: Well, I think it's both, Your Honor. Well, first of all, tax -- tax collection, by definition, is an intrusion of someone's life. The allegations alleged here are principally invasion of privacy, disclosure of information, that sort of thing. Ninety-seven percent of that conduct occurred in California. You cannot possibly investigate or prosecute Mr. Hyatt's case without intruding into that tax --

THE COURT: Mr. Leatherwood, if I understand your position, it would be exactly the same if a hundred percent of the conduct had occurred in Nevada.

MR. LEATHERWOOD: Absolutely, Your Honor. That -- but --

THE COURT: But the problem I have -- may I just ask this question? Assume there is a -- there's a difference between Nevada law and California law, as I understand it. Some things are actionable against a tax people* in one state and not the other. Why is it, in your view, that if the same conduct had occurred six months later, but by Nevada tax collectors instead of by

California tax collectors, because he's been in both states and probably is subject to taxes in both, Nevada would allow the suit against its own tax people but now allow it against the California tax people? Why does that make sense?

MR. LEATHERWOOD: Well, Your Honor, in this particular case, as I've indicated, according to our reading of Nevada precedent, published precedent, that they would not permit this lawsuit to proceed until the tax process has been concluded. With respect to -- to directly answer your question, it does not appear that Nevada would prosecute its own -- it will permit a prosecution of its own agents in the case where the allegations are principally that there is an intrusion into Mr. Hyatt's life or that there --

THE COURT: Well, we understood the reasoning of the Nevada Supreme Court to say they would. I think -- I must have misread the opinion. Is that --

MR. LEATHERWOOD: No, absolutely not, Your Honor. I don't think you misread the opinion. What I think the Nevada Supreme Court said is that they will permit intentional torte prosecution of government employees. This case does not involve a government employee. This case involves a government agency itself, a tax agency. And under Nevada law, you cannot proceed

against the Nevada tax agency without first exhausting your administrative and statutory remedies to contest the underlying tax itself.

THE COURT: But certainly this sort of thing isn't the kind of thing you could have exhausted your remedies on, is it?

MR. LEATHERWOOD: Absolutely, Your Honor. In our -- in our -- it is our position that this entire -- the entire lawsuit is linked up to our tax process, because the conduct that the Respondent is complaining about here is that the tax itself is -- the tax itself and the tax process is engaged in bad faith. And I would --

THE COURT: Now, what is -- was your answer to the question? Suppose that this tax collector were driving negligently in Nevada --

MR. LEATHERWOOD: (Inaudible.)*

THE COURT: Suppose the tax collector were driving negligently in Las Vegas. It's very important for the tax collector to go examine the record, and he's driving negligently. What --

MR. LEATHERWOOD: I think, under Nevada v. Hall, he would be -- he would be subject to negligent liability. It's not connected to a torte --

THE COURT: (Inaudible.)*

MR. LEATHERWOOD: -- because the function here

is -- the function here is as a tax investigation; whereas, driving is something that you can investigate independent of the tax process itself.

THE COURT: So suppose that we conclude that footnote 24 does not provide sufficient guidance for us to have a stable jurisprudence and that you will lose unless Nevada versus Hall is overruled. Would you then ask us to overrule Nevada versus Hall?

MR. LEATHERWOOD: Your Honor --

THE COURT: I know you don't want to entertain that possibility, but suppose that's what we conclude.

MR. LEATHERWOOD: Well, we -- we've thought about this, Your Honor, of course, and we would accept a win, if that's the Court's direction, through overruling Nevada v. Hall, but it's our contention that the Court doesn't have to go that far to get -- to get to this point. The Court can literally analogize to the special protections that are provided to state tax systems within the federal system itself.

THE COURT: But then that, as I suggested earlier, is a difficult thing to do, because there are congressional statutes that mandate that here. And all we have is the Full Faith and Credit Clause. Now, perhaps you say that's sufficient, but isn't it possible that there might be other emanations of the Full Faith and

Credit Clause, other than just footnote 24, or whatever it is, in Nevada against Hall. I'm not talking about overruling it, but developing it, perhaps.

MR. LEATHERWOOD: Yes, Your Honor. I would agree with that. Of course, we think that Nevada's failure to recognize or give dignity to California's immunity statute is not only a violation of the Full Faith and Credit Clause, but is a hostile act, and this kind of hostility is contrary to our whole concept of --

THE COURT: What -- what about a congressional statute? That is, suppose the opinion read -- what would your objection -- I know you'll object to this possible opinion, and I want to hear what your objection is -- the opinion says they're complaining here, as far as we're concerned, with a serious torte, invasion of privacy, you know, a whole lot of really bad behavior, et cetera -- they're complaining about that taking place by a California official in Nevada, and we can't really distinguish that from the automobile accident taking place in Nevada. They're both tortes. They're both very bad -- you know, this is worse conduct. Now, it's true that our investigation of this may interfere with California's tax authority's ability to sort of run investigations in general. But if that turns out to be a problem, a big problem, Congress can legislate.

MR. LEATHERWOOD: Well, that still creates -- that still creates the situation where Nevada is supervising and managing California's tax --

THE COURT: Back to activities happening in Nevada.

MR. LEATHERWOOD: Yeah. In this lawsuit -- this lawsuit is -- is being prosecuted -- is being investigated almost exclusively in California. The intrusion here, the interference here, is that Nevada has permitted Mr. Hyatt to use this lawsuit both as a -- as a wall and a battering ram. It has almost suppressed the entire California tax investigation. It's creating an entire class of possible plaintiffs that can sue California just for literally going across the state line and making an inquiry as to whether or not a former California resident, a former California taxpayer, actually owes any taxes.

THE COURT: Well, they would have to show as an intentional -- whatever that means under Nevada law -- not just negligible, to me.

MR. LEATHERWOOD: Well, the intentional act here is that California created a tax system in bad faith to -- bad faith to extort an exit -- and exit tax from -- from a taxpayer.

THE COURT: I thought that, again, the Nevada Supreme Court said, "We are not going to touch the

question of where this man was domiciled. That's for California to decide." What we are dealing with is this new thing. One allegation was trespass and going through the man's trash, and another was calling -- maybe the calls emanated in California -- calling people in Nevada insinuating bad things about this person. And that has nothing to do with where the man is domiciled. It's a question that California is deciding and Nevada says it won't touch.

MR. LEATHERWOOD: Yeah, and I would -- I would direct the Court to Joint Appendix 133, where -- where the Court would -- the Nevada courts have indicated that almost all the action in this lawsuit occurred in California. And --

THE COURT: Well, you -- you recognized that there were two trips into California.

MR. LEATHERWOOD: Actually, Your Honor --

THE COURT: I mean, to Nevada.

MR. LEATHERWOOD: Actually, Your Honor, I believe there were three trips, and they were short trips -- they were trips of extremely short duration.

THE COURT: And what was there about -- on one of those trips, there was a trespass on his property and rummaging through his trash.

MR. LEATHERWOOD: Well, that's not part of --

that's not part of the allegations of the -- of the complaint itself. The complaint is saying that --

THE COURT: It was a more -- a more general interference with his privacy, but those were examples that were alleged, if not in the complaint, somewhere.

MR. LEATHERWOOD: No, there has been deposition testimony that there -- on one of the trips, that the investigator looked at the timing of Mr. -- of Respondent's trash delivery and also looked at -- determined whether or not Respondent was receiving any mail at that particular location. That does not justify the pervasive nature and the extent in which this lawsuit has reached into California and literally attacked the tax process.

And, once again, I will refer the Court to the Joint Appendix at page 60, where it is alleged that the California tax system itself is a fraud -- that is, put together in bad faith for the specific purpose of extorting an exit tax from former residents who -- as they leave California.

Well, if the Court has no more questions in this regard, I would like --

THE COURT: Do you want to reserve your time, Mr. Leatherwood?

MR. LEATHERWOOD: -- reserve the balance of my

time, thank you.

THE COURT: Very well.

Mr. Farr, we'll hear from you.

ORAL ARGUMENT OF H. BARTOW FARR

ON BEHALF OF RESPONDENT

MR. FARR: Thank you, Mr. Chief Justice, and may it please the Court:

In our federal system, it's recognized that the states will sometimes have overlapping jurisdiction. When that happens, the Constitution allows each state to apply its own laws against the background principle of comity where they believe it would be appropriate to defer to the laws of another state. And I submit that the Nevada courts here have applied these principles very carefully.

Nevada, of course, correctly held that they were not required to apply California's legislated created law of immunity. At the same time, however, they have applied principles of comity to strike out the declaratory judgment count that would have gone to the very issue that is being contested in the Florida -- excuse me -- in the California tax proceeding, which is the date that Mr. Hyatt moved to Nevada. And they have also given California complete immunity for any negligence that it has committed.

So in this case, it seems to me, the system is

working --

THE COURT: Mr. Farr, can I ask you, do you think they were compelled by the Full Faith and Credit Clause to grant immunity on the negligence claim?

MR. FARR: That's an interesting question, Justice Stevens, because Nevada officials themselves have immunity. There would be a question, I suppose, of whether the Full Faith and Credit Clause requires that. My general feeling is probably not, but that is really not a question so much of whether -- a choice of law between California law and Nevada law, but simply a question of what Nevada law would apply. So I don't think that the Full Faith and Credit Clause itself speaks to that issue, but I do think principles of comity will traditionally reach that result. And, in fact --

THE COURT: Well, are principles of comity dictated by the Constitution? Suppose --

MR. FARR: They are --

THE COURT: -- suppose Nevada said they were not -- (inaudible)*?

MR. FARR: That's correct, yes. And I don't think there is a federally enforceable law of state comity, but I think that is the system that has existed essentially between sovereigns for much longer than the United States is --

THE COURT: Well, is it your position then the private plaintiff can always bring suit against a state in the courts of another state?

MR. FARR: Well, the first question, of course, is whether the court has legislated -- the first Full Faith and Credit question is whether the court in which the suit is brought has legislative jurisdiction. So there is a requirement that that state have constitutionally sufficient contacts with the law --

THE COURT: Well, then it would be a precedent. Well, that's easy to satisfy.

MR. FARR: So assuming that they've satisfied that, they are entitled to bring a suit. Then the question is whether the state -- and I believe at that point the state is free to apply its own laws to protect its own interests. I think that's what the Full Faith and Credit Clause allows. And it is the doctrine of comity that provides the acknowledgment of the state -- the other state's interests. And that's typically, in fact, what's happened with Nevada --

THE COURT: It's very --

MR. FARR: -- versus --

THE COURT: -- it's very odd to me that California can't be sued in its own courts and it can't be sued in a federal court, but it can be sued in a Nevada

court, which, if we follow that, the question really is has the -- has the least interest in maintaining the dignity of the State of California.

MR. FARR: Well, there are two -- two factors there, Justice Kennedy. First of all, there is the fact that Nevada has some very real interests of its own, its own sovereign interests to protect here. I mean, there have been tortes which were both committed in Nevada and directed at a Nevada resident. So, to begin with, before one gets to the immunity question, Nevada, as a sovereign state, has important interests in assuring compensation and also in deterring that kind of conduct. So the idea that a legislatively created immunity by another state should be able to prevent Nevada from protecting those interests seems inconsistent with the federal system.

Now, if one goes beyond that to the question of inherent immunity, the very idea that a state should have to be subject to sue in the courts of another state, I think, first of all, as you know, we don't believe that issue is properly presented on the question presented in this case. But if you would like me to address it just for a moment, I think there are differences if one looks to the -- to the way that the -- essentially immunity has been resolved in the course of the United States.

First of all, in its own courts, it has the

common-law immunity based on the idea that it is both the king being sued in its own court, and also typically it is also the progenitor of the law, so to speak, to Justice Holmes' point.

In the United States, there's -- the courts of the United States, there's a very specific situation. At the time of the convention, the states were, obviously, forming a new sovereign, and the question of whether that sovereign was going to grant them the immunity they had in their own courts or whether that sovereign would be in the same position essentially as foreign sovereigns typically were, which is that they did not have to provide sovereignty except as a matter of comity. That's The Schooner Exchange opinion.

But -- so the states, at that point, had a very real interest in deciding that question, and they did, in fact, decide that question, as the court has recognized. That is not true with respect to the immunity that they have had in the courts of other states.

THE COURT: Is -- how does Alden fit into this? In Alden, I take it the court now -- we've held that a citizen of Maine suing in the State of Maine's courts alleging that Maine had violated a federal law can't do it. Sovereign immunity. Right? That's Alden.

All right. Suppose the citizen of Maine walks

into a New Hampshire court and brings the same lawsuit against Maine, assuming New Hampshire has appropriate jurisdiction under its own law.

MR. FARR: Uh-huh.

THE COURT: Do we get a different result?

MR. FARR: Okay, I think that is not a question that is within the notion of what is the question in this case.

THE COURT: No, no, well --

MR. FARR: I'm sorry. I --

THE COURT: -- you see, what I --

MR. FARR: Excuse me.

THE COURT: -- nonetheless, although --

MR. FARR: No, I --

THE COURT: -- what I'm trying to do is -- is sort out what, in my mind, are a set of impossible anomalies, and that's why I ask you that question.

MR. FARR: I'm sorry. I started to answer in the wrong way.

THE COURT: Go ahead.

MR. FARR: What I -- I reserve the point, of course, always, that I don't believe this is within the question presented.

THE COURT: Yeah, yeah, of course.

MR. FARR: But I actually was going -- what I

meant to say is that I don't think it's the same kind of question in the sense that I think still when you're talking about enforcement of a federal cause of action in another state, that is still really a federal-state question.

THE COURT: But, you see --

MR. FARR: That's still --

THE COURT: -- your answer, then --

MR. FARR: -- an evolving question.

THE COURT: -- your answer to my question is Alden cannot be avoided simply by the Maine citizen walking into a New Hampshire court and bringing the same case.

MR. FARR: That's correct.

THE COURT: All right.

MR. FARR: I think that is --

THE COURT: And I would guess that's right.

MR. FARR: -- still a federal-state --

THE COURT: All right, assuming that's right --

MR. FARR: -- I think assuming the federal-state --

THE COURT: -- assuming that's right, now, look at the tremendous anomaly, which you were just about to address, and I want to be sure you do. Our citizen of Maine walks into the New Hampshire court and sues the

State of Maine under federal law. And the answer is, he can't do it because of sovereign immunity. Our citizen of Maine does the same thing, but this time his cause of action is state law. And now you say he can do it.

MR. FARR: That's right. And --

THE COURT: And the only difference between the two cases is that his cause of action is federal law in the first case, and he can't sue the state; but state law in the second case, and he can, which, of course, means that the law of New Hampshire binds Maine in a way that federal law cannot. Now, that, to me, I just can't -- that, to me, seems to anomalous that -- that I'd like an explanation --

MR. FARR: Well --

THE COURT: -- if you can give it. And you see how I'm thinking of it as connected here, because the facts here are just part of that general anomaly.

MR. FARR: That's correct. Actually, Justice Breyer, I think that's something that the court, to some extent, addressed in Alden itself --

THE COURT: Uh-huh.

MR. FARR: -- in distinguishing the opinion in Nevada versus Hall, when it noted that when you get into the situation of a state being sued in the courts of another state and, as in Nevada versus Hall, under a state

cause of action, you have now implicated the sovereignty of a second sovereign. So when one is now looking at the -- at the issues of sovereign immunity, one is looking at a different platform of issues and also at a different historical base.

THE COURT: But that seems to make their case even harder. It would be difficult to conceive that the framers thought that Virginia could be sued in Pennsylvania but not in the federal court. I would think that the presumption would be that this was an even stronger case for the exercise of sovereign immunity than when all of the citizens of the union are involved as in the Alden situation --

MR. FARR: Well, I think that --

THE COURT: -- in the Eleventh Amendment.

MR. FARR: I mean, I think that there are two things going on. First of all, the question is not whether they can be sued, but if not, why not. For example, with Pennsylvania and Virginia, as I'm sure the Court is aware, had as Nathan* versus Virginia is a case in which that very situation came up. But in the courts of Pennsylvania, the Pennsylvania Attorney General urged its own courts to recognize sovereign immunity. So that could naturally fit within the idea that Schooner Exchange had made clear, which is that when you're talking about

coequal sovereigns of that nature, one is talking about sovereignty that -- excuse me, immunity that is extended as a matter of comity, not as a matter of absolute right of the other sovereign. And the reason is -- excuse me -- the reason is that if you don't allow the sovereign to execute its own laws within its own territory, you're depriving that sovereign of part of its sovereignty.

THE COURT: Well, doesn't our original jurisdiction as the states between states bear something on this question?

MR. FARR: It bears a little bit. But, of course, Article III itself is not a exclusive jurisdiction provision. The Section 1251 provides exclusive jurisdiction with respect to suits between states.

THE COURT: The idea that the framers would provide for its original jurisdiction in the Supreme Court in -- for suits by one state against another suggests they thought it might be pretty hard to bring such a suit anywhere else.

MR. FARR: Well, and they -- certainly as a practical matter, they would have been right, Mr. Chief Justice. I mean, as a practical matter, it has always been difficult to bring a suit against a state, either in its own courts or in the courts of another state. I mean, even since Nevada versus Hall, typically states have

granted immunity to other states for when they're sued in their own courts. And if they haven't granted absolute immunity, what they have done, which I think is an important principle emerging -- emerging principle of comity, is they have tended to look at their own immunity to see what kinds of suits could be brought against them and to try, then, to grant to the -- to the outside sovereign that same type of immunity.

THE COURT: Mr. Farr, have you found other examples around the country of suits by citizens of one state against another state in the other state's courts?

MR. FARR: I --

THE COURT: Is this relatively rare, or is it happening? And in what context is it happening?

MR. FARR: It's relatively rare, and -- but there have been some suits. There are a few of them cited in our brief, if I can find the page number, pages 38 and 39. The -- there are suits, for example, negligence suits involving the release of dangerous persons within another state who have created injury to citizens --

THE COURT: Uh-huh.

MR. FARR: -- of that state. There are more commercial-type things involving contracts or -- one, in particular, is suit for invasion of privacy when someone who wrote a book disclosed information. In general,

though, Justice O'Connor, as I say, some of those suits, the courts have just said, "We're not going to hear them. Whether you have a valid cause of action or not, we're simply not going to -- going to recognize that in our courts because of the sovereignty of the defendant." Other courts have said, "Yes, we will open our courts, but we are going to look to our own immunity to try to have essentially a baseline to measure the sort of immunity that we are going to" --

THE COURT: Mr. Farr, are you saying --

MR. FARR: -- "accept."

THE COURT: -- that that, too, is just a matter of comity?

MR. FARR: I do think that that's --

THE COURT: Doesn't --

MR. FARR: -- just a matter --

THE COURT: -- doesn't the Privileges and Immunity Clause of Article IV have something to say? If you can treat a tax collector from California differently than the tax collector in Nevada, you're not giving their tax collectors equal privileges and immunities in Nevada.

MR. FARR: If one granted lesser immunity? Is that the question --

THE COURT: Yes. If one -- you said that the only stopper* was a notion of comity, and I'm suggesting

that you might not be able to treat two officials, one from out of state, one from in state, to treat -- to favor the in-state official. But maybe Privileges and Immunities have -- has something to do with that.

MR. FARR: If a state is entitled -- or the defendant -- to invoke Privileges and Immunities against the courts in another state, I would think that's right. Certainly in the case --

THE COURT: Is it?

MR. FARR: I --

THE COURT: I mean, I thought --

MR. FARR: I would have thought not.

THE COURT: -- that would go to individual liability, but it would -- it not affect this question, but I may be wrong.

MR. FARR: Well, no, I -- that would be my assumption, also, Justice Souter. I think that the Privileges and Immunities and Equal Protection are provisions that apply to individuals who are claiming discrimination in another state. I don't think they would apply directly to a state.

But, as I say, the notion that comity is something that doesn't have a force, even though it's not federal enforceable, it seems to me is a little bit of a misperception. Because, again, if one goes back to the

notion to the law of nations or separate sovereigns, comity essentially has been the provision that governs their relations since well before the convention.

THE COURT: Well, there is some reluctance to say that California officials can run amuck in Nevada without Nevada being able to do anything about it. I suppose if it were a pervasive practice, Nevada might be able to sue California in the original jurisdiction under some parens patriae theory. I'm not sure about that.

MR. FARR: Well, I mean, let me suggest a couple of other possibilities, Justice Kennedy, as well. I don't -- I don't know whether the court would take original jurisdiction of that question or not, but, I mean, the most direct example of something states could do, obviously, is they could reach agreements between themselves. I mean, there have been two cases before this court involving suits against states in the courts of other states. One was Nevada in California's courts. This is California in Nevada's courts. If those states, who are neighboring states, feel that this is an issue that they need to address, they could reach some sort of agreement and, therefore, have reciprocal legislation.

And, for example, under the Full Faith and Credit Clause for years, as the Court may know, there is a doctrine that said that states didn't have to enforce the

penal laws of another state, even though Full Faith and Credit, on its face, would make you feel that maybe they would have.

But, in fact, states eventually began, through reciprocal agreements in decisions, and I think in legislation also; saying, you know, "We essentially will enforce the penal laws and the tax laws of other states, so long as they do for us." So, again, the states --

THE COURT: Penal law or penal judgments.

MR. FARR: No, now, penal judgments, the court said in Milwaukee County, have to be enforced, but they distinguished at that point, Mr. Chief Justice, the idea that a law itself would have to be enforced before it had been reduced to --

THE COURT: Right, but what is the -- I don't want to -- I don't want you to get distracted, because I thought Justice Ginsberg and maybe Justice Kennedy and I were driving at the same problem, which is that imagine Nevada v. Hall is good law. All right, now, the question comes up, How do you prevent Nevada from going wild? All right. And so now we have several answers: (a), Congress can pass a statute --

MR. FARR: Correct.

THE COURT: -- (b) interstate compacts -- that was what you were suggesting.

MR. FARR: And --

THE COURT: All right.

MR. FARR: -- if I may --

THE COURT: Yeah, the --

MR. FARR: -- if I may intercede, it doesn't necessarily have to be a compact. I'm not sure --

THE COURT: Right, some --

MR. FARR: -- it's agreements that have to be --

THE COURT: -- kind of voluntary action by the states.

MR. FARR: Right, correct.

THE COURT: -- (c) Privileges and Immunities, which has the problem that it refers to citizens and not states, (d) -- equal protection doesn't work, I don't think, because it says, again, "citizens" -- a due process clause -- is a state a process under the Due Process Clause? -- (e), what's (e)? I mean, you see? If Nevada -- (e) is, of course, footnote 24, but then that gets us into the National League of Cities problem. And so National League of Cities --

MR. FARR: Well, there could --

THE COURT: -- that approach -- equal -- no, Privileges and Immunities, due process of law, voluntary action states, Congress enacts a law, anything else? Have we got -- is that the exhausted list that we must choose

from?

MR. FARR: It's --

THE COURT: Or --

MR. FARR: -- it seems exhausted --

THE COURT: And the only -- all right, that's -- if nothing in that list works, then the only alternative is overrule Nevada v. Hall.

THE COURT: Is --

THE COURT: -- or, excuse me --

THE COURT: -- is comity on the list?

MR. FARR: Well, comity --

THE COURT: I mean, I --

MR. FARR: -- excuse me -- comity is --

THE COURT: Comity -- comity is not the answer to the problem, because -- well, it is, in a sense. It is, in a sense.

MR. FARR: Yeah, I mean --

THE COURT: Voluntary restraint.

MR. FARR: Excuse me. I don't -- I certainly don't mean to minimize the theoretical possibility that suits in courts of one state could ultimately prove to be a problem, generally. What I'm suggesting is that there is nothing, first of all, in the history of the Full Faith and Credit Clause that would suggest that once a state has proper legislative jurisdiction, as I think everybody

concedes that Nevada does here, that somehow that clause was intended to displace the law of that state simply because another state had made different policy choices about, let's say, here, compensation and immunity.

THE COURT: But can you say that categorically and absolutely? I mean, there are all sorts of permutations of facts that could up.

MR. FARR: Well, what -- the permutations and fact, I think, go particularly to what constitutes legislative jurisdiction. So perhaps in that sense, my statement is broader, or seems broader in the context of this case than I mean it to be. But I do -- but I do think, in general, that I don't see any warrant in the Full Faith and Credit Clause, given the fact that it was enacted with very little debate, and almost all of the debate was about judgments and not about enforcement of other states' laws, I think it would be stretching the clause beyond recognition to say that at some point it was -- it was telling states, "You're going to have to set your laws aside and apply the laws of another state."

THE COURT: There was a time in the '30s and '20s when this court came pretty close to that, the cases that preceded Pacific Employers.

MR. FARR: That's correct, Mr. Chief Justice.

THE COURT: Clapper and Bradford.

THE COURT Yes.

MR. FARR: That's correct. And as I think my argument might suggest, I think the Court was correct to essentially back away from that kind of balancing test and essentially go back to the principle of saying when a state is competent to legislate, then it may apply its own laws, leaving the additional questions about what might happen at that point to questions comity where a state is the defendant. And, as I've suggested, Nevada courts have shown considerable comity already here, and the case, of course, is not yet concluded.

THE COURT: Comity is something like a hearty handshake. I mean, it's something that you can't put any force to.

MR. FARR: That's -- that's true in one sense, Mr. Chief Justice. I mean, when I say it's not -- that there's no federally enforceable state law of comity, I -- that's true. But at the same time, I mean, the court's decisions about comity since back in the last 18th century have emphasized that it is a serious doctrine. It's a doctrine built of respect for other sovereigns. And in particular -- and I think this is -- also goes to the practical problem that Justices Kennedy and Breyer are asking about -- it also does have a healthy measure of self interest in it.

I mean, when -- when you are talking about coequal sovereigns, any sovereign that is exercising jurisdiction over another sovereign understands that that's -- the first sovereign -- or the second sovereign has the same power and authority over it.

THE COURT: Is -- is the question of comity one that has a federal component so that this court should weigh in on when it has to be exercised?

MR. FARR: I don't believe so. It's state versus state, Justice O'Connor. Or course, in the -- in the types of cases that the board was referring to this morning, like McNary*, there are comity elements. And there is a jurisprudence of this court with respect to federal and state relations which does depend on comity, and that is, of course, federally enforceable. I don't believe that there is a concomitant enforceable doctrine --

THE COURT: But you're arguing --

MR. FARR: -- state to state.

THE COURT: Even in the face of -- (inaudible)* by state -- a state court that seems totally out of whack with our constitutional structure?

MR. FARR: Well, Justice O'Connor, I suppose I should --

THE COURT: Are there no extremes? Is there no

limitation?

MR. FARR: Well, I mean, I'm -- I suppose I should pause in the sense that if there is something that is so threatening to the constitutional structure and something for which there is no historical basis in terms of the way that sovereigns deal with each other. Now, see, that's -- that's where I think this case is very different, because even though there was certainly a practical tradition that states were not to be sued in other states, as I say, since Schooner Exchange, and, indeed, in the Verlinden in 1980, this court has always taken the position that when you're talking about relationships between sovereigns, and they're coequal sovereigns, and the issue is immunity between them, that is a matter of comity.

THE COURT: Well, -- (inaudible)* this case, I can easily see on your theory writing the part of the opinion that says the acts in Nevada, the acts in Nevada that were arguably tortes are certainly up to Nevada to pursue. But the discovery commissioner here, they say, went way too far in ordering discovery and ordered discovery that would have been relevant only to negligent action and only negligent action, really, that took place in California, though a Nevada resident was at issue. And they can't do that, says the opinion, because -- because

-- and now this is where it seems to me there -- something -- what do I -- (inaudible)*. They can't do that. They can't go over and, in Nevada, complain about negligent action as this discovery commissioner may have done, negligent action in California aimed at a Nevada resident where it's a tax action. They can't do that because -- and now what? You see -- do you see what's bothering me?

I -- at this point, it seems there either has to be something in the Constitution that limits that, and this case may raise that problem because of the actions of the discovery commissioner. And, therefore, I think I need something to fill that blank with.

MR. FARR: Well, as -- I don't think, to start with, that the answer is the Full Faith and Credit Clause.

THE COURT: All right, what is it?

MR. FARR: I mean --

THE COURT: I -- it's an odd -- an awkward vehicle --

MR. FARR: Right.

THE COURT: -- (inaudible)*, but what is the answer?

MR. FARR: Well, I mean, I still think that, in the end, the answer is that this is a matter that one trusts to the judgment of states --

THE COURT: So the answer is if they want to do

that, they can do it.

MR. FARR: -- that if, in fact, there is a question about discovery, that --

THE COURT: Uh-huh.

MR. FARR: -- I mean, that I -- accepting the characterization, although I dispute it to some extent --

THE COURT: (Inaudible.)*

MR. FARR: -- but to the extent there's a question about discovery, that is simply part and parcel of the states being able to exercise their jurisdiction. I don't --

THE COURT: I thought discovery was --

THE COURT: Okay.

THE COURT: -- interlocutory. I thought that we couldn't write an opinion, as Mr. Farr has suggested, if I didn't think that that question was currently reviewable.

MR. FARR: Well, there's certainly nothing specifically in the question presented about discovery. The -- again, to come back to the question presented, because we've discussed a wide range of issues, most of which I don't think are within the question presented, but when we come back to the question presented, the question is basically was the Nevada or the Nevada -- (inaudible)* -- required to dismiss this action on summary judgment because of California's law of immunity? And the reason

for that is because, according to California, the Full Faith and Credit Clause requires Nevada to enforce California's law of immunity.

THE COURT: Mr. Farr --

MR. FARR: Our view is -- yeah?

THE COURT: -- do I understand -- your comity argument basically is -- it's kind a self-executing thing, because each time a state has to answer the comity question, it asks the question, "What would I do if the tables were reversed?" And as history teaches us, they generally treat the other sovereign the way they would want to be treated themselves. And that's --

MR. FARR: Well --

THE COURT: -- well, that's the rule that seems to have been developed without any overriding constitutional command -- (inaudible)* -- here.

MR. FARR: That's correct, Justice Stevens. And, in fact, they have become more specific as -- (inaudible) * -- comity, I believe, in saying we want to treat the other sovereign as we do treat ourselves, not just as we want to be treated. We are treating the other sovereign the way we treat ourselves.

THE COURT: What if the -- what if the case came, and they didn't do it? Justice Breyer's question, "How do I fill in the blank?" If, let's say, through this

intrusive discovery process, this somatically* applied, they really were interfering with California's taxation. Couldn't California bring an original action to enjoin this interference?

MR. FARR: I certainly think that's possible. And, of course, as I've said, I mean, California can try to talk to Nevada and try to reach agreement at a sovereign level about this, or if, in fact -- the Full Faith and Credit Clause has a specific expressed commitment to Congress of the right to declare the effects of other laws.

THE COURT: What would be the underlying --

THE COURT: (Inaudible.)*

THE COURT: -- substantive law in Justice Souter's proposed original action?

MR. FARR: The -- I suppose, I mean, based on what California has said before -- said up to now, it would bring it under the Full Faith and Credit Clause, that it would say that there is some requirement --

THE COURT: Well, but we wouldn't need an original action for the Full Faith and Credit Clause. If that's so, it could apply in this case.

MR. FARR: That's correct. I mean, whether they're --

THE COURT: So what's the -- what would an

original action -- there was -- there's no underlying substantive standard to apply?

MR. FARR: I mean, the question would be, is there -- obviously, the question that's being raised. I am not aware of a federal substantive standard --

THE COURT: (Inaudible)* --

MR. FARR: -- that says --

THE COURT: -- in boundary cases, though, adopted, as a federal rule, something maybe different from the law of either state.

MR. FARR: That's correct. Now, you do have -- there are certain cases, in fact, in which you can't have overlapping jurisdiction, where you can't own the same water, you can't own the same land, you can't escheat the same property. So that's true. The court has addressed those kinds of cases.

In a situation where you're simply saying another state is applying its laws, I prefer that they apply our laws, and I'm troubled by the discovery that they have -- they have allowed in applying their own laws, I'm not sure what the federal principle --

THE COURT: It's not simply that.

MR. FARR: -- (inaudible).*

THE COURT: It's a prior action pending. That's what makes this case different -- one of the things that

makes it different than Nevada v. Hall. Why is it -- is the California proceeding ongoing? Isn't it normal for a second court to stay its operations so it won't interfere with that prior action?

MR. FARR: In fact, the Nevada court dismissed the declaratory judgment action precisely because it didn't want to get into the question that was at issue in the California proceeding.

THE COURT: Yes, but what about the intrusive discovery?

MR. FARR: Well, most of the -- most of the other material -- with one exception, most of the other issues involved things that had nothing to do with the merits of the California inquiry. I mean, whether confidential information has been improperly disclosed has -- is not -- does not require you to adjudicate the California tax liability in order to understand that. The only thing that has any bearing that is close to that, I submit, is something that is roughly akin to like a malicious prosecution suit. And torte law itself, over time, takes care of that. We've not gotten to that issue yet in the Nevada Supreme Court.

THE COURT: Thank you, Mr. Farr.

Mr. Leatherwood, you have five minutes remaining.

REBUTTAL ARGUMENT OF FELIX LEATHERWOOD

ON BEHALF OF PETITIONER

MR. LEATHERWOOD: Thank you, Your Honor.

In this particular case, I'd like to go back to Justice Breyer's thumbscrew example. I don't think the Full Faith and Credit law will actually force Nevada to apply a California thumbscrew statute, because that would actually be outside the tax function.

What I'm saying in this particular case what has happened is that Nevada's failure to give us back to California's immunity statute has resulted in interference with California's tax system. If this court does not intervene and gives this back to our particular proposed test, which would look into California to see whether or not we would grant immunity, then essentially that would permit any defendant any form of taxpayer to run to the border and wait until we sue the State of California or any other state to prevent the enforcement of that particular statute.

In addition, I pointed out that this gives another state the power to intrude into the actual operation of another state, and that's what has happened here.

There has been some -- some discussion as to whether or not Nevada has legislative jurisdiction. We

concede that they have legislative jurisdiction over the torte. But we -- what we complain about is that they won't respect our legislative jurisdiction or our tax process over our immunity laws, and that is our particular complaint.

We submit the case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Leatherwood. The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

EXHIBIT 4

No. 02-42

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT and EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

MARK A. HUTCHISON
HUTCHISON & STEFFEN
Lakes Business Park
Las Vegas, NV 89117
(702) 385-2500

DONALD J. KULA
RIORDAN & MCKINZIE
300 South Grand Avenue
Twenty-Ninth Floor
Los Angeles, CA 90071-3155
(213) 629-4824

H. BARTOW FARR, III
Counsel of Record
FARR & TARANTO
1220 19th Street, N.W.
Suite 800
Washington, DC 20036
(202) 775-0184

PETER C. BERNHARD
BERNHARD, BRADLEY & JOHNSON
3980 Howard Hughes Parkway
Suite 550
Las Vegas, NV 89109
(702) 650-6565

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Full Faith and Credit Clause requires the Nevada state courts to apply California immunity law, rather than Nevada law, to tort claims alleging intentional misconduct against a Nevada citizen in Nevada, even though Nevada has substantive lawmaking authority over the subject matter of the lawsuit.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF FOR RESPONDENT GILBERT P. HYATT

STATEMENT

The issues in this case arise out of a tort suit brought by respondent Hyatt, a Nevada citizen, in Nevada state court against petitioner Franchise Tax Board of the State of California (the "Board" or "FTB"). In a motion for summary judgment seeking dismissal of all claims, the Board asserted, among other defenses, that the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, compelled the Nevada courts to apply California law to the claims, in particular California law that allegedly shields the Board from liability for both negligent and intentional torts. The state district court denied the motion. On a petition for

mandamus filed by the Board, the Nevada Supreme Court decided, on grounds of comity, to apply California immunity law to the negligence claim, Pet. App. 11-12, but declined to apply California immunity law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not immunize Nevada officials from liability for intentional torts, the court concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

This tort suit is one of two continuing disputes between respondent and the Board. The other dispute involves a residency tax audit initiated by the Board in 1993 with respect to the 1991 and 1992 tax years. The principal issue in that underlying tax matter turns on 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—on behalf of and under contract to U.S. Philips Corporation—from certain patented inventions.[1] For its part, the Board has concluded that respondent became a resident of Nevada six months later. The administrative proceedings relating to this six month dispute are being conducted in California, and are ongoing. *See* FTB Br. at 4.

This suit, in turn, concerns various tortious acts committed by the Board, including fraud, outrageous conduct, disclosure of confidential information, and invasion of privacy. *See generally* Pet. App. 49-90 (First Amended Complaint); J.A. 246-66 (Petition for Rehearing); J.A. 267-97 (Supplement to Petition

[1] In suggesting (FTB Br. 3) that the 1991 income in dispute amounts to "$40 million," the Board simply disregards the fact that respondent collected licensing income on behalf of U.S. Philips. The correct figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment). ("Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus.)

for Rehearing). The evidence introduced at the summary judgment stage shows that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extort a tax settlement from Mr. Hyatt. This bad-faith effort relied on two primary courses of action. The first was to create a huge potential tax charge against respondent, largely by making false and unsupported claims and then embellishing them with the threat of large penalties. The second was to put pressure on respondent to settle the inflated claims by, among other things, releasing confidential information, while informing respondent that resistance to settlement would lead to a further loss of privacy and to public exposure.

The Board undertook this campaign against respondent after the State of California urged its tax officials to increase revenues in order to alleviate a pressing financial crisis. *See* J.A. 13 ("the demands for performance and efficiency in revenue production are higher than they have ever been"); *see also id.* 9-13, 15. Auditors knew that prosecution of large tax claims would provide recognition and an opportunity for advancement within the department. *See generally* J.A. 157-58. Indeed, large assessments, in and of themselves, would be advantageous, because the department evaluated its performance by the amount of taxes assessed. Some evidence suggests that California tax officials especially targeted wealthy taxpayers living in Nevada. *See* J.A. 174-75.

The Board also had a policy of using the threat of penalties to coerce settlements. *See* J.A. 164-67, 178-80. A memorandum regarding tax penalties, in fact, placed a picture of a skull and crossbones on its cover. *See* J.A. 16. A former Board employee testified in a deposition that a California tax official showed auditors how to use threatened penalties as "big poker chips" to "close audits" with taxpayers. *See* J.A. 165, 166. The largest, most severe penalty, and thus the biggest chip, was the seldom imposed penalty for fraud. *See* J.A. 158, 177-78.

Against this background Sheila Cox set her sights on Mr. Hyatt. As the evidence shows, her attempts to pursue a tax claim against Mr. Hyatt were, by any measure, extraordinary and offensive. *See* J.A. 161 (auditor Cox "created an entire fiction about [respondent]"). Referring to respondent, the auditor declared that she was going to "get that Jew bastard." J.A. 148, 168. According to evidence from a former Board employee, the auditor freely discussed information about respondent - - much of it false—with persons within and without the office. *See* J.A. 148-52. That information included, among other things, details about members of his family, his battle with colon cancer, a woman that the Board claimed to be his girlfriend, and the murder of his son. *See, e.g.*, J.A. 148, 168, 169, 170, 176; 283. The auditor also committed direct invasions of respondent's privacy. She sought out respondent's Nevada home, *see* J.A. 153, 174, 176, and looked through his mail and his trash. *See* J.A. 172. In addition, she took a picture of one of her colleagues posed in front of the house. *See* J.A. 44, 171. Her incessant discussion of the investigation eventually led the colleague to conclude that she was "obsessed" with the case. *See* J.A. 157.

Within her department Ms. Cox pressed for harsh action, including imposition of the rare fraud penalties. *See* J.A. 161, 162. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See* J.A. 150, 159. Reflecting her obsession, she created a story about being watched by a "one-armed" man and insisted that associates of Mr. Hyatt were mysterious and threatening. *See* J.A. 151, 152, 161-62. She repeatedly spoke disparagingly about respondent and his associates. *See* J.A. 148, 152, 169-70.

The Board also repeatedly violated its promises of confidentiality, both internally and externally. *See, e.g.*, J.A. 149-50. 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, *see* J.A. 19-43, including California and Nevada newspapers. *See* J.A. 34-36, 39-40, 40-43. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. *See* J.A. 24-27, 29-30. The Board also disclosed its investigation of respondent to respondent's patent licensees in Japan. *See* J.A. 256-57.

The Board was well aware that respondent, like many private inventors, had highly-developed concerns about privacy and security. *See* J.A. 175, 197-206. Far from giving these concerns careful respect, the Board sought to use them against him. In addition to the numerous information "Demand[s]" sent by the Board to third parties, one Board employee pointedly told Eugene Cowan, an attorney representing respondent, that "most individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid publicity, to avoid the individual's financial information becoming public, and to avoid the very fact of the dispute with the FTB becoming public." J.A. 212. In Mr. Cowan's view, "[t]he clear import of her suggestion was that famous, wealthy individuals settle with the FTB to avoid being, rightly or wrongly, branded a 'tax dodger.'" J.A. 212.

These deliberate acts caused significant damage to respondent's business and reputation. Because of the tortious Board actions, the royalty income received by respondent from new licensees "dropped to zero." J.A. 257.

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts.[2] The Board sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause, U.S. Const., art IV, § 1, required the Nevada courts to apply California law and that, as a result, the

[2] In addition to his claims for damages, respondent sought a declaratory judgment that he had become a Nevada resident effective as of September 26, 1991. *See* Pet. App. 62-65. The district court dismissed this claim, and it is no longer part of the case.

Board was immune from liability for all claims. The Nevada trial court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Board then sought a writ of mandamus from the Nevada Supreme Court, asking that the court order dismissal of the action "for lack of subject matter jurisdiction" or, alternatively, that it limit the action to what the Board termed "the FTB's Nevada acts and Nevada contacts concerning Hyatt." FTB Petition for Mandamus at 43. The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding (on a ground neither asserted by the Board nor briefed by the parties) that respondent had not presented sufficient evidence to support his claims. Respondent sought rehearing, citing extensive evidence from the record that the Board had committed numerous negligent and intentional torts. *See* J.A. 246-97. After reviewing that evidence, the supreme court granted rehearing and vacated its prior order. *See* Pet. App. 6-7.

The Nevada Supreme Court then addressed whether the district court should have applied California law, reaching different conclusions based on the nature of respondent's claims. With respect to the one negligence claim made against the Board, the supreme court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. 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." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to respondent's intentional tort claims. With respect to the full faith and credit argument, 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." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. 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." Pet. App. 12. 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." Pet. App. 12-13.[3]

SUMMARY OF ARGUMENT

I. This Court has held that "[t]he 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." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (internal quotation marks omitted). This longstanding respect for the States' traditional lawmaking authority directly reflects the fact that each State retains 'a residuary and inviolable sovereignty,' *Printz v. United States*, 521 U.S. 898, 919 (1997) (internal quotation marks omitted), which includes the sovereign power to address harms occurring within its borders. While a State should properly take account of the interests of its sister States, the fact remains that full faith

[3] In its decision the Nevada Supreme Court apparently assumed that California law, if applicable, would provide immunity for the tortious acts committed by the Board. Pet. App. 10-13. *But see* pages 36-37 *infra* (discussing California law).

and credit doctrine does not "enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939). This principle holds even when the law of the sister State would provide immunity for its actions within the forum State. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

The State of Nevada plainly was "competent to legislate" with respect to the torts at issue in this case. To meet that standard, a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Here, Nevada was both the State in which the injuries to respondent took place, *see Carroll v. Lanza*, 349 U.S. 408, 413 (1955), and the State in which respondent was a citizen at the time that the tortious conduct causing his injuries occurred. Moreover, Nevada has significant contacts with the defendant in this case: the Board not only engaged in improper actions that took place directly within Nevada, it conducted a broad tortious scheme that was specifically intended to have its harmful effects there. Nothing in the Full Faith and Credit Clause bars Nevada from applying its own law to that wrongdoing. In doing so, however, the State made a point of treating California as a co-equal sovereign, specifically examining whether Nevada would be liable for similar actions by its own officials and deciding to defer to California law, as a matter of comity, where it would not.

II. The Court should decline to adopt the "new" full faith and credit rule proposed by the Board. This rule—which would bar application of forum law "to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities"—would work a wholly unjustified change in the States'