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Attorneys for Respondent Gilbert P. Hyatt

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

MAR 12 2009

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

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Case No.: 53264

Appellant,

v.

GILBERT P. HYATT,

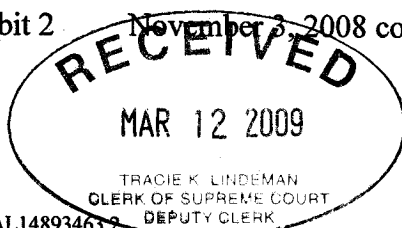
**VOLUME 1 HYATT'S APPENDIX OF
EXHIBITS IN SUPPORT OF RESPONDENT
GILBERT P. HYATT'S OPPOSITION TO
APPELLANT'S MOTION FOR STAY
PENDING APPEAL WITHOUT BOND**

Respondent.

Plaintiff Gilbert P. Hyatt submits this Appendix of Exhibits in Support of Respondent Gilbert P. Hyatt's Opposition to Appellant's Motion for Stay Pending Appeal Without Bond. Set forth below is an index of the exhibits.

Exhibit 1 October 30, 2008 letter from Hyatt counsel to FTB counsel

Exhibit 2 November 3, 2008 cover letter and draft stipulation



- 1 Exhibit 3 January 29, 2009 district court hearing transcript, at p. 85
2
3 Exhibit 4 FTB Writ Petition filed in this Court July 7, 2000, at pp. 24-31
4
5 Exhibit 5 transcript from the oral argument before the United States Supreme
6 Court: at pp. 7, 9, 11
7
8 Exhibit 6 Hyatt Answer to FTB Petition for Writ of Mandamus Ordering Dismissal,
9 filed in this Court October 17, 2000, at pp. 23-61
10
11 Exhibit 7 Michael Genest trial testimony August 11, 2008, at pp. 145:2-146
12

13 Dated this // day of March, 2009.
14

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13 *Attorney's for Plaintiff Gilbert P. Hyatt*

14 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

15 FRANCHISE TAX BOARD OF THE STATE
16 OF CALIFORNIA,

Case No.: 53264

17 Appellant,

CERTIFICATE OF SERVICE

18 v.

19 GILBERT P. HYATT,

20 Respondent.

CERTIFICATE OF SERVICE

21 Pursuant to NPAP 25, I certify that I am an employee of BULLIVANT HOUSER
22 BAILEY PC and that on this 11 day of March, 2009, I caused the above and foregoing
23 document to be served as follows:

24 **Volume 1 Hyatt's Appendix of Exhibits in Support of Respondent Gilbert P.
25 Hyatt's Opposition to Appellant's Motion for Stay Pending Appeal Without Bond.**

26 [X] by placing same to be deposited for federal express mailing in the United States,
27 in a sealed envelope upon which postage was prepaid in Las Vegas Nevada;
28 and/or

[X] by delivering same to a commercial carrier for delivery within 3 calendar days;
and/or

[] to be hand-delivered;

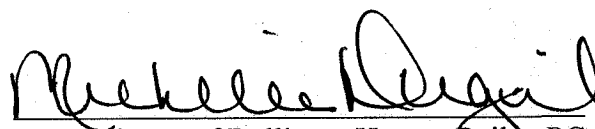
to the attorney(s) listed below at the address and/or facsimile number indicated below:

RECEIVED

MAR 12 2009

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CLERK OF SUPREME COURT
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An employee of Bullivant Houser Bailey PC
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PETER C. BERNHARD
E-mail: peter.bernhard@bullivant.com

October 30, 2008

James Bradshaw, Esq.
Pat Lundvall, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno, NV 89501

***Re: Gilbert P. Hyatt v. Franchise Tax Board
Case No. A382999***

Dear Jim and Pat:

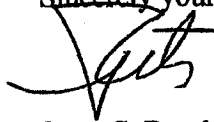
We have reviewed the FTB's reply concerning its Provisional Motion for Stay Upon Appeal Without Bond. We object to FTB's inclusion of additional evidence and authorities not included with its initial motion. However, the FTB's late-filed affidavits seem to say that the Hyatt judgment, once it becomes final after exhaustion of all appeals, will be enforceable in California and that California will be required to take steps necessary to satisfy the final judgment. These affidavits seem to address the concerns of Mr. Hyatt under the Nelson v. Heers standards.

Therefore, Mr. Hyatt is willing to stipulate that, consistent with these new affidavits, he will not execute on the judgment until after it becomes final and that no bond need be posted, provided FTB stipulates that any final judgment will be entitled to full faith and credit in California and that the FTB will facilitate the steps necessary to obtain satisfaction of any final judgment. Please confirm that FTB is willing to enter into such a stipulation, and we will circulate it, obviating the need for a hearing on the FTB's Provisional Motion.

James Bradshaw, Esq.
Pat Lundvall, Esq.
October 30, 2008
Page 2

If you will not so stipulate, we will seek leave of court to respond to FTB's late-filed evidence and authorities, and we will ask that the FTB's Provisional Motion be continued to November 19, to permit Hyatt to serve and file his response.

Sincerely yours,



Peter C. Bernhard

PCB/mmd

cc: Donald J. Kula, Esq.
Mark A. Hutchison, Esq.
Jeff Silvestri, Esq.



PETER C. BERNHARD
E-mail: peter.bernhard@bullivant.com


November 3, 2008

James Bradshaw, Esq.
Pat Lundvall, Esq.
McDonald Carano Wilson LLP
100 West Liberty Street
10th Floor
Reno, NV 89501

Re: *Gilbert P. Hyatt v. Franchise Tax Board*
Case No. A382999

Dear Jim and Pat:

We have not received a response to our letter from last Thursday, October 30, 2008 in which we proposed a stipulation that would resolve the issues raised in the FTB's provisional motion for a stay. Attached is the stipulation we propose the parties enter into. Please advise today by 2:00 p.m., either that FTB is willing to enter into such a stipulation or that it is not. We are preparing an appropriate motion and will be filing it this afternoon, unless we hear that such a stipulation is acceptable.

Sincerely yours,

Peter C. Bernhard

PCB/mmd

cc: Donald J. Kula, Esq.
Mark A. Hutchison, Esq.
Jeff Silvestri, Esq.
Robert Eisenberg, Esq.

1 **SAO**

2 JAMES W. BRADSHAW (NSBN 1638)

3 PAT LUNDVALL (NSBN 3761)

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19 Telephone No. (702) 669-3600

20 Attorneys for Plaintiff Gilbert P. Hyatt

21 **DISTRICT COURT**

22 **CLARK COUNTY, NEVADA**

23 * * * *

24 GILBERT P. HYATT,

25 Plaintiff,

26 vs.

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

Defendants.

Case No. : A 382999

Dept. No. : X

Docket No. : R

STIPULATION AND ORDER RE:

**(1) ENFORCEABILITY OF THE
JUDGMENT IN THIS MATTER UNDER**

**THE "FULL FAITH AND CREDIT"
CLAUSE OF THE UNITED STATES
CONSTITUTION AND**

**(2) STAY OF ENFORCEMENT OF THE
JUDGMENT IN THIS MATTER PENDING
EXHAUSTION OF APPEALS**

Hearing Date: N/A

Hearing Time: N/A

1 Plaintiff Gilbert P. Hyatt ("Hyatt") and Defendant Franchise Tax Board of the State of
2 California ("FTB"), by and through their attorneys of record, stipulate and agree as follows:

3 WHEREAS, on September 8, 2008, this Court entered a judgment in this matter in
4 favor of Hyatt (the "Judgment"), and on September 16, 2008, Hyatt agreed on the record before
5 this Court not to execute on the Judgment until ten days after notice of entry of orders on FTB
6 post-trial motions seeking relief from or amendment of the Judgment under NRCP 50 and 59;

7 WHEREAS, on September 22, 2008, the FTB filed post trial motions under NRCP 50
8 and 59 seeking relief from or amendment of the Judgment, and the hearing on those motions is
9 currently scheduled for November 19, 2008;

10 WHEREAS, on September 30, 2008, the FTB filed a motion under NRCP 62(b) entitled
11 Provisional Motion for Stay Pending Appeal Without Bond seeking a provisional order from
12 the Court staying enforcement of the Judgment in this action pending the FTB's appeal of the
13 Judgment to the Nevada Supreme Court, and on October 14, 2008, Hyatt filed an opposition to
14 the FTB's motion;

15 IT IS STIPULATED that:

16 (1) The Judgment, whether remaining in its current form or in any way modified,
17 amended, corrected, or changed in any manner as a result of this Court's rulings on the FTB's
18 pending post-trial motions or as a result of any ruling by the Nevada Supreme Court or any
19 ruling by the United States Supreme Court following any and all appeals of the Judgment by
20 the FTB, is enforceable as a judgment in the State of California under the Full Faith and Credit
21 clause, Article IV, Section 1 of the United States Constitution;

22 (2) The FTB specifically agrees that upon exhaustion of all of its rights to appeal
23 the Judgment to the Nevada Supreme Court and to the United States Supreme Court, resulting
24 in a final judgment in favor of Plaintiff (the "Final Judgment"), it will not (and it irrevocably
25 waives any and all of its rights, if any) to challenge the enforceability of the Final Judgment in
26 any California court or any other court, including but not limited to any constitutional
27 challenge of any kind;

28 (3) The FTB further pledges, as an agency of the State of California, that any Final
Judgment is backed by the Full Faith and Credit of the State of California and that upon

1 exhaustion of all of its rights to appeal the Judgment to the Nevada Supreme Court and to the
2 United States Supreme Court, the FTB as an agency of the State of California will not oppose
3 but instead will help facilitate, as expeditiously as possible and without any undue delay, any
4 and all measures necessary to satisfy the Final Judgment, including without limitation
5 facilitating any appropriation of funds from the State of California to satisfy the Final
6 Judgment; and

7 (4) Hyatt agrees that he will not execute on the Judgment until exhaustion of all of
8 the FTB's rights to appeal the Judgment to the Nevada Supreme Court and to the United States
9 Supreme Court; and the FTB need not post any bond to stay enforcement of the Judgment
10 pending appeal. The FTB's motion seeking a stay pending appeal without bond may be taken
11 off calendar, effective upon the Court's approval of this stipulation.

12 Dated the ____ day of November, 2008.

Dated the ____ day of November, 2008.

13 HUTCHISON & STEFFEN, LLC
14 BULLIVANT HOUSER BAILEY PC

McDONALD CARANO WILSON LLP

15 By _____
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By _____
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25 (720) 669-3600

26 Attorneys for Plaintiff Gilbert P. Hyatt

Attorneys for Defendant Franchise Tax Board
of the State of California

ORDER

IT IS SO ORDERED.

DATED: _____

DISTRICT COURT JUDGE

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **STIPULATION AND ORDER**
RE:(1) ENFORCEABILITY OF THE JUDGMENT IN THIS MATTER UNDER THE
"FULL FAITH AND CREDIT" CLAUSE OF THE UNITED STATES CONSTITUTION
AND (2) STAY OF ENFORCEMENT OF THE JUDGMENT IN THIS MATTER
PENDING EXHAUSTION OF APPEALS filed in District Court Case No. A 382999 does not
contain the social security number of any person. This affirmation does not extend to documents
that are a matter of public record and are available from other public sources, which may have
been attached as exhibits hereto.

Dated this ____ day of November, 2008.

MCDONALD CARANO WILSON LLP

Pat Lundvall (NSBN 3761)
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
(702) 873-4100
Attorneys for Defendant Franchise Tax Board
of the State of California

Dated this ____ day of November, 2008.

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Attorneys for Plaintiff Gilbert P. Hyatt

COPY FILED

DISTRICT COURT
CLARK COUNTY, NEVADA

FEB 12 3 54 PM '09

GILBERT P. HYATT,

Plaintiff,

vs.

CALIFORNIA STATE FRANCHISE
TAX BOARD,

Defendant

CASE NO. A-382999

DEPT. NO. X

Transcript of
Proceedings

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

MOTIONS HEARING

THURSDAY, JANUARY 29, 2009

APPEARANCES:

FOR THE PLAINTIFF:

MARK HUTCHISON, ESQ.
DON KULA, ESQ.
PETER BERNHARD, ESQ.
MICHAEL WALL, ESQ.

FOR THE DEFENDANT:

PAT LUNDVALL, ESQ.
CARLA HIGGINBOTHAM, ESQ.
BOB EISENBERG, ESQ.

COURT RECORDER:

VICTORIA BOYD
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

1 agent.

2 The Court notes FTB is not required to appeal. Mr.
3 Hyatt has been fighting the FTB for about 16 years. FTB's
4 conduct throughout the audit process and this 10 year
5 litigation does not give this Court any reason to believe
6 that payment to Mr. Hyatt will be swift if and when FTB loses
7 this appeal. Even as FTB attempts to reassure this Court of
8 that fact, it raises doubts. There is very clearly a
9 politicized process that must take place before this judgment
10 is paid.

11 That's the Court's ruling.

12 MR. WALL: Thank you, Your Honor.

13 (Proceedings concluded at 11:54 a.m.)
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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Julie Lord
JULIE LORD, TRANSCRIBER

2/5/09
DATE

Opened for filing & ORIGINAL

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Attorneys for Franchise Tax Board

IN THE SUPREME COURT OF THE
STATE OF NEVADA

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT of
the State of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District
Judge,

Respondent,

and

GILBERT P. HYATT,

Real Party in Interest.

Case No. :

36390

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA'S PETITION
FOR A WRIT OF MANDAMUS
ORDERING DISMISSAL, OR
ALTERNATIVELY FOR A WRIT OF
PROHIBITION AND MANDAMUS
LIMITING THE SCOPE OF THIS CASE

CONFIDENTIAL INFORMATION
FILED UNDER SEAL

SEALED

opened 4/25/01 jek
sealed 4/25/01 jek

RECEIVED

The envelope attached to this document contains the Franchise Tax Board of the State of

JUL 07 2000

JANETTE M. GLOUM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORIGINAL

m-11567

FILED

JUL 07 2000

JANETTE M. GLOUM
CLERK OF SUPREME COURT
BY S. Troop
DEPUTY CLERK

McDONALD CARANO WILSON McCUNE BERGIN FRANKOVICH & HICKS LLP

ATTORNEYS AT LAW
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RENO, NEVADA 89505-2670
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California's Petition for a Writ of Mandamus Ordering Dismissal, or Alternatively for a Writ of Prohibition and Mandamus Limiting the Scope of this Case filed by the Petitioner Franchise Tax Board of the State of California in the above-referenced matter. The Petition for Writ of Mandamus contains certain information, the subject of which may be precluded from public disclosure pursuant to the Protective Order entered by the District Court in this case. The Protective Order is one of the matters raised in the FTB's writ petition before this Court. A copy of the Protective Order is attached as Exhibit 6 to the FTB's writ petition.

DATED this 7th day of July, 2000.

McDONALD CARANO WILSON MCCUNE
BERGIN FRANKOVICH & HICKS

By: 

THOMAS R.C. WILSON
JAMES C. GIUDICI
MATTHEW C. ADDISON
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JEFF A. SILVESTRI
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Attorneys for Petitioner Franchise Tax Board

1 2. The FTB is entitled to a Writ of Mandamus ordering dismissal of Hyatt's case.

2 Under California law, there are multiple jurisdictional bars to Hyatt's tort claims. California
3 Government Code Section 860.2, a reflection of California's sovereign immunity, specifically
4 immunizes the FTB from liability for the torts that Hyatt claims, which all arise from FTB acts relating
5 to the application of California's tax laws:

6 Neither a public entity nor a public employee is liable for an injury caused by:

7 (a) Instituting any judicial or administrative proceeding or action for or incidental to the
8 assessment or collection of a tax.

9 (b) An act or omission in the interpretation or application of any law relating to a tax.

10 *See Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal. Rptr. 750 (1986)
11 (dismissing negligence, slander of title, interference with credit relations, and due process claims against
12 the FTB based on section 860.2). In addition, California's Constitution and Revenue and Taxation Code
13 bars legal action against any California official "to prevent or enjoin the assessment or collection of any
14 tax," including taxes based on residency determinations, prior to exhaustion of all applicable
15 administrative remedies, which Hyatt has not yet done. Cal. Const. Art. XIII, § 32; Cal. Rev. & Tax.
16 Code § 19381. California's Tort Claims Act further protects the FTB from Hyatt's tort lawsuit by
17 making presentation of such claims to California's Board of Control a jurisdictional prerequisite to suit,
18 something that Hyatt did not do before filing, and something that Hyatt cannot do now. Cal. Gov. Code
19 §§ 911.2, 905.2, 945.4.

20 At oral argument on the FTB's motion, Hyatt made a belated argument that four "loopholes" in
21 California's sovereign immunity laws allowed Hyatt's Nevada claims to proceed: (1) the privacy rights
22 in the California Constitution; (2) California's Information Practices Act; (3) California Revenue and
23 Taxation Code section 21021; and (4) a claimed exception to governmental immunity for breach of
24 contract. (App. Ex. 16 at 30-34 (Tr. of Proceedings).) But Hyatt's argument ignores that his claims are
25 for Nevada common law torts, not for violation of the California Constitution, any California statute,
26 or any California contract law. In fact, Hyatt's argument even ignores his own statements in prior
27 pleadings, in which Hyatt expressly limited his case solely to Nevada common law tort claims. (*See*,
28 *e.g.*, App. Ex. 14, FTB Reply Ex. A at 14:7 (Plaintiff's Mot. to Remand: "Plaintiff's causes of action

1 are based solely on state law"); *id.* at 19:2-3 ("Th[is] action is based entirely on Nevada law."))

2 Moreover, even damages actions based on these supposed "loopholes" are subject to the claims
3 filing requirements in California's Tort Claims Act, with which Hyatt did not comply. Unless excepted
4 by statute, that act makes presentation of a claim to the California Board of Control a jurisdictional
5 prerequisite to a damages action for "any . . . injury for which the State is liable." Cal. Code Regs, tit.2,
6 § 630(h); *see also* Cal. Govt. Code § 905.2. There are no statutory exceptions for damages actions based
7 on any of Hyatt's claimed "loopholes," not even actions based on breach of contract claims. *Adler v.*
8 *Los Angeles Unified School Dist.*, 98 Cal. App. 3d 280, 285-286, 159 Cal. Rptr. 528 (1979) (contract
9 claims for money subject to claim filing requirements); *see also* Cal. Govt. Code § 905.2. Thus, even
10 if Hyatt's case involved these supposed "loopholes" in California's sovereign immunity laws, Hyatt
11 could not proceed to trial if the California laws that the FTB cites are applied.

12 As described below, principles of Full Faith and Credit, sovereign immunity, and constitutional
13 choice of law all required that the District Court apply California's governmental immunity and
14 administrative exhaustion laws. Under these principles, the District Court had to apply California's
15 governmental immunity laws regarding tax administration to the entirety of the FTB's conduct,
16 including its Nevada acts. The District Court also had to apply California's administrative exhaustion
17 laws, and Hyatt failed to exhaust his administrative remedies before filing. Even if applying these laws
18 was not constitutionally required, this Court should still apply them as a matter of comity. Finally,
19 Nevada's own law of administrative exhaustion/ripeness is also a bar to Hyatt's actions. For all of these
20 reasons, the District Court erred, and this Court should issue a Writ of Mandamus ordering dismissal.

21 **A. Full Faith and Credit required the District Court to apply California's**
22 **governmental immunity and administrative exhaustion laws.**

23 Principles of Full Faith and Credit required the District Court to apply California's governmental
24 immunity laws regarding tax administration to the entirety of the FTB's conduct, including its conduct
25 in Nevada. *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979). Full Faith and
26 Credit also required the District Court to apply California's administrative exhaustion laws to the
27 entirety of Hyatt's case. *Id.*

28 In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California

1 negligently caused an accident resulting in severe physical injury to California residents. At the time,
2 Nevada law limited tort recoveries against the State of Nevada to \$25,000. *Nevada v. Hall*, 440 U.S.
3 at 412. The California courts declined to apply this limitation, despite Nevada's argument that the Full
4 Faith and Credit Clause required California to respect the limitations on Nevada's statutory waiver of
5 its immunity from suit. *Id.* at 412-413.

6 The Supreme Court affirmed, holding that the Full Faith and Credit Clause did not require
7 California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S.
8 at 424. The Court noted that California had an interest in providing full protection to those injured on
9 its highways, and that requiring California to limit recovery based on Nevada law would have been
10 obnoxious to California's policy of full recovery. *Id.* But the Court also stated that different state
11 policies could require a different Full Faith and Credit analysis, particularly where one state's exercise
12 of jurisdiction over a sister state could "interfere with [the sister state's] capacity to fulfill its own
13 sovereign responsibilities:"

14 California's exercise of jurisdiction in this case poses no substantial threat to our
15 constitutional system of cooperative federalism. Suits involving traffic accidents
16 occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its
17 own sovereign responsibilities. We have no occasion, in this case, to consider whether
different state policies, either of California or of Nevada, might require different analysis
or a different result. *Nevada v. Hall*, 440 U.S. at 424 n. 24.

18 Under *Nevada v. Hall*, negligently driving a car on the highways of a sister state is not an
19 exercise of an inherent sovereign function. But auditing a citizen's claimed change of residency and
20 corresponding state income tax liability is an exercise of an inherent sovereign function in which states
21 have "a special and fundamental interest." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir.
22 1998), *cert. denied*, 525 U.S. 1122 (1999) ("Congress has made it clear in no uncertain terms that a state
23 has a special and fundamental interest in its tax collection system.") The FTB's Nevada acts were all
24 performed as part of such audits, and thus were taken as part of the State of California's inherent
25 sovereign right to collect and lay taxes. (See App. Ex. 8, *Illia Aff.* ¶ 2; *id.*, *Cox Aff.* ¶ 36.)

26 Given that the FTB's Nevada acts involved an inherent sovereign function, this case falls
27 squarely within footnote 24 of the *Nevada v. Hall* opinion. Allowing Hyatt to proceed notwithstanding
28 the existence of multiple California laws barring his action would seriously interfere with California's

1 capacity to fulfill its sovereign responsibilities. California, and the FTB in particular, have the sovereign
2 responsibility to administer California's tax laws. Hyatt's case seeks to punish the FTB for making
3 minimal disclosures of identifying information about Hyatt for the purpose of determining his residency
4 under these laws. Allowing Hyatt to litigate these acts further without applying California law would
5 impede the FTB's entire residency audit program, as making even minimal inquiries and information
6 disclosures out of state would expose the FTB to the threat of protracted, out of state tort litigation about
7 its residency audit processes. This would necessarily interfere with the FTB's ability to administer
8 California's tax laws, as consulting third party sources and making minimal information disclosures out
9 of state are things that the nature of a change of residency claim often requires.

10 Allowing Hyatt's case to proceed also exposes the FTB to additional legal expenses and the
11 threat of punishment for trying to obtain relevant information during residency audits. The FTB would
12 incur these additional litigation expenses before it has even finalized its proposed tax assessment against
13 Hyatt, something that the FTB should never have to do. The FTB's administrative process could result
14 in modification or withdrawal of the FTB's proposed assessments, yet the FTB already has to justify
15 virtually all of its audit actions and conclusions in this Nevada litigation as if the final result were set
16 in stone. This deprives the parties of much of the value of the administrative process.

17 Hyatt's argument below that "there is no recognized exception to *Nevada v. Hall*" is absurd.
18 Numerous courts have recognized the *Nevada v. Hall* exception that the FTB asserts, applied it, and
19 dismissed lawsuits against sister states as a result. In *Guarini v. State of N.Y.*, 521 A.2d 1362 (N.J.
20 Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the
21 Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New
22 York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued
23 the state of New York in a New Jersey Court, but the New Jersey court dismissed the case under the
24 exception to *Nevada v. Hall*. *Id.* at 1366-67. The *Guarini* court held that the "ruling [in *Nevada v. Hall*]
25 did not mean that a state could be sued in another as a matter of course," *id.* at 1366, and dismissed the
26 action based on its threat to the constitutional system of cooperative federalism, including a potential
27 "cascade of lawsuits" by one state's citizens against neighboring states:

28 The present case clearly requires a "different analysis" and a "different

1 result." . . . Plaintiffs are challenging in a suit in New Jersey the
2 authority of New York State over land bordering the two states.
3 Plaintiffs, if successful, would clearly interfere with New York's capacity
4 to fulfill its own sovereign responsibility over those two islands in
accordance with and as granted by the 1833 compact. Exercise of
jurisdiction by this court would thereby pose a "substantial threat to our
constitutional system of cooperative federalism." *Id.*

5 *Mejia-Cabral v. Eagleton School, Inc.*, No. 972715, 1999 WL 791957 (Mass. Super. Sept. 16,
6 1999), involved another application of the *Nevada v. Hall* exception. In *Mejia-Cabral*, the plaintiff sued
7 a Massachusetts school for wrongful death caused by a juvenile delinquent attendee. The State of
8 Connecticut was joined as a third-party defendant under allegations that it was negligent in placing the
9 juvenile at the school. The State of Connecticut moved to dismiss the claim on the ground of sovereign
10 immunity. The Massachusetts court agreed and said:

11 Unlike *Hall*, the present third-party complaint directly implicates important
12 governmental functions and controversial policy choices. The sentencing and treatment
13 of juveniles who have committed serious criminal offenses is a matter left entirely to the
14 state, and striking the appropriate balance between the competing demands of
15 rehabilitation and public safety is a policy problem that each state must address. The
16 prospect of one state's court deciding whether another state was negligent in selecting
17 a particular rehabilitation program for a juvenile offender is profoundly troubling, and
this court's assertion of jurisdiction over such a claim against the state of Connecticut
would pose a "substantial threat to our constitutional system of cooperative federalism."
The State of Connecticut makes a compelling argument that this third-party complaint
would, if allowed to proceed, "interfere with [Connecticut's] capacity to fulfill its own
sovereign obligations" and that recognition of its sovereign immunity is therefore
mandatory. *Id.* (Internal citations omitted).

18 Similarly, in *Reed v. University of North Dakota*, 543 N.W.2d 106 (Minn. Ct. App. 1996), a
19 plaintiff sued the State of North Dakota in a Minnesota court for a negligence action. The Minnesota
20 Court of Appeal, citing footnote 24 of the *Hall* case, declined to exercise jurisdiction over the State of
21 North Dakota as a matter of comity. *Id.* at 109-111. In *Montana v. Gilham*, 133 F.3d 1133 (9th Cir.
22 1998), the State of Montana was sued by an individual plaintiff in Blackfeet Tribal Court for negligence
23 in the design, construction and maintenance of a highway intersection at which the plaintiff was injured
24 in a car accident. The Ninth Circuit held that even if *Nevada v. Hall* were extended to include Indian
25 tribes, it could not apply to a suit which sought to hold Montana liable for governmental decisions
26 concerning highway design. "Because the suit's theory would affect governmental processes, it falls
27 outside the scope of *Nevada v. Hall*." *Id.* at 1138 (emphasis added).

28 Thus, Hyatt's claim that the *Nevada v. Hall* exception has never been recognized could not be

1 further from the truth. The falsity of Hyatt's assertion is proven not only by the above cases, but even
2
3 by cases that Hyatt cited in his own brief to the District Court. *Haberman v. Washington Public Power*
4 *Supply System*, 744 P.2d 1032, 1066 (Wash. 1987) ("Full faith and credit does not require a forum state
5 to respect another state's rule on sovereign immunity *unless the other state's ability to govern would*
6 *be threatened.*") (emphasis added); *Biscoe v. Arlington County*, 738 F.2d 1352, 1358 (D.C. Cir. 1984)
7 (discussing possible application of footnote 24 of *Nevada v. Hall*). The *Nevada v. Hall* exception exists,
8 has been applied in other cases, and should similarly be applied here.

9 The District Court's refusal to apply California's governmental immunity and administrative
10 exhaustion laws to Hyatt's case, which arises entirely from acts incident to California tax administration,
11 violated the Full Faith and Credit Clause of the United States Constitution. This Court should correct
12 that violation by issuing a writ of mandamus ordering dismissal of this case.

13 **B. The Supreme Court's recent sovereign immunity decisions confirm that the District**
14 **Court erred.**

15 If there was ever any doubt that dismissal of this action is constitutionally required, the Supreme
16 Court's recent sovereign immunity decisions dispel it. *Seminole Tribe of Florida v. Florida*, 517 U.S.
17 44 (1996), was the beginning of the Supreme Court's recent revisiting and clarification of states'
18 expansive sovereign immunity, a process that continues to the present day. *See, e.g., Alden v. Maine*,
19 527 U.S. 706 (1999) (provision of the Fair Labor Standards Act purporting to authorize private actions
20 against unconsenting states in state courts was an unconstitutional abrogation of state sovereign
21 immunity); *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S.
22 666 (1999) (federal Trademark Remedy Clarification Act did not validly abrogate state sovereign
23 immunity); *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S.Ct. 631 (2000) (federal Age
24 Discrimination in Employment Act did not validly abrogate states' sovereign immunity from suit by
25 private individuals); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (the *Ex Parte*
26 *Young* doctrine, a judicially created exception to state sovereign immunity, could not be applied in an
27 action that implicated "special sovereignty interests").

28 Most notably for this case, the Supreme Court in *Alden* held that the States' immunity from suit

1 is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the
2 Constitution, and noted that “[t]he generation that designed and adopted our federal system considered
3 immunity from private suits central to sovereign dignity.” *Alden*, 527 U.S. at 715. The Court also noted
4 that states’ sovereign immunity was merely “confirmed,” not “established,” by the Eleventh
5 Amendment, and that the “fundamental postulates implicit in the constitutional design” are what courts
6 must consider when evaluating a sovereign immunity claim:

7 The more natural inference is that the Constitution was understood, in light of its history
8 and structure, to preserve the States’ traditional immunity from private suits. As the
9 [Eleventh] Amendment clarified the only provisions of the Constitution that anyone had
suggested might support a contrary understanding, there was no reason to draft with a
broader brush. *Alden*, 527 U.S. at 724.

10 * * *

11 ... The Eleventh Amendment confirmed rather than established sovereign immunity as
12 a constitutional principle; it follows that the scope of the States’ immunity from suit is
13 demarcated not by the text of the Amendment alone but by fundamental postulates
14 implicit in the constitutional design. *Alden*, 524 U.S. at 728-29 (emphasis added).

15 As Justice Rehnquist noted in his *Nevada v. Hall* dissent, one fundamental postulate implicit in
16 the constitutional design is that an unconsenting state is not subject to suit in a sister state’s forum.
17 *Nevada v. Hall*, 440 U.S. at 432-433. Thus, the Supreme Court’s recent sovereign immunity decisions
18 direct courts to consider this fundamental principle. Consideration of this fundamental principle
19 suggests that suits against states in a sister state’s forum should be rare and unintrusive on sovereign
20 responsibilities, to the extent that they should ever occur at all. This confirms that the Court should
21 respect California’s sovereignty by applying California’s laws and dismissing this case under footnote
22 24 of *Nevada v. Hall*. Any other result would call into question *Nevada v. Hall*’s continued vitality in
light of the Supreme Court’s more recent sovereign immunity decisions.

23 **C. Constitutional Choice of law principles also required the District Court to apply**
24 **California’s governmental immunity and administrative exhaustion laws.**

25 Constitutional choice of law principles also required the District Court to apply California’s
26 governmental immunity laws regarding tax administration to the entirety of the FTB’s conduct, and the
27 application of California’s administrative exhaustion laws to the entirety of Hyatt’s case. When faced
28 with constitutional choice-of-law questions, the United States Supreme Court has invalidated the choice

1 of law of a state which had no significant contact or significant aggregation of contacts, creating state
 2 interests, with the parties and the occurrence or transaction. Choice of a particular state's law must not
 3 be arbitrary or fundamentally unfair. *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930)
 4 (nominal residence was inadequate to justify application of forum law); *John Hancock Mut. Life Ins.*
 5 *Co. v. Yates*, 299 U.S. 178, 182 (1936) (post-occurrence change of residence to the forum state was
 6 insufficient to justify application of forum law); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, *reh'g*
 7 *denied*, 450 U.S. 971 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-823 (1985).

8 A plaintiff's residence and place of filing the action are generally accorded little or no
 9 significance in the constitutional analysis because of the dangers of forum shopping. *Phillips*
 10 *Petroleum*, 472 U.S. at 820. Fairness and expectation of the parties are more important. *Id.* at 822. As
 11 in the Full Faith and Credit analysis, the threat of interference with the other state's capacity to fulfill
 12 its own sovereign responsibilities plays an important role, because the Full Faith and Credit Clause is
 13 one of the several constitutional provisions relevant to making choice of law determinations. *Allstate*,
 14 449 U.S. at 323 (Stevens, J., concurring) (the Full Faith and Credit Clause will not invalidate a forum's
 15 choice of law "unless that choice threatens the federal interest in national unity by unjustifiably
 16 infringing upon the legitimate interests of another state." (footnote omitted) (emphasis added)).

17 Even assuming that the FTB's acts involving Hyatt were tortious, the District Court must apply
 18 California's governmental immunity and administrative exhaustion laws as a constitutional choice of
 19 law matter. The FTB's minimal contacts with Nevada make the District Court's disregard of
 20 California's governmental immunity and administrative exhaustion laws fundamentally unfair.
 21 Although Hyatt attempts to portray FTB's contacts with Nevada as substantial with numerous references
 22 and averments, (App. Ex. 4 pp. 4-9, ¶¶ 10-23), FTB auditors spent only nominal time physically in
 23 Nevada on the Hyatt audits, and only nominal time on phone and mail contacts from California to
 24 Nevada to check Hyatt's claims. (*See* App. Ex. 8, Cox Aff. ¶ 34.) These contacts with Nevada are
 25 insignificant compared to the 624 total hours that the FTB spent trying to verify Hyatt's dubious
 26 residency claim for 1991. (*Id.*)

27 Reasonable parties' expectations compel the same conclusion. Any reasonable long-time
 28 California resident would expect that any FTB audit of his or her change of residency claim would be

1 of 1 DOCUMENT

FRANCHISE TAX BOARD OF CALIFORNIA, Petitioner, v. GILBERT P. HYATT, ET AL.

No. 02-42

SUPREME COURT OF THE UNITED STATES

2003 U.S. TRANS LEXIS 12

February 24, 2003, Monday, Washington, D.C.

NOTICE: [*1] Transcribed by Alderson Reporting Company, Inc., 1111 14th Street, N.W., Suite 400, Washington D.C. 20005-5603, Telephone Number: 202-289-2260

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.

OPINION: PROCEEDINGS

[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 I 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 [*2] administer these taxes. The administration of taxes is a core, sovereign responsibility from which all functions of State Government depend on. It is protected by immunity laws of common-law tort 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.

QUESTION: Mr. Leatherwood, may I ask you a threshold question? Some of your friends in this case have invited 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 [*3] function. It's -- Nevada v. Hall was strictly an automobile accident.

QUESTION: But 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 tort 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 --

QUESTION: Education versus tax.

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

QUESTION: That's not the sovereign function.

MR. LEATHERWOOD: That's not --

QUESTION: I'm saying that --

MR. LEATHERWOOD: -- the sovereign function.

QUESTION: -- 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 [*4] 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 -- is much more significant than the education function.

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

MR. LEATHERWOOD: Well --

QUESTION: You're -- 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 -- 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 --

QUESTION: [*5] 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 I'm arguing is that taxation is an essential core sovereign function since that education cannot move forward --

QUESTION: Well, Mr. --

MR. LEATHERWOOD: -- to provide taxation.

QUESTION: -- 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 [*6] fair assessment cases, where the court has directed that the Federal Government will back off on trying to manage state taxes.

QUESTION: 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 -- in a tax audit. Anything that's associated with tax audit, is protected.

QUESTION: 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 [*7] paid their taxes, would they?

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

QUESTION: Why not?

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

QUESTION: 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 torts or torts --

QUESTION: Oh.

MR. LEATHERWOOD: -- outside the scope --

QUESTION: I see.

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

QUESTION: 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 -- 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 --

QUESTION: But that's not what they're -- the Nevada court said, we're going to treat the [*8] 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.

QUESTION: Oh, but this -- but Nevada Supreme Court, I thought, made very clear that what they were dealing with is tortious 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 [*9] 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 tort and make a collateral attack on the tax itself.

QUESTION: 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 tort 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 --

QUESTION: All right.

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

QUESTION: May I go back to Justice Stevens' question, because [*10] 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 crimes committed within the course of this audit.

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

QUESTION: 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 tort immunity. Okay? Even for beating people up. Now, suppose they did [*11] 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 -- well, I understand that, Your Honor. My position is that even though that law does not exist in California --

QUESTION: Yes.

MR. LEATHERWOOD: -- but applying --

QUESTION: If it did.

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

QUESTION: Yes.

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

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

MR. LEATHERWOOD: If --

QUESTION: If that were the law in California.

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

QUESTION: Yeah, okay.

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

QUESTION: So how, then, do we reconcile that [*12] 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.

QUESTION: 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 --

QUESTION: 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 [*13] outside the scope of that --

QUESTION: Okay.

MR. LEATHERWOOD: -- of that statute.

QUESTION: 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 --

QUESTION: Which is it? Is it the nature of the tax collection or the nature of the activity which leads to the tort 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 --

QUESTION: 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 -- but --

QUESTION: But the problem I have -- may [*14] 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 tax 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 --

QUESTION: Well, we understood the reasoning of the Nevada Supreme Court to say they would. I think -- I must have misread [*15] 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 tort 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.

QUESTION: 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 --

QUESTION: Now, what is -- was your answer to the question? Suppose that this tax collector were driving negligently in Nevada --

MR. LEATHERWOOD: Part --

QUESTION: Suppose the tax collector were driving negligently in Las Vegas. It's [*16] 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 core silent function because the function here is -- the function here is a tax investigation, whereas, driving is something that you can investigate independent of the tax process itself.

QUESTION: So suppose that we -- 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 --

QUESTION: 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 [*17] system itself.

QUESTION: 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 --

QUESTION: 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 tort, invasion of privacy, you know, a whole lot of really bad behavior, et cetera -- they're complaining [*18] 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 torts. 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 practices.

QUESTION: 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 -- 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, [*19] a former California taxpayer, actually owes any taxes.

QUESTION: Well, they would have to show as an intentional -- whatever that means under Nevada law -- not just negligent when they --

MR. LEATHERWOOD: Well, the intentional act here is that California created a tax system in bad faith to -- bad faith to extort an exit -- an exit tax from -- from a taxpayer.

QUESTION: 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 -- in this lawsuit occurred in California. And --

QUESTION: Well, you -- you recognized that there [*20] were two trips into California.

MR. LEATHERWOOD: Actually, Your Honor --

QUESTION: 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.

QUESTION: 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 --

QUESTION: 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 [*21] it is alleged that the California tax system itself is a -- 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 --

QUESTION: Do you want to reserve your time, Mr. Leatherwood?

MR. LEATHERWOOD: -- reserve the balance of my time, thank you.

QUESTION: 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 legislative-created law of immunity. At the same time, however, they have applied principles of comity to strike out the declaratory [*22] 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 --

QUESTION: 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 --

QUESTION: Well, are principles of comity dictated by the Constitution? Suppose --

MR. FARR: They are --

QUESTION: -- suppose [*23] Nevada said they were not going to grant comity?

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 --

QUESTION: 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 legislative -- 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 --

QUESTION: Well, then under due 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 -- 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. [*24] And that's typically, in fact, what's happened with Nevada --

QUESTION: It's very --

MR. FARR: -- versus --

QUESTION: -- 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 torts 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

detering 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 [*25] 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 -- there are differences if one looks to the -- to the way that the -- essentially immunity has been resolved in -- in the course of -- 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 [*26] 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.

QUESTION: 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 laws.

MR. FARR: Uh-huh.

QUESTION: 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.

QUESTION: No, no, well --

MR. FARR: I'm sorry. I --

QUESTION: -- you see, what I --

MR. FARR: Excuse me.

QUESTION: -- nonetheless, although --

MR. FARR: No, I --

QUESTION: -- 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.

QUESTION: [*27] Go ahead.

MR. FARR: What I -- I reserve the point, of course, always, that I don't believe this is within the question presented.

QUESTION: 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.

QUESTION: See, but --

MR. FARR: That's still --

QUESTION: -- your answer, then --

MR. FARR: -- an evolving question.

QUESTION: -- 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.

QUESTION: All right.

MR. FARR: I think that is --

QUESTION: And I would guess that's right.

MR. FARR: -- still a federal-state --

QUESTION: All right, assuming that's right --

MR. FARR: -- I think that is still a federal-state issue.

QUESTION: -- 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 [*28] 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 --

QUESTION: 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 so anomalous that -- that I'd like an explanation --

MR. FARR: Well --

QUESTION: -- 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 --

QUESTION: 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, [*29] 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.

QUESTION: 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 --

QUESTION: -- in the Eleventh Amendment.

MR. FARR: I mean, I think that there are two things going on. I mean, 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 a -- 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 [*30] 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.

QUESTION: 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.

QUESTION: 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 [*31] 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.

QUESTION: 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 --

QUESTION: 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 red 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 --

QUESTION: Uh-huh.

MR. FARR: -- of that state. There are more commercial-type things involving [*32] contracts or -- one, in particular, is a it 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 --

QUESTION: Mr. Farr, are you saying --

MR. FARR: -- accept.

QUESTION: -- that that, too, is just a matter of comity?

MR. FARR: I do think that that's --

QUESTION: Doesn't --

MR. FARR: -- just a matter --

QUESTION: -- 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 --

QUESTION: Yes. If one -- you said that the only stopper [*33] 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 as a defendant to invoke Privileges and Immunities against the courts in another state, I would think that's right. Certainly in the case --

QUESTION: Is it?

MR. FARR: I --

QUESTION: I mean, I thought --

MR. FARR: I would have thought not.

QUESTION: -- that would go to individual liability, but it would -- it would 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 -- the Privileges and Immunities and Equal Protection are -- are provisions that apply to individuals who are claiming discrimination in -- in another state. I don't think they would apply directly to a state.

But, as I say, the -- the notion that comity is -- is something that -- 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 [*34] of the law of nations or separate sovereigns, comity essentially has been the provision that governs their relations since well before the convention.

QUESTION: Well, there is some reluctance to say that California officials can run amok 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 [*35] 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 --

QUESTION: Penal laws or penal judgments?

MR. FARR: No, no, penal judgments, the court said in -- in Milwaukee County, have to be enforced, but they -- they distinguished at that point, Mr. Chief Justice, the idea that a law itself would have to be in force before it had been reduced to --

QUESTION: Right, but what -- what -- 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: [*36] (a), Congress can pass a statute --

MR. FARR: Correct.

QUESTION: -- (b) interstate compacts -- that was what you were suggesting.

MR. FARR: And -- and --

QUESTION: All right.

MR. FARR: -- if I may --

QUESTION: Yeah, the --

MR. FARR: -- if I may intercede, it doesn't necessarily have to be a compact. I'm not sure --

QUESTION: Right, some --

MR. FARR: -- it's agreements that have to be proven.

QUESTION: -- kind of a voluntary action by the states.

MR. FARR: Right, correct.

QUESTION: (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 person 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 --

QUESTION: -- that -- that -- 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 exhaustive list that we must choose from? [*37]

MR. FARR: It's --

QUESTION: Or --

MR. FARR: -- it seems exhaustive --

QUESTION: And the only -- all right, that's -- if -- if nothing in that list works, then the only alternative is overrule Nevada v. Hall.

QUESTION: Is --

QUESTION: -- or, excuse me --

QUESTION: -- is comity on the list?

MR. FARR: Well, comity --

QUESTION: Well, I mean -- I mean I --

MR. FARR: -- excuse me -- comity is --

QUESTION: 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 --

QUESTION: 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.

QUESTION: But can [*38] 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 facts, 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.

QUESTION: 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.

QUESTION: 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 [*39] 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.

QUESTION: Comity is something like a hearty handshake. I mean, it -- it's something that you can't put any -- 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 -- for other sovereigns. And in particular -- and I think this -- 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 [*40] over another sovereign understands that that's -- the first sovereign -- or the second sovereign has the same power and authority over it.

QUESTION: 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 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 -- 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 -

QUESTION: But you're arguing --

MR. FARR: -- state to state.

QUESTION: Even in the face -- even in the face of some development 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 --

QUESTION: Are there no extremes? Is there no limitation?

MR. FARR: Well, I -- I mean, I'm -- I suppose I should pause in the sense that -- that if there is something that is so threatening to the [*41] constitutional structure and something for which there is no historical basis in -- in terms of the -- 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.

QUESTION: All right, but leave -- say, 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 torts 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 [*42] to me there -- something -- what do I fill that blank with*. 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 to me there 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.

QUESTION: All right, what is it?

MR. FARR: I mean --

QUESTION: I -- it's an odd -- an awkward vehicle, Full Faith --

MR. FARR: Right.

QUESTION: -- 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 --

QUESTION: 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 --

QUESTION: Uh-huh. [*43]

MR. FARR: -- I mean, that I -- accepting the characterization, although I dispute it to some extent, 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 --

QUESTION: I thought discovery was --

QUESTION: Okay.

QUESTION: -- interlocutory. I thought that we couldn't write in an opinion, as Justice Breyer 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 -- the -- 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 courts required to dismiss this action on summary judgment because of California's law of immunity? And --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.

QUESTION: Mr. Farr --

MR. FARR: Our view is -- yeah?

QUESTION: -- do I understand [*44] -- 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 --

QUESTION: -- well, that's the rule that seems to have been developed without any overriding constitutional command order here.

MR. FARR: That's correct, Justice Stevens. And, in fact, they have become more specific in applying 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.

QUESTION: 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? I -- if, let's say, through this intrusive discovery process, systematically 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, [*45] 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 express commitment to Congress of the right to declare the effects of other laws.

QUESTION: What would be the underlying --

QUESTION: Underlying --

QUESTION: -- 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 --

QUESTION: 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 -

QUESTION: 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 the federal substantive standard --

QUESTION: We haven't --

MR. FARR: -- that says --

QUESTION: -- in boundary cases, though, adopted, as a federal rule, something maybe [*46] 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 --

QUESTION: It's not simply that.

MR. FARR: -- is that entitles you to stop it.

QUESTION: It's not simply that it's a prior action pending. That's what makes this case different, and one of the things that makes it different from 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: it -- 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.

QUESTION: Yes, but [*47] 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 have 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 tort law itself, over time, takes care of that. We've not gotten to that issue yet in the Nevada Supreme Court.

QUESTION: 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 Clause would actually force Cal -- force Nevada to apply -- 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 [*48] 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 give us 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 literally 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 tort. 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.)

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ORIGINAL

SEALED

FILED

OCT 17 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

IN THE SUPREME COURT OF THE
STATE OF NEVADA

36390

FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

CASE NO. ~~35549~~

Petitioner,

**REAL PARTY IN INTEREST GILBERT
P. HYATT'S ANSWER TO THE FTB'S
PETITION FOR A WRIT OF
MANDAMUS ORDERING DISMISSAL,
OR ALTERNATIVELY FOR A WRIT
OF PROHIBITION AND MANDAMUS
LIMITING THE SCOPE OF THIS CASE**

vs.

EIGHTH JUDICIAL DISTRICT COURT of
the state of Nevada, in and for the County of
Clark, Honorable Nancy Saitta, District Judge,

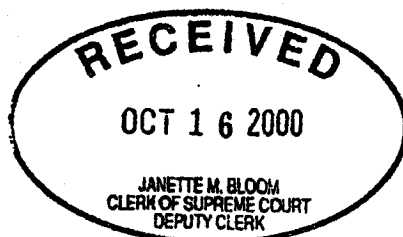
Respondent,

and

GILBERT P. HYATT,

**CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL**

Real Party in Interest.



00-18373

1 This case involves tens of thousands of pages of documents, thousands of disputed
2 relevant facts, and ongoing discovery. Hyatt supported his well-pled allegations by affidavits,
3 deposition testimony, and other evidence, as the district court found in denying the FTB's motion
4 for summary judgment. This fact is driven home by a review of the district court's decision on
5 the FTB's motion below. The district court made a crucial finding in denying the motion: that
6 there were factual issues that could not be resolved without further discovery or trial. Moreover,
7 Hyatt's version of the facts must be presumed to be true at this stage of these proceedings. There
8 is no reason, therefore, for the Court to provide a *de novo* review of this complex case before
9 completion of discovery and a trial that determines the disputed issues of fact on which the FTB's
10 sovereign immunity defense depends.

11 Based on the FTB's ability to seek and obtain warranted relief through a post-judgment
12 appeal, the *Thompson* rule declining to review the very kind of writ now before the Court, and
13 the existing factual disputes on the FTB's defenses, Hyatt respectfully requests that the Court not
14 interject itself into this factually complex case now, but rather allow it to proceed through trial
15 consistent with the Court's practice since *Thompson*.

16
17
18 **VI. Full faith and credit does not accord the FTB sovereign immunity for**
19 **injurious intentional torts and deficient operational acts directed at**
Nevada residents.

20 In this case, the torts are not based on the discretionary decision to commence an audit of
21 Hyatt. Rather, the torts are premised on the FTB's intentional misconduct and breaches of its
22 duty to perform operational acts in the course of executing its auditing activities. The FTB does
23 not have immunity in Nevada to misbehave in this fashion and injure Nevada residents.

24 ...

25 ...

26 ...

27

28

1 **A. Sister states do not have sovereign immunity in Nevada.**

2 **1. *Nevada v. Hall* rejected the FTB's full-faith-and-credit argument.**

3 California's statute granting it limited sovereign immunity *within California* cited by the
4 FTB has no application to this case. *Nevada v. Hall*⁷² expressly held that the
5 Full-Faith-and-Credit Clause of the U.S. Constitution does not require a state court to apply
6 another state's sovereign-immunity law. Nevada was held liable in California for tortious
7 conduct that caused injury in California, despite Nevada law granting Nevada sovereign
8 immunity *within Nevada*. The U.S. Supreme Court determined that "the Full-Faith-and-Credit-
9 Clause does not require a state to apply another state's law in violation of its own legitimate
10 public policy."⁷³

11 **2. *Mianecki* recognized Nevada's obligation to protect its citizens.**

12 In the watershed *Mianecki* case,⁷⁴ the Nevada Supreme Court unanimously held that the
13 Full-Faith-and-Credit Clause of the U.S. Constitution did not require Nevada to give full faith
14 and credit to Wisconsin's immunity statute. In *Mianecki*, Wisconsin had exercised functions
15 strongly tied to a state's sovereign prerogatives in the areas of criminal justice, parole, and
16 incarceration. Acting solely within Wisconsin, a state parole officer negligently relocated a
17 paroled, convicted Wisconsin sex offender to Nevada without warning the unsuspecting Nevada
18 family with whom the parolee was assigned to live. The parolee victimized the family's minor
19 son and the family sued the State of Wisconsin in Nevada.

20 Acknowledging "interstate implications of substantial magnitude,"⁷⁵ *Mianecki*
21 nevertheless allowed the suit to proceed against Wisconsin for its failure to warn the family and
22 its failure to properly supervise and control the parolee. Even though criminal justice is arguably
23 ...

25 ⁷² 440 U.S. 410, *reh'g denied*, 441 U.S. 917 (1979).

26 ⁷³ *Id.* at 422 (citing *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939)).

27 ⁷⁴ 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983).

28 ⁷⁵ *Id.* at 94, 658 P.2d at 423.

1 the most sovereign of state activities, *Mianecki* held that Nevada was not obligated to grant full
2 faith and credit to Wisconsin's assertion of sovereign immunity.

3 The injured family did not attribute their injuries to the discretionary decision to transfer
4 the parolee to Nevada. Rather, the gravamen of the family's claim against Wisconsin was based
5 on the negligent performance of operational acts by Wisconsin in effectuating the transfer and
6 placement of the parolee in Nevada. The family alleged that Wisconsin failed to investigate
7 where he would be living and failed to warn the Nevada family of the parolee's prior criminal
8 sexual aberrations, and these allegations amounted to negligent acts for which Nevada has
9 waived immunity.⁷⁶

10 The *Mianecki* Court looked to Nevada law to determine under what circumstances
11 Nevada waived its own sovereign immunity to determine the circumstances under which
12 sovereign immunity would be accorded sister states causing injury in Nevada. The Court
13 concluded that "immunity has been retained [by Nevada] with respect to claims arising out of
14 conduct which is deemed to be discretionary rather than operational."⁷⁷

15 Therefore, this Court held that Nevada is not required to honor Wisconsin's claim of
16 sovereign immunity, especially in light of Nevada's paramount interest in protecting its citizens.⁷⁸

17 **B. Notwithstanding *Mianecki*, Nevada law does not extend sovereign immunity**
18 **to its own or the FTB's intentional torts.**

19 Not directly addressed in *Mianecki* is whether discretionary immunity accorded
20 government entities in Nevada applies to intentional torts. Consistent with logic and the basic
21 purposes for which our civil and criminal justice systems exist, Nevada law does not recognize a
22 governmental entity's discretion to commit intentional torts, and therefore denies immunity for
23 their commission. In regard to intentional torts, the distinction between whether the offending
24 ...

25 ⁷⁶ Nev. Rev. Stat. 41.032(2).

26 ⁷⁷ *Mianecki*, 99 Nev. at 96.

27 ⁷⁸ *Id.* at 97, 658 P.2d at 424. *Mianecki* relied on three similar cases that also denied Full-Faith-and-Credit
28 protection to a sister state. See *Peterson v. Texas*, 635 P.2d 241 (Colo. 1981); *Daughtry v. Arlington County*, 490 F.
Supp. 307 (D.D.C. 1980); and *Wendt v. Osceola County*, 289 N.W.2d 67 (Minn. 1979).

1 conduct was purely discretionary or operational — a distinction so significant to liability in the
2 negligence context of *Mianecki* — is not relevant.

3 Despite the unambiguous intentional nature of the torts alleged by Hyatt — torts for
4 which the district court found Hyatt has set forth a *prima facie* case — the FTB failed to even
5 address this issue in its writ petition.

6 1. Nevada case law has long held that there is no sovereign immunity for
7 intentional torts.

8 The chain of Nevada cases holding that a government agency has no immunity for
9 intentional torts started with *Falline v. GNLV Corp.*⁷⁹ *Falline* did not directly involve or address
10 a government agency's lack of immunity for intentional torts. Rather, the Court in *Falline*
11 concluded that self-insured employers administering their workers compensation plans are
12 entitled to the same immunity as the State Industrial Insurance System, a government agency. In
13 describing the scope of such immunity, this Court explained that government agencies have
14 immunity for discretionary acts, but do not have immunity for operational acts or for acts
15 "attributable to bad faith" regardless of whether the act was discretionary.⁸⁰

16 The *Falline* Court then explained in a footnote the difference between abusing discretion,
17 — for which a government agency has immunity — and acting in a bad faith, intentionally
18 tortious manner for which a government agency has *no* immunity:

19 Bad faith, on the other hand, involves an implemented attitude that
20 completely transcends the circumference of authority granted the
21 individual or entity. In other words, an abuse of discretion occurs
22 within the circumference of authority, and an act or omission of
23 bad faith occurs outside the circumference of authority. Stated
24 otherwise, an abuse of discretion is characterized by an application
25 of unreasonable judgment to a decision that is within the actor's
26 rightful prerogatives, *whereas an act of bad faith has no*
27 *relationship to a rightful prerogative, even if the result is*
28 *ostensibly within the actor's ambit of authority.*⁸¹

...

⁷⁹ 107 Nev. 1004, 823 P.2d 888 (1991).

⁸⁰ *Id.* at 1009.

⁸¹ *Id.* at 1009, n. 3 (emphasis added).

1 The bad faith (*i.e.*, intentional tort) limitation on a government agency's immunity was
2 more directly addressed and amplified by this Court in *Wayment v. Holmes*⁸² which involved a
3 claim of wrongful termination in violation of public policy by a fired government employee. In
4 *Wayment*, this Court affirmed the district court's order granting summary judgment for
5 defendants based on (1) the lack of any admissible evidence supporting the plaintiff's allegations
6 of a violation of public policy, and (2) the decision to terminate the plaintiff being discretionary
7 and therefore immune. This Court, however, cited *Falline* and noted that had there been
8 evidence that the termination was in bad faith "the actions would no longer be discretionary and
9 subject to immunity."⁸³

10 The dissent in *Wayment*, although addressing the apparent lack of evidence submitted by
11 the plaintiff, amplified the above holding and concluded that the government has no immunity
12 for intentional torts.

13 The case at hand involves an intentional tort alleged to have been
14 committed by [defendants]. In the cases of malice, bad faith, or
15 other intentional misconduct a different rule relating to government
16 immunity obtains. When an intentional or malicious "act or
omission of bad faith occurs outside the circumference of
authority," public officials may be held liable for their tortious
misconduct.

17 The dissent cited not only to *Falline*, but also *Edgar v. Wagner*⁸⁴ where this Court held
18 that a district attorney does not have immunity for "malicious and deliberate wrongdoing."⁸⁵

19 **2. Recent case law from other states also holds that there is no sovereign**
20 **immunity for intentional torts.**

21 Nevada is not alone in refusing to accord sovereign immunity for the intentional torts
22 committed by its agencies and employees. Most recently, in an action by a criminal suspect
23 alleging false imprisonment, assault, and invasion of privacy the Supreme Court of South Dakota
24 found no immunity for intentional torts:

25 ⁸² 112 Nev. 232, 912 P.2d 816 (1996).

26 ⁸³ *Id.* at 820 (citing *Falline*, 107 Nev. at 1009-10.)

27 ⁸⁴ 101 Nev. 226, 699 P.2d 110 (1985).

28 ⁸⁵ *Wayment*, 112 Nev. at 241.

1 Hart's tort claims of false imprisonment, assault and invasion of
2 privacy when applied to her factual allegations are all intentional
3 torts. . . . Sovereign immunity does not apply, as it is inapplicable
4 to intentional torts committed by state employees. As such we do
5 not reach the issue of whether [the state employee] was acting in a
6 ministerial or discretionary capacity.⁸⁶

7 There is also a series of cases so holding from Virginia,⁸⁷ and the United States Supreme
8 Court has addressed and affirmed the inapplicability of sovereign immunity for intentional torts
9 when so waived by a state.⁸⁸

10 **3. Nevada statutory law now also specifies that there is no sovereign**
11 **immunity for intentional torts when the offending conduct was *within***
12 **the scope of the state employee's employment.**

13 Statutory support for the inapplicability of sovereign immunity for intentional torts
14 committed by a government agency starts with Nevada Rev. Stat. 41.0334(2). The statute itself
15 makes an exception to the general rule of state liability for torts. It is not directly applicable here
16 because it relates to criminals engaging in criminal activity who are injured by employees of the
17 state on public property. The statute forbids suits by such injured criminals, but makes an
18 exception when the injury or damage was "*intentionally caused or contributed by an officer or*
19 *employee of the state.*"⁸⁹ In other words, even criminals can sue the state for intentional torts. It
20 would be an anomaly, to say the least, if criminals can sue the state for intentional torts, but a
21 law-abiding citizen cannot.

22 Indeed, although now withdrawn for other reasons, in *State Dep't of Human Resources v.*
23 *Jimenez*, the Court cited to the above statute concluding that so long as the intentional actions
24 were within the course and scope of the employee's employment "the State can be held liable for
25 intentional torts of its employees."⁹⁰

26 ⁸⁶ *Hart v. Miller*, 609 N.W.2d 138, 148 (S.D. 2000)(citations omitted).

27 ⁸⁷ *Elder v. Holland*, 208 Va. 15, 155 S.E. 2d 369 (Va. 1967); *Gross v. Rolan*, 49 Va. Cir. 529 (Va. 1997);
28 *Fox v. Deese*, 234 Va. 412, 362 S.E. 2d 699 (Va. 1987).

⁸⁸ *Hudson v. Palmer*, 468 U.S. 517, 536, n. 15 (1984).

⁸⁹ Nev. Rev. Stat. 41.0334, subs. 2 (emphasis added).

⁹⁰ 113 Nev. 356, 363-64, *opinion withdrawn*, 113 Nev. 735 (1997). Based on statements made by the
Attorney General, the request to withdraw the *Jimenez* case was due to the expansive definition given to the term

1 In response to the *Jimenez* Court's definition of the term "scope of employment," the
2 Nevada legislature subsequently modified the law by providing a specific definition of when an
3 employer is liable for its employees' intentional torts — including "any public . . . employer . . .
4 including the State of Nevada, any agency of this state and any political subdivision of the
5 state."⁹¹ For example, if the acts complained of were "committed within the very task assigned
6 to the employee," the employer is liable.⁹²

7 In so doing, the Nevada Legislature effectively confirmed that government entities have
8 no immunity in Nevada for intentional torts committed by government employees within the
9 scope of their employment.

10 **4. In this case, the FTB admits that the primary perpetrator of the**
11 **intentional torts was acting *within* the scope of her employment.**

12 In its ill-fated summary judgment motion, the FTB submitted affidavits stating, and
13 strenuously arguing, that the FTB's lead auditor, Sheila Cox, was acting within the scope of her
14 authority as an FTB auditor in performing the Hyatt audits. But, Cox's "auditing activities"
15 involved willfully and intentionally committing various torts, including those designed to invade
16 Hyatt's privacy rights and to defraud him out of "taxes and penalties" that had no lawful
17 application to him. These torts, and others were part of the district court's implicit findings of
18 *prima facie* causes of action established by Hyatt.

19 Cox stated in her affidavit that all actions she took "involving Mr. Hyatt were for the
20 purpose of determining whether Mr. Hyatt had established significant ties with Nevada and had
21 severed significant ties with California at the time he claimed."⁹³ The head of the FTB residency
22 audit program and Cox's ultimate supervisor, Steve Illia, confirmed in his affidavit that Cox's
23 activities were "fully within the course and scope of her employment as a tax auditor" for the

24 _____
25 "scope of employment" and had nothing to do with the Court's specific holding that the State does not have
26 immunity for the intentional torts committed by its employees. See news articles regarding *Jimenez* case (Supp.
27 Hyatt Appendix, Vol. XIII, Exh. 40).

28 ⁹¹ Nev. Rev. Stat. 41.745(3)(b).

⁹² Nev. Rev. Stat. 41.745, (1)(b).

⁹³ Cox affid., p. 7, lns. 10-12 (FTB Appendix, Vol. 2, Exh. 8).

1 FTB.⁹⁴ The FTB's Introduction in its writ petition again affirms that there is no dispute that the
2 FTB personnel involved in the tortious conduct alleged by Hyatt were "within the course and
3 scope of their employment."⁹⁵

4 Hyatt has set forth a *prima facie* case of the intentional torts, and the FTB admits that the
5 primary perpetrator was acting within the scope of her authority in carrying out her predatory
6 acts. It is thus clear that even if certain of the wrongful acts could be considered purely
7 discretionary (which they were not), it would not benefit the FTB because, with the exception of
8 the claim for negligent misrepresentation, all of the torts specified in Hyatt's amended complaint
9 are intentional torts for which no immunity exists.

10 **C. Consistent with *Mianeki*, there is no sovereign immunity for the FTB's**
11 **deficient operational acts.**

12 Notwithstanding the inapplicability of sovereign immunity with respect to intentional
13 torts, other torts, such as negligence, require an analysis as to whether the conduct in question
14 was part of a purely discretionary decision-making by the government agency or an operational
15 act implementing the decision or policy.⁹⁶

16 ...

17
18 ⁹⁴ Illia Affid., p. 2 (FTB Appendix, Vol. 2, Exh. 8).

19 ⁹⁵ FTB Writ Petition, p. 4.

20 ⁹⁶ A significant number of the cases that address the discretionary verses operational distinction involve
21 claims that the government agency negligently supervised or trained the government employee. This Court has
22 considered the full scope and possibility of such claims when evaluating whether any of the tortious conduct alleged
23 would be operational and therefore not immune from suit, even when the plaintiff's pleadings did not specifically set
24 forth such claims. See *Pittman v. Lower Court Counseling*, 110 Nev. 359, 871 P.2d 953 (1994), overruled on the
25 other grounds, *Nunez v. City of North Las Vegas*, 1 P.3d 359 (Nev. 2000). Hyatt's amended complaint includes a
26 claim for negligent misrepresentation. While this claim stems at least in part from the FTB's negligent training and
27 supervision of its auditors, Hyatt did not specifically identify such claims by name in his amended complaint. But
28 Hyatt's discovery has resulted in an embarrassment of riches in regard to FTB admissions of lax, in fact grossly
negligent, supervision and training of the auditors working on the Hyatt audits. For example, the first supervisor of
the audits held the position "under protest," did no work on the audits, and did not want to be involved in the day-to-
day work of the auditors. (Shigemitsu Depo., plaintiff. 6 - 10 (Supp. Hyatt Appendix, Vol. XIII, Exh. 46).) A
subsequent supervisor had a reputation for *taking naps in the office*, did not want to be a supervisor, thought his role
was to let the auditor do her work without interference from him, and was subsequently transferred to a lower
paying job. (Les Depo., plaintiff. 443-44 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49); Lou Depo., plaintiff. 29-30,
91 (Supp. Hyatt Appendix, Vol. XIII, Exh. 47). Hyatt intends to pursue these claims in the district court and will, if
necessary, amend his complaint. The operational verses discretionary issue will therefore have additional
significance to such negligence claims.

1 1. Nevada law limits a state agency's sovereign immunity to purely
2 discretionary decisions.

3 As referenced above, only purely discretionary acts of a government agency are immune
4 in Nevada.⁹⁷ This court has long held that where a close call exists between a government agent's
5 act being purely discretionary and immune or operational and not immune, courts must err on the
6 side of finding them to be operational and thereby not protected by sovereign immunity. Prior to
7 the *Mianeki* decision, *State v. Silva*⁹⁸ definitively addressed the distinction between *purely*
8 discretionary acts (which are immune) and operational acts (which are not). The *Silva* case
9 concerned the issue of state liability for lax control and supervision of an honor camp for
10 inmates. The Nevada Supreme Court recognized that "[t]he supervision and control of a state
11 facility involves the exercise of some discretion."⁹⁹ "The apparent legislative thrust was to waive
12 immunity and correlatively to *strictly construe* limitations upon that waiver."¹⁰⁰ Significantly, it
13 held that "[i]n a close case we must favor a waiver of immunity and accommodate the legislative
14 scheme. Only when we conclude that discretion *alone* is involved may we find immunity from
15 suit."¹⁰¹ While selection of inmates may primarily be discretionary, "the manner in which the
16 camp was supervised and controlled is *mainly* operational in nature."¹⁰² Other Nevada cases
17 place the same limitations on discretionary immunity.¹⁰³

18 ...

19

⁹⁷ Nev. Rev. Stat. 41.031 & 41.032(2).

20 ⁹⁸ 86 Nev. 911, 478 P.2d 591 (1970).

21 ⁹⁹ *Id.* at 914.

22 ¹⁰⁰ *Id.* at 914 (emphasis added).

23 ¹⁰¹ *Id.* at 914 (emphasis added).

24 ¹⁰² *Id.* at 914 (emphasis added); *See also State v. Webster*, 88 Nev. 690, 696, 504 P.2d 1316, 1320 (1972)
25 ("In a close case we must favor a waiver of immunity.").

26 ¹⁰³ *See Arnesano v. State*, 113 Nev. 815, 823, 942 P.2d 139, 144 (Nev. 1997) ("Discretionary immunity is
27 limited to conduct involving policy decisions. . . . Restatement (Second) of Torts § 895B cmt.d. Accordingly,
28 discretionary immunity applies to the planning level of government, but not to the actual construction and operation
 of a project."); *Webster*, 88 Nev. at 694 (rejecting argument that installation of a fence requires discretion because:
 "In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the
 use of some degree of discretion.") (quoting *Swanson v. United States*, 229 F.Supp. 217, 219 (N.D. Cal. 1964)).

2. Courts in other states have also limited sovereign immunity to a narrow scope of discretionary conduct while denying such immunity to a wide range of deficient operational acts.

Mianecki and other cases have refused to accord sovereign immunity to a sister state engaged in what is arguably the most sovereign of state activities — law enforcement. *Biscoe v. Arlington County*¹⁰⁴ declined to recognize Virginia's self-granted immunity from suit by an injured innocent by-stander when Virginia police negligently engaged in a car chase of bank robbers across state lines — even though Virginia claimed it was merely exercising its sovereign right to enforce its criminal law against fleeing bank robbers — and even though the liability was partially based on inadequate training, supervision, and control taking place *entirely in Virginia*. Likewise, *Daughtry v. Arlington County*,¹⁰⁵ involved law enforcement activity, and the court rejected an attempt to distinguish *Nevada v. Hall* on this basis.

In regard to a state's power to raise revenues, Washington's Supreme Court denied *two* sister states' claims of immunity and rejected their full-faith-and-credit claims when those states defrauded investors in raising revenues. *Haberman v. Washington Public Power Supply Sys.*¹⁰⁶ concluded that Washington fraud law applied and that Oregon and Idaho were not immune from Washington common-law fraud claims because their interests in protecting the public fisc and governing their own actions in raising money were outweighed by Washington's interest in discouraging tortious governmental conduct and in holding government responsible for its acts.

Education is another sovereign function for which sovereign immunity has been denied when the offending conduct was operational, not discretionary. California, in fact, ignored Oregon's assertion of sovereign immunity and comity arising out of Oregon's sovereign exercise of education.¹⁰⁷

¹⁰⁴ 738 F.2d 1352, 1357 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

¹⁰⁵ 490 F. Supp. 307 (D.D.C. 1980).

¹⁰⁶ 109 Wash. 2d 107, 159-60, 744 P.2d 1032, 1066 (1987), *mod. on other grounds*, 109 Wash. 2d 107, 750 P.2d 254 (1988).

¹⁰⁷ *Oregon v. Superior Court*, 24 Cal. App.4th 1550, 1562, 29 Cal. Rptr. 2d 909 (1994), *disapproved on other grounds by*, *Vons Co. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 448, 58 Cal. Rptr.2d 899, 908, 926 P.2d 1085, 1094 (1996).

1 The key distinction in all of these cases was not the function the government agency was
2 empowered to carry out, but rather the fact that the tortious conduct occurred during operational
3 or ministerial acts by agency personnel. The plaintiffs were not challenging discretionary policy-
4 making decisions. They were challenging the manner in which the decisions were being
5 implemented. The law is no different for a state taxing agency. In this regard, the New Jersey
6 Supreme Court earlier this year held that the Illinois tax agency could be held liable in New
7 Jersey for its tortious conduct directed against a New Jersey resident, since the tort suit in no way
8 prevented or disrupted Illinois' tax revenue collection activities.¹⁰⁸

9 Coincidentally, the California Supreme Court has provided one of the clearest explanations
10 of the limitation of immunity to basic policy decisions in the context of sovereign immunity:

11 [T]his court rejected a purely semantic approach to determining
12 whether a given act is discretionary or ministerial, noting that any
13 act, no matter how ministerial, involves some degree of
14 "discretion" and judgment in the literal sense of those words.
15 Instead, [we] looked to the policy considerations underlying the
16 grant of immunity for discretionary acts. [We] concluded that . . .
17 immunity [applies] only with respect to those "basic policy
18 decisions" which have been committed to coordinate branches of
19 government, and does not immunize government entities from
20 liability for subsequent ministerial actions taken in the
21 implementation of those basic policy decisions. This distinction is
22 sometimes characterized as that between the "planning" and the
23 "operational" levels of decision making.¹⁰⁹

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28 ¹⁰⁸ *McDonnell v. Illinois*, 163 N.J. 298, 303, 748 A.2d 1105, 1108 (2000). Additional cases include: *Head*
29 *v. Platte County*, 242 Kan. 442, 749 P.2d 6 (1988) (holding in a false imprisonment claim that Kansas' long-
30 standing policy to compensate its citizens and those within its borders for injuries occurring in the state, even where
31 negligent acts causing the injury occurred outside the state, required it to deny sovereign immunity to sister state);
32 *Struebin v. Iowa*, 322 N.W.2d 84, 86 (Iowa 1982), *cert. denied*, 459 U.S. 1087 (1982) (holding that "Illinois does
33 not and could not claim a sovereign right to be negligent in carrying out its contractual responsibilities in
34 maintaining the Interstate 80 bridge" and the fact that Illinois may have to pay monetary damages does not override
35 "Iowa's legitimate interest in getting full access and protection in Iowa courts to those injured on Iowa highways.");
36 *Peterson v. Texas*, 635 P.2d 241, 243 (Colo. 1981) (rejecting claim of sovereign immunity because an "injured party
37 and a citizen of this state, injured, in this state, and [suing] in the courts of this state" is entitled to recovery such that
38 the defendant foreign state does not have immunity and will not receive comity).

39 ¹⁰⁹ *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal.3d 780, 793, 710 P.2d 907, 915, 221 Cal.Rptr. 840
40 (1985) (emphasis added).

1 3. The FTB misstates Nevada law on the scope of discretion and
2 immunity accorded investigations.

3 The Nevada cases cited by the FTB fail to support, and in fact contradict, the FTB's
4 assertion regarding the breadth of discretion given a government agency conducting an
5 investigation. The FTB first cites and quotes *Hagblom v. State Director of Motor Vehicles*.¹¹⁰
6 But the *Hagblom* Court found the conduct complained of by the plaintiff to be discretionary
7 decisions about (1) whether a police officer should have issued a ticket, and (2) whether the
8 department should have implemented a specific policy. The Court specifically distinguished
9 operational acts as not immune.¹¹¹

10 The FTB also cites *Foster v. Washoe County*¹¹² and *Travelers Hotel Ltd. v. City of Reno*¹¹³
11 for the proposition that an investigation is inherently discretionary. In *Foster*, the issue was
12 whether the Department of Social Services should have taken additional action to further and
13 more completely investigate a complaint of child abuse before removing the child from the
14 accused parent. In other words, the department's decision to conduct or stop the investigation
15 was at issue.¹¹⁴

16 But had the *Foster* investigator, as in this case, intentionally trumped-up charges against
17 the accused parent or failed to follow department procedure in handling evidence and protecting
18 the privacy and confidentiality of the accused parent, that kind of deficient operational conduct
19 would subject the agency to liability.

20 In *Travelers Hotel*, the plaintiff sought damages for the city's abuse of discretion in
21 denying a special use permit. The Court held that a decision concerning the issuance of the

22 ¹¹⁰ 93 Nev. 599, 571 P.2d 1172 (1977)

23 ¹¹¹ *Id.* at 604 ("Although a given act involved the exercise of discretion and was thus immune from
24 liability, negligence in the operational phase of a decision would subject the State, its agencies, and employees to
25 liability.")

26 ¹¹² 114 Nev. 936, 964 P.2d 788 (1998).

27 ¹¹³ 103 Nev. 343, 741 P.2d 1353 (1987).

28 ¹¹⁴ *Foster*, 114 Nev. at 941-42. This Court in *Foster* also emphasized the special circumstances of child
 abuse cases and the need to give state social workers absolute immunity in regard to their investigations. *Id.* at 942-
 43. There is no similar special circumstance in the present case.

1 permit was obviously discretionary. Most telling, however, is that no torts of any kind were
2 alleged against the city.¹¹⁵

3 **4. Recent Ninth Circuit authority also contradicts the FTB's argument**
4 **and holds that tortious government investigations do *not* have**
5 **immunity.**

6 Recent authority from the Ninth Circuit holds that sovereign immunity does not shield
7 government agencies from tortious conduct during investigations, particularly intentional torts
8 because the government has no discretion to tortiously investigate citizens. In *White v. Lee*,¹¹⁶
9 the Ninth Circuit found that officials from the Department of Housing and Urban Development
10 did not have immunity for their actions in conjunction with an aggressive investigation that
11 violated Constitutional rights.

12 The fact that an investigation may have been initiated pursuant to
13 statutory and regulatory authority does not, however, entitle the
14 defendants to qualified immunity regarding the extent of the
15 investigation and the manner in which it was conducted. It is the
16 scope and manner of the investigation that the HUD officials
17 should have known to be violative of the plaintiff's First
18 Amendment rights.¹¹⁷

19 Another recent Ninth Circuit case, *Vickers v. United States*,¹¹⁸ held that the INS could be
20 held liable for failing to conduct an adequate investigation when it failed to follow its own
21 mandatory regulations. The FTB's argument that all conduct while investigating is cloaked with
22 immunity,¹¹⁹ is contrary to logic and significant precedent.

23 **5. Even California law does not accord the FTB the immunity it asserts.**

24 The linchpin of the FTB's claim for immunity is Section 860.2 of the California
25 Government Code. Contrary to the FTB's assertion, in the district court and again here Hyatt has
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¹¹⁵ *Travelers Hotel*, 103 Nev. at 346.

¹¹⁶ 2000 WL 1407125 (9th Cir. Sept. 27, 2000).

¹¹⁷ *Id.* at 20.

¹¹⁸ 2000 WL 1459406 (9th Cir. Oct. 3, 2000).

¹¹⁹ FTB Writ Petition, p.34.

1 vigorously disputed the purported scope of the above statute.¹²⁰ The statute's plain language
2 provides immunity in California to the FTB and its employees in regard to "instituting" a tax
3 proceeding. It does not apply here because Hyatt's claims are not based on the FTB *instituting* a
4 procedure or action to collect taxes.

5 The case cited by the FTB, *Mitchell v. Franchise Tax Board*,¹²¹ held that the plaintiff's
6 claims were all directly based on the FTB instituting an action or proceeding to collect taxes
7 against the taxpayer and placed a tax lien on that individual's property. In other words, the
8 plaintiff was trying to sue merely because an action to collect taxes had been instituted, which
9 allegedly caused damages. But the very fact that the FTB initiated an audit against an individual
10 cannot be the basis of a tort claim, and it is not the basis of Hyatt's suit.

11 Here, as Hyatt stated first in his complaint and numerous times in motion practice, this
12 lawsuit in no way either attempts to nor does interfere with the tax protest in California. Rather,
13 in conducting its audits of Hyatt, the FTB cannot engage in tortious conduct. As stated before,
14 just as a peace officer cannot enforce an arrest warrant with the use of excessive force or other
15 undue means, the FTB cannot implement its policy decision to pursue taxes from Hyatt through
16 illegal and tortious means. California courts have so held in interpreting a similar immunity
17 statute.

18 Here, [Plaintiff's] allegations, go beyond the contention that the
19 LAPD officers acted improperly in deciding to seek his arrest. He
20 alleges they acted negligently in conducting the investigation . . . ,
and they caused his arrest and imprisonment in Mexico.¹²²

21 Additionally, although the FTB likes to refer to them as "loopholes," California's
22 Constitution, California's privacy act, and the California Taxpayer Bill of Rights all forbid the

24 ¹²⁰ FTB Writ Petition, p. 18. As to Hyatt's opposition in the district court on this issue, upon the Court's
25 request Hyatt will gladly supplement the record with his filings in the district court successfully opposing the FTB's
motion for judgment on pleadings.

26 ¹²¹ 183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

27 ¹²² *Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998); see also *Bell v. California*, 63
28 Cal.App. 4th 919, 929, 74 Cal.Rptr. 2d 541 (1998) (holding no immunity under Cal. Govt. Code § 821.6 to state
investigators for conduct in executing a search warrant). Section 821.6 of the California Government Code provides
immunity for public employees for "investigating or prosecuting any judicial or administrative proceeding."

1 FTB from engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such
2 conduct.¹²³ California cannot therefore object if held liable in Nevada for conduct not protected
3 by its own immunity statute and for which its own laws provide relief to an aggrieved party.

4 **D. The FTB cannot distinguish *Mianecki* from the present case because the**
5 **FTB's torts consisted of deficient operational acts stemming from violations**
6 **of its own policies, procedures, and regulations.**

7 The FTB attempts to cloak all actions taken by its auditors during the Hyatt audits as
8 discretionary and therefore immune. But the FTB limits and restricts the discretion of its
9 auditors in performing their audits through regulations, policies, manuals, guidebooks,
10 employment contracts, and rigorous, yearly education through which it mandates proper, non-
invasive operations.

11 **1. The FTB's own policies, procedures, and regulations restrict and limit**
12 **the FTB's operational activities.**

13 The FTB Field Audit Manual, for example, governs the work of the Residency Program
14 auditors who audited Hyatt. The manual provides that its audit standards and resource
15 considerations "govern not only the determination of the procedures to be used but also the
16 *manner* in which these are to be carried out."¹²⁴ Included in these non-negotiable operational
17 standards is objectivity, defined as: "An objective examination of all relevant, available factual
18 data must be made in a fair and unbiased manner."¹²⁵ And, as in almost all FTB publications, it
19 mandates that "It is the *auditor's* responsibility to maintain the security of *all* confidential data
20 during the audit process and to prevent *any* unauthorized disclosure."¹²⁶
21 ...
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23 ¹²³ California Constitution., Art. I, Sec. 1 (providing that dissemination of data gathered on or about an
24 individual by state agencies is illegal and actionable as invasion of privacy); California Information Practices Act
25 (Cal. Civ. Code § 1798 *et seq.*) (also providing that improper dissemination of information gathered by state
agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction");
California Revenue and Taxation Code § 21002 (providing that an individual may recover damages from the state
if injured by the FTB's reckless disregard of published procedures).

26 ¹²⁴ Depo. Exhibit 136 at FTB 3760 (emphasis added) (Supp. Hyatt Appendix, Vol. XI, Exh. 31).

27 ¹²⁵ Depo. Exhibit 136 at FTB 3760 (Supp. Hyatt Appendix, Vol. XI, Exh. 31).

28 ¹²⁶ Depo. Exhibit 136 at FTB 3762 (Supp. Hyatt Appendix, Vol. XI, Exh. 31).

1 The FTB Disclosure Education Materials teach FTB auditors about the myriad
2 restrictions on how they can go about their jobs. It teaches that auditors are limited and bound
3 by:

- 4 • State tax law,¹²⁷
- 5 • Federal tax law,¹²⁸
- 6 • The California equivalent to the federal privacy act,¹²⁹
- 7 • The FTB Disclosure Manual,¹³⁰
- 8 • The FTB exchange agreement with the IRS on sharing data,¹³¹
- 9 • The FTB Information Security Manual,¹³²
- 10 • FTB Policy File 9201,¹³³
- 11 • The FTB Statement of Incompatible Activities and Rules of Conduct for
12 Departmental Employees,¹³⁴ and
- 13 • The Government Code.¹³⁵

15 ¹²⁷ California Revenue and Taxation Code § 19542 through 19566; see Depo. Exhibit 200 at 7 (Supp.
16 Hyatt Appendix, Vol. XIII, Exh. 39).

17 ¹²⁸ Internal Revenue Code §§ 6103(d), 7213(a)(2), and 7431; see Exhibit 200 at 7 ("specifies penalties for
18 unauthorized disclosure"), see Depo. Exhibit 200 at 7, and Depo. Exhibit 178 at (7) (Supp. Hyatt Appendix,
Vol. XIII, Exh. 39).

19 ¹²⁹ California Information Practices Act of 1977, California Civil Code §§ 1798 *et. seq.*; see Exhibit 200 at
20 7 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

21 ¹³⁰ See Depo. Exhibit 200, at 7 ("[The Disclosure Manual] provides detailed procedures regarding
confidentiality and disclosure.") (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

22 ¹³¹ Exhibit 200 at 9 ("Our exchange agreement with the IRS . . . severely restricts our use of IRS data.")
23 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

24 ¹³² Exhibit 200 at 7 ("Provides a formal approach to information security.") (Supp. Hyatt Appendix,
Vol. XIII, Exh. 39).

25 ¹³³ Exhibit 200, at 7 ("Policy statement on confidentiality and security of data.") (Supp. Hyatt Appendix,
Vol. XIII, Exh. 39).

26 ¹³⁴ Depo. Exhibit 178 (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

27 ¹³⁵ California Government Code § 19990 ("A state . . . employee shall not engage in any . . . activity which
28 is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or
employee.").

1 In his cover letter to a document signed yearly by all FTB employees, the FTB chief
2 executive officer admits that the FTB is *required* to identify and publish those employee
3 activities that are inconsistent, incompatible, or in conflict with their duties.¹³⁶ The FTB defines
4 those forbidden activities as including providing "confidential information to persons to whom
5 issuance of this information has not been authorized."¹³⁷ Somewhat redundantly, the FTB also
6 forbids its employees to "Disclose confidential information in writing, electronically, or verbally
7 to unauthorized individuals."¹³⁸ It repeats itself a third time: "It is the responsibility of FTB
8 agents to ensure that confidential information is not disclosed to unauthorized persons."¹³⁹

9 The FTB defines confidential information as including both tax and non-tax information;
10 information from federal or state tax returns;¹⁴⁰ taxpayer name, social security number, income,
11 and financial information; data from the IRS;¹⁴¹ the filing status of a taxpayer and the amount of
12 tax owed; any data collected by FTB with respect to a return; and whether a taxpayer's return is
13 being audited.¹⁴² Indeed, according to the FTB's educational booklet to auditors, "Essentially, *all*
14 information on an individual's tax return is confidential."¹⁴³

15 These provisions are not discretionary. The FTB states that its standards of conduct and
16 specific rules of conduct "shall apply *without exception* to all . . . employees of the department.

17 . . .

18 . . .

21 ¹³⁶ Depo. Exhibit 178 (cover letter) (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

22 ¹³⁷ Depo. Exhibit 178 at (1), paragraph I(3) (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

23 ¹³⁸ Depo. Exhibit 178 at (3), paragraph II (2) (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

24 ¹³⁹ Depo. Exhibit 200 at 11 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

25 ¹⁴⁰ Depo. Exhibit 178 at (3), paragraph II(2) (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

26 ¹⁴¹ Depo. Exhibit 178 at (7), paragraph IX (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

27 ¹⁴² Depo. Exhibit 200 at 5 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

28 ¹⁴³ Depo. Exhibit 200 at 4 (emphasis added) (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

1 All . . . employees shall conform to these standards without further directive."¹⁴⁴ Failure to
2 conform subjects an FTB auditor to discipline and termination.¹⁴⁵

3 The FTB emblazons its training materials with visual aids shouting "TOP SECRET,"
4 "CONFIDENTIAL," "CLASSIFIED," and "NEED TO KNOW."¹⁴⁶

5 It instructs auditors in bold type: "*If in doubt, don't disclose*," repeating that mantra 16
6 times in 14 pages.¹⁴⁷

7 The FTB warns its auditors that under California law it is a *misdemeanor* for an auditor to
8 disclose confidential tax information. Worse, if an auditor uses a state computer to disclose tax
9 information, he or she may be prosecuted for a *felony*.¹⁴⁸ It warns them that *federal* law
10 authorizes both felony prosecution and private lawsuits for browsing of IRS data or unauthorized
11 disclosure.¹⁴⁹

12 **2. The FTB's many violations of its own policies, procedures, and**
13 **regulations, i.e. deficient operational acts, evidence the intentional**
14 **torts alleged by Hyatt.**

15 Hyatt sets forth examples, not an exhaustive list, of the FTB's violations of its own
16 policies, procedures, and regulations that caused or contributed to Hyatt's injuries.

17 **a. It made blatant disclosures about Hyatt and the audit.**

18 The FTB gives as one example of unauthorized disclosure: "You discuss an account,
19 including the taxpayer's name, with a member of your family. This is considered an
20 unauthorized disclosure because the family member does not have a 'right to know.'"¹⁵⁰ Hyatt
21 has discovered that FTB auditor Sheila Cox discussed the Hyatt case with, and discussed Hyatt's

22 ¹⁴⁴ Depo. Exhibit 178 at (5), paragraph IV (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

23 ¹⁴⁵ Depo. Exhibit 178 at (5), paragraph V (Supp. Hyatt Appendix, Vol. XIII, Exh. 38).

24 ¹⁴⁶ Depo. Exhibit 200 at cover page (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

25 ¹⁴⁷ Depo. Exhibit 200 (bold type in original) (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

26 ¹⁴⁸ Depo. Exhibit 200 at 14 (emphasis added) (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

27 ¹⁴⁹ Depo. Exhibit 200 at 14 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

28 ¹⁵⁰ Depo. Exhibit 200 at 13 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

1 name to her husband. Her then best friend, Candace Les, has testified that in referring to Hyatt
2 Cox stated to Les and to Cox's husband that she, Cox, was going to "get that Jew bastard."¹⁵¹
3 This is despite FTB directives that expressly prohibit bigotry.

4 Another example the FTB gave of an unauthorized disclosure is: "You bring up an
5 account on the view to show another employee or agent the taxpayer's large tax liability. This is
6 considered an unauthorized disclosure and is not a need to know in order to perform your
7 specific duties."¹⁵² But Cox disclosed the amount of Hyatt's large tax liability to her friend,
8 Candace Les.¹⁵³ She gave Les a copy of the FTB position letter and audit narrative report, with
9 all their intimate detail.¹⁵⁴ She even took Les on a covert visit to Hyatt's Las Vegas home¹⁵⁵ —
10 after the audit was over¹⁵⁶ — and took a trophy photograph of Les standing on Hyatt's property in
11 front of the Hyatt's residence.¹⁵⁷ Because the audit was closed, FTB policies forbade this
12 curiosity-driven visit as unauthorized stalking.¹⁵⁸ Because the visit was for idle curiosity, a
13 nontax purpose, the surveillance was forbidden by the Taxpayers' Bill of Rights.¹⁵⁹ Because the
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19 ¹⁵¹ Les Depo., pp. 10-11, 253 to 254 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

20 ¹⁵² Depo. Exhibit 200 at 13 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

21 ¹⁵³ Les Depo., plaintiff. 94 - 95 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

22 ¹⁵⁴ Les Depo., plaintiff. 26 - 27 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

23 ¹⁵⁵ Les Depo., p. 42 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

24 ¹⁵⁶ Les Depo., plaintiff. 54 - 55 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

25 ¹⁵⁷ Les Depo., plaintiff. 264, 402 - 403 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

26 ¹⁵⁸ Les Depo., plaintiff. 54 - 55 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

27 ¹⁵⁹ California Revenue & Taxation Code § 21014, *forbidding* any FTB employee from conducting an
28 investigation or surveillance of any person except for tax purposes. For purposes of the prohibition, the Legislature
defined investigation as "any oral or written inquiry" and surveillance as "the monitoring of persons, places, or
events by means of . . . overt or covert observations, or photography, or the use of informants."

1 stalking was forbidden by FTB policies, Cox's joyride for hours through Las Vegas to stalk
2 Hyatt's former apartment and his Las Vegas home violated California's privacy act and published
3 FTB procedures.¹⁶⁰

4 **b. It violated its own Disclosure Manual.**

5 The FTB directs auditors to its Disclosure Manual for "disclosure restrictions" unique to
6 audits.¹⁶¹ That Manual minces no words in making it the responsibility of every FTB auditor to
7 ensure confidentiality of tax data provided by taxpayers: "Failure to do so could subject the
8 employee to criminal action, disciplinary proceedings, and potential loss of employment."¹⁶² It
9 broadly defines confidential information as "*any* information that is submitted to, or developed
10 within" the FTB department to administer its responsibilities and is not specifically made public
11 information by statute.¹⁶³ It gives the auditors *no* discretion: "Employees have *no authority* to
12 use such records and information for any purpose not specified by law."¹⁶⁴

13 The Manual spells out that the law protects the confidentiality, not only of state tax
14 returns, but all information in the returns, all information contained in any audit or investigation
15 report, all information submitted by the taxpayer or any other person about the taxpayer's tax
16 liability or income, and all information contained in a federal tax return or obtained from the
17 IRS.¹⁶⁵

18 Recognizing the "limitations imposed by law," including the need to ensure "individuals'
19 rights to privacy," the Manual states that authorized disclosures are to be made *only* to requesters
20 with a need to know (*i.e.* the necessity to obtain specific information to execute official duties).

21 _____
22 ¹⁶⁰ California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at
23 H 06708 (Supp. Hyatt Appendix, Vol. XIII, Exh. 38) ("employees *shall not access or use* personal or confidential
24 information about individuals maintained by the department without a legal right to such information as provided by
25 law and a 'need to know' to perform his/her official duties.") (Emphasis added.)

26 ¹⁶¹ Depo. Exhibit 200 at 11 (Supp. Hyatt Appendix, Vol. XIII, Exh. 39).

27 ¹⁶² Depo. Exhibit 118 at H 06600 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

28 ¹⁶³ Depo. Exhibit 118 at H 06601 (emphasis added) (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

¹⁶⁴ Depo. Exhibit 118 at H 06601 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

¹⁶⁵ Depo. Exhibit 118 at H 06603 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

1 Even then, the needed information is to be "abstracted from the document rather than providing
2 them a copy of the entire document."¹⁶⁶

3 The Manual, and the FTB generally, profess to be bound¹⁶⁷ by California's privacy act,
4 the Information Practices Act of 1977,¹⁶⁸ the California counterpart to the federal Privacy Act of
5 1974. California's privacy act was enacted to protect individual privacy, a right the Legislature
6 found was "threatened by the indiscriminate collection, maintenance, and dissemination of
7 personal information."¹⁶⁹ That act restricts government dissemination and accumulation of
8 data.¹⁷⁰ It provides individuals with guarantees safeguarding the accuracy of government
9 dossiers by providing access and the right to demand corrections of inaccurate, untimely,
10 incomplete, or irrelevant entries.¹⁷¹

11 Ironically, although the Manual professes compliance, Hyatt has discovered wholesale
12 disregard of its mandates. For example, to protect the accuracy of the highly personal
13 information contained about him, Hyatt pointed out numerous factual mistakes in the FTB files
14 and demanded correction.¹⁷² He sent a letter requesting the FTB to correct its objectively-
15 verifiable \$25 million overstatement of his 1992 income,¹⁷³ three letters correcting its
16 misallocation of *checks* to California verses Nevada,¹⁷⁴ two letters correcting FTB factual

18 ¹⁶⁶ *Id.*

19 ¹⁶⁷ Depo. Exhibit 118 at H 06660 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

20 ¹⁶⁸ California Civil Code §§ 1798 *et seq.*

21 ¹⁶⁹ California Civil Code § 1798.1(b).

22 ¹⁷⁰ Depo. Exhibit 145 (Supp. Hyatt Appendix, Vol. XI, Exh. 32); California Civil Code § 1798.14
23 mandates that an agency may "maintain in its records only personal information which is relevant."

24 ¹⁷¹ Depo. Exhibit 145 (Supp. Hyatt Appendix, Vol. XI, Exh. 32); California Civil Code § 1798.18
25 mandates that each agency "*shall* maintain all records, to the maximum extent possible, with accuracy, relevance,
timeliness, and completeness." (Emphasis added.)

26 ¹⁷² Depo. Exhibits 117, 152-156 (Supp. Hyatt Appendix, Vol. X, Exh. 29 and Vol. XII, Exhs. 35-37,
27 respectively).

28 ¹⁷³ Depo. Exhibit 117 (Supp. Hyatt Appendix, Vol. X, Exh. 29).

¹⁷⁴ Depo. Exhibits 152, 154, 156 (Supp. Hyatt Appendix, Vol. XII, Exhs. 33, 35 and 37, respectively).

1 mistakes in assigning Hyatt *credit card charges* to California or Nevada,¹⁷⁵ and a letter correcting
2 the FTB failing to consider the *envelopes* addressed to Hyatt at his Las Vegas home.¹⁷⁶ The FTB
3 failed in its mandatory duty to respond within 30 days and failed to correct *any* of the
4 inaccuracies (and to date the FTB has still failed to make any corrections).¹⁷⁷ The FTB officer
5 who is in charge of compliance with the privacy act testified that the FTB has received
6 "thousands" of requests for correction, but never corrected *any* record.¹⁷⁸

7 c. It disclosed Hyatt's personal information.

8 As demonstrated previously, the California Revenue and Taxation Code, and the web of
9 laws and regulations that are compiled in the FTB disclosure education materials forbid
10 disclosure of personal information about a taxpayer even to other auditors who have no need to
11 know.

12 But FTB lead Hyatt-auditor Sheila Cox bragged to her best friend Candace Les about
13 Hyatt and the audit — talking incessantly about the audit. Cox talked about the case
14 "constantly," "year after year." She talked about the Hyatt case so much and was so unwilling to
15 let it go — even after it was closed — that Les concluded she was so "fixated" and "obsessed"
16 with it that she was beginning to create a fiction in her own head about it.¹⁷⁹

17 She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former
18 California house — referring to his old house as a "dump," and falsely stating it contained a
19 "dungeon," and calling Hyatt "a bad man." She falsely alleged to Les that he had several
20 Californians on the lookout for the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng,
21 a "one-armed man," and other "ghouls." She disclosed facts to her friend about his family
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23 ¹⁷⁵ Depo. Exhibit 153, 156 (Supp. Hyatt Appendix, Vol. XII, Exhs. 34 and 37, respectively).

24 ¹⁷⁶ Depo. Exhibit 155 (Supp. Hyatt Appendix, Vol. XII, Exh. 36).

25 ¹⁷⁷ California Civil Code § 1798.35 *mandates* that the FTB respond to any request for correction within 30
26 days, and either correct the record or explain why it refused to do so. It provides that any individual has a right to
27 request corrections of record that are not "accurate, relevant, timely, or complete."

28 ¹⁷⁸ Meyer Depo., p. 104 (Supp. Hyatt Appendix, Vol. XIII, Exh. 48).

¹⁷⁹ See Les Depo., pp. 59 - 60, 167 - 168, 61-63, respectively, (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

1 members, his colon cancer, his patent business, the amount of taxes at issue, Cox's first trip to
2 Las Vegas, her several trips to La Palma, interviews with Hyatt's Nevada landlord, the tenor of
3 dealings with Hyatt's tax reps, the Hyatt audit was one of the largest, if not the largest in history,
4 Cox obtained affidavits only from Hyatt's estranged relatives. Cox told Les about the murder of
5 Hyatt's son — and called him a "freak" because of it. She disclosed to Les her unsuccessful
6 attempts to get special investigations to investigate Hyatt for fraud, showed Les the narrative
7 report, audit papers, and position letters that lay out extensive detail about Hyatt's personal life
8 and finances, disclosed to Les alternative theories to tax Hyatt, told Les of her meetings with
9 higher-ups on the Hyatt case, and talked about Hyatt incessantly.¹⁸⁰

10 **d. Its disclosures violated state privacy laws.**

11 The California privacy act required the FTB to disclose to Hyatt all the persons and
12 entities who would receive his social security number and other personal information.¹⁸¹ The
13 FTB's initial contact letter dated June 17, 1993, contained a "Privacy Act Notice" that promised
14 Hyatt that the information he would give to the FTB might be disseminated to the IRS, to
15 California agencies, or to the Multistate Tax Commission or to other states that impose an
16 income tax. Nevada does not impose such a tax, so it was not included. FTB's Disclosure
17 Manual further restricts the local California agencies to tax agencies (e.g. assessors) and law
18 enforcement (e.g. district attorneys and grand juries).¹⁸² It also admits that the FTB's use of a
19 taxpayer's social security number is *limited* to those shown on the notice.¹⁸³

21
22 ¹⁸⁰ See Les Depo., pp. 388 - 389; 176; 24 - 26; 385 - 386; 387 - 388; 113 - 114; 391; 143 - 144; 245 - 246;
23 181 to 182; 371; 375 - 376; 24 - 25; 386 - 387; 385 - 386; 25 - 26; 375-376; 125 - 126; 69 - 70; 22 - 23; 140 - 141;
24 103 - 104 - 105; 113 - 114; 388 - 389; 254 - 255; 357 - 358; 171 - 172; 141 - 142; 25-26; 94 - 95; 349; 10 - 11; 253
25 - 254 - 254; 345 - 356; 167 - 168; 42; 49- 51; 263; 268 - 269; 275, respectively, (Supp. Hyatt Appendix, Vol. XIV,
26 Exh. 49).

27 ¹⁸¹ California Information Practices Act of 1977, California Civil Code § 1798.17 requires the FTB to
28 notify any individual supplying information of the "known or foreseeable" recipients of any further FTB
republication of the information. The Federal Privacy Act *requires* states to notify persons that they request to
disclose their social security number "what uses will be made of it." Depo. Exhibit 118 at H 06656 (Supp. Hyatt
Appendix, Vol. XI, Exh. 30).

¹⁸² Depo. Exhibit 118 at H 06631-33 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

¹⁸³ Depo. Exhibit 118 at H 06659 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

1 In addition, each of the FTB's three lead auditors and its first protest officer made written
2 and oral promises of confidentiality to Hyatt.¹⁸⁴ Within a month after the first FTB auditor
3 promised confidentiality by sending the Privacy Act Notice with a promise of very specific
4 limited disclosure, the FTB disclosed Hyatt's social security number to the Nevada DMV in
5 violation of the Federal and state privacy acts.¹⁸⁵

6 Within a month after the second FTB auditor took over, he too breached the promises of
7 the Privacy Act Notice and the federal and state privacy acts by again disclosing the social
8 security number to another Nevada agency.¹⁸⁶ He compounded the disclosure by quickly
9 divulging it to Southern California Edison¹⁸⁷ and the City of La Palma,¹⁸⁸ both in violation of
10 federal and state privacy law and the FTB's Privacy Act Notice.

11 But it was the third lead FTB auditor, Cox, who went to extremes in her disclosures of
12 Hyatt's social security number. She disclosed it to *over 30 unauthorized recipients*:

13 Hyatt's temple in Las Vegas, a professional organization in
14 Connecticut, two professional associations in New York, a sporting
15 goods store in Las Vegas, Hyatt's former dating service in Irvine,
16 CA and Los Angeles [asking for his dating application!], a Nevada
17 public agency, a computer users group in Las Vegas, an office
18 supply store in Las Vegas, Sam's Club in Las Vegas, Hyatt's Jewish
19 temple at another address in Las Vegas, a bank in Downey,
20 California, Sam's Club in Downey, California, the managers at
21 Wagon Trails Apartments in Las Vegas, a Cablevision service in
22 Costa Mesa, California, a frequent-flyer program in Dallas, Texas,
23 the U.S. Postmaster in Cypress, California, a second temple in Las
24 Vegas, the *Las Vegas Sun*, the Las Vegas Valley Water District, a
25 trash company in Las Vegas, the gas company in Las Vegas, the
26 department of elections in Las Vegas, the Postmaster of Cerritos
27 California, a law firm in Los Angeles, a lawyer in Anaheim,
28 California, another lawyer in Anaheim, California, an accounting
firm in Anaheim, California, a patent lawyer in La Palma, California,
a litigator in Studio City, California, the *Las Vegas Sun* (a second

¹⁸⁴ Cowan Affid. (Hyatt Appendix, Vol. VIII, Exh. 15).

¹⁸⁵ Depo., Exhibit 101 at H 01223 (Supp. Hyatt Appendix, Vol. X, Exh. 28).

¹⁸⁶ Depo., Exhibit 101 at H 01313 (Supp. Hyatt Appendix, Vol. X, Exh. 28).

¹⁸⁷ Depo., Exhibit 101 at H 01321 (Supp. Hyatt Appendix, Vol. X, Exh. 28).

¹⁸⁸ Depo., Exhibit 101 at H 01322 (Supp. Hyatt Appendix, Vol. X, Exh. 28).

1 time), The *Los Angeles Times*, Orange County, and The *Orange County Register* in
2 Santa Ana, California.¹⁸⁹

3 The FTB sent out these Demands to furnish information that wrongfully disclosed Hyatt's
4 social security number and personal information in violation of California and federal privacy
5 law and the FTB's own Privacy Act Notice promise to Hyatt. *None* of these recipients was
6 disclosed to Hyatt in advance, as was required by law, when he was asked to divulge his social
7 security number and other personal information to the FTB. Both the privacy act and FTB
8 published procedures require FTB auditors to collect personal and confidential information to the
9 greatest extent practicable directly from the taxpayer, rather than from third parties.¹⁹⁰

10 Moreover, these Demands were not innocent. Contrary to FTB disclosure standards which
11 mandate keeping confidential whether a taxpayer is under audit, they disclose that they want
12 information either because of an investigation [i.e. criminal investigation], audit, or collection.

13 **e. It failed to accord Hyatt the notice required by law.**

14 Contrary to the requirements of the California privacy act, the FTB did not first go to
15 Hyatt but the Demands were covertly sent out without his knowledge. Contrary to the same act
16 the Demands did not disclose to the Nevada recipients that they were voluntary, since California
17 had no jurisdiction over Nevadans. Contrary to the same act, the Demands did not require the
18 recipients to agree to keep Hyatt's personal information confidential. Contrary to the California
19 Financial Privacy Act and the Discovery Statute in California, Cox quizzed Hyatt's lawyers,
20 accountants, and financial institutions without Hyatt's knowledge or consent and without first
21 sending Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most
22 sensitive Japanese customers, enclosing portions of sensitive, confidential multi-million dollar
23 patent licensing agreements.

24
25 ¹⁸⁹ Depo. Exhibit 101 at H 01473; at H 01475; at H 01477 and H 01479; at H 01481; at H 01483 and
26 H 01485; at H 01486; at H 01488; at H 01500; at H 01502; at H 01504; at H 01528; at H 01530; at H 01548; at
27 H 01570; at H 01572; at H 01623; at H 01626; at H 01637; at H 016389; at H 01640; at H 01642; at H 01650; at
H 01651; at H 01659; at H 01661; at H 01663; at H 01665; at H 01672; at H 01673; at H 01852; at H 01854; at
H 01856, respectively, (Supp. Hyatt Appendix, Vol. X, Exh. 28).

28 ¹⁹⁰ Information Practices Act of 1977, California Civil Code § 1798.15; Disclosure Manual, Depo. Exhibit
118 at H 06706 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

1 While the state privacy act and its own Disclosure Manual require the FTB to maintain
2 only relevant and necessary information, the FTB has *never purged* even one page of irrelevant,
3 unfounded allegations from its files, even after seven-and-a-half years and even after Hyatt has
4 pointed out the errors in th audit file and the lack of personal knowledge, and personal bias
5 against him of some of the FTB interviewees.¹⁹¹

6 **f. It failed to correct its own erroneous records.**

7 The California Legislature also limited the discretion of tax auditors because, as the
8 Legislature declared, "taxes are the most sensitive point of contact between citizens and their
9 government and that there is a delicate balance between revenue collection and freedom from
10 government oppression."¹⁹²

11 The California Legislature intended to place "*guarantees* in California law to ensure that
12 the rights, *privacy*, and property of . . . taxpayers are adequately protected during the . . .
13 assessment. . . of taxes."¹⁹³ It expressly waived sovereign immunity in the Taxpayers' Bill of
14 Rights by authorizing "actual and direct monetary damages," and attorneys' fees caused by an
15 FTB employee recklessly disregarding FTB published procedures. It did so again in the
16 California privacy act.¹⁹⁴ That act authorizes money damages and attorneys' fees if the FTB
17 violates the act or fails to maintain any record with such accuracy, relevancy, timeliness, and
18 completeness as is necessary to assure fairness in any determination relating to his rights.¹⁹⁵

19 Hyatt discovered that the FTB files are packed with inaccurate, irrelevant, untimely, and
20 incomplete information.¹⁹⁶ He found that the FTB auditors and management used the FTB's
21 massive powers of investigation to "compile a file" on him that was 3,500 pages in length but
22

23 ¹⁹¹ Disclosure Manual, Depo. Exhibit 118 at H 06666 (Supp. Hyatt Appendix, Vol. XI, Exh. 30).

24 ¹⁹² The Taxpayers' Bill of Rights, California Revenue & Taxation Code § 21002.

25 ¹⁹³ *Id.*

26 ¹⁹⁴ California Information Practices Act of 1977, California Civil Code §§ 1798 *et. seq.*

27 ¹⁹⁵ California Information Practices Act of 1977, California Civil Code §§ 1798.45.

28 ¹⁹⁶ Hyatt Affid., (Hyatt Appendix, Vol. VIII, Exh. 12).

1 was written in such a one-sided way that it assured an *unfair* determination.¹⁹⁷ The act has
2 waived FTB sovereign immunity for such misconduct.

3 In sum, the FTB does not have immunity in Nevada for its conduct at issue in this case
4 because intentional torts such as those alleged by Hyatt have no immunity in Nevada. Nor are
5 the FTB's deficient operational acts immune from liability because it was not discretionary, but
6 rather in direct violation of its own mandated policies, procedures, and regulations.

7
8
9 **VII. No exception to *Nevada v. Hall* applies to this case.**

10 **A. This tort case has not, by the FTB's own admissions, interfered with the tax**
11 **protest in California.**

12 The FTB cites to footnote 24 in *Nevada v. Hall*¹⁹⁸ and argues from it that taxation is so
13 important that this case is different and fits the *possible* exception left open by that footnote.¹⁹⁹
14 Yet, this case in no way interferes with the current tax protest nor, more generally, California's
15 right to tax and raise revenue.

16 The FTB offers *no evidence* that this case has had any effect on or in any way limits or
17 prohibits the FTB from proceeding with tax collection from Hyatt or anyone else. Hyatt is
18 pursuing tort claims in this action, while the FTB is pursuing assessment of taxes in the
19 California tax protest. Neither prevents, inhibits, or in any way limits the other from proceeding.

20 Hyatt offered concrete admissible evidence in the district court, and new evidence has
21 surfaced, demonstrating that the California tax protest is still moving forward and nearing
22 completion in parallel with and unimpeded by this case:

23
24 ¹⁹⁷ *Id.*

25 ¹⁹⁸ Footnote 24 reads: "California's exercise of jurisdiction in this case poses no substantial threat to our
26 constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could
27 hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this
case, to consider whether different state policies, either of California or Nevada, might require different analysis or a
different result." *Nevada v. Hall*, 440 U.S. at 424, n.24.

28 ¹⁹⁹ Of course, the Supreme Court in footnote 24 never said that it would rule differently if a more
important sovereign function was impinged than that in *Nevada v. Hall*, only that it was not faced with that decision.

1. Two years ago, at the outset of this suit, Terry Collins, the FTB's in-house attorney in charge of the California tax protest and the FTB supervisor in charge of this suit, *swore under oath* in support of a motion filed in this litigation that the California tax protest *would continue unimpeded by this suit*,²⁰⁰
2. Last year, the FTB relieved the second California tax protest officer Bob Dunn from his responsibilities in handling the California tax protest because it was a conflict of interest for him to also manage this litigation, so that from then on he could focus his energies to this Nevada tort case, and the new protest officer could *focus on the California tax protest*,²⁰¹
3. FTB personnel continually stated to Hyatt's tax representative while this case has been pending that they are processing the protest. In fact after the Court dismissed the declaratory relief claim, the FTB informed Hyatt's tax representative that the protest was proceeding and the protest officer would have a response in six months,²⁰²
4. In December 1999, the FTB's third California tax protest hearing officer, Charlene Woodward, sent a 31-page demand to Hyatt, posing 186 interrogatories, and demanding 50 document categories in the California tax protest, requesting responses by March 31, 2000,²⁰³
5. Commencing *prior* to this litigation and continuing for at least the past three years, Hyatt's California tax attorney, Eugene Cowan, has been requesting, to no avail, an *early* California tax protest hearing. The first of three protest officers told Cowan almost three years ago that a decision was only weeks away. During the past three years, the FTB has nonetheless chosen to do virtually nothing on the protest, until Ms. Woodward's voluminous requests to Mr. Cowan last year,²⁰⁴ and
6. The hearings on the 1991 and 1992 tax-year protests were recently complete and the FTB told Hyatt's representatives that it expects to complete its work on the

²⁰⁰ Collins Affid. ¶ 7, attached as Exh. 23 to Hyatt's Opp. to Mot. for Sum. Judg. (Hyatt Appendix, Vol. VII, Exh. 11).

²⁰¹ Cowan Affid., ¶ 45 (Hyatt Appendix, Vol. VIII, Exh. 15).

²⁰² Cowan Affid., ¶¶ 47-48 (Hyatt Appendix, Vol. VIII, Exh. 15).

²⁰³ Cowan Affid., Exhibit 31 (Hyatt Appendix, Vol. VIII, Exh. 15).

²⁰⁴ Cowan Affid., at ¶¶ 31-32, 43-48, 52-53 (Hyatt Appendix, Vol. VIII, Exh. 15).

1 protest by year's end and to come to their final decision in the first quarter of
2 2001.

3 At best, it is a disputed issue of fact as to whether this case is affecting California's ability
4 to collect taxes from Hyatt or anyone else, a dispute for which the FTB offers *no evidence* to
5 support its position. The FTB did not even submit a *pro forma* affidavit in the district court from
6 an FTB official mouthing words to that effect. The reason is that the FTB's prior statements and
7 conduct during this litigation belie its newly found assertion.

8 The FTB's taxing process is not impaired by subjecting the FTB to liability for invading
9 privacy and making false representations. The California legislature and the FTB's own manuals
10 mandate fairness and confidentiality in tax assessment and collection.²⁰⁵ Indeed, holding the
11 FTB liable for such conduct will foster, not impede, the public confidence so essential to the
12 California tax system.

13 **B. The cases cited by the FTB for the so-called exception to *Nevada v. Hall* do not
14 apply.**

15 The FTB cites to a select few cases in arguing that the exception to *Nevada v. Hall* is
16 applicable to the underlying tort case.²⁰⁶ None of the cases are on point.

17 In the first, *ANR Pipeline Co. v. Lafaver*,²⁰⁷ the plaintiffs were directly challenging a
18 Kansas state tax, not suing for torts resulting from operational acts. The 10th Circuit held that
19 neither it nor the district court may "entertain [a] suit ultimately seeking federal declaratory relief
20 against the tax policy against the State of Kansas."²⁰⁸ In the present case, there is no attempt to
21 nor actual interference with the FTB's taxation efforts directed at Hyatt.

22 In *Guarini v. New York*,²⁰⁹ members of the New Jersey House of Representatives sued the

23 ²⁰⁵ The California Taxpayers' Bill of Rights, Cal. Rev. & Taxation Code § 21002; The Information
24 Practices Act of 1977, Cal. Civil Code § 1798.1; Disclosure Manual, ¶ 1000, Depo. Exhibit 118, at H 06600 (Supp.
25 Hyatt Appendix, Vol. XI, Exh. 30).

26 ²⁰⁶ FTB Writ Petition, pp. 25 -29.

27 ²⁰⁷ 150 F.3d 1178, 1193 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999).

28 ²⁰⁸ *Id.* at 1194.

²⁰⁹ 215 N.J. Super. 426, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S.
817 (1987).

1 State of New York over the respective state's boundaries. The court found that disputes between
2 states over their borders must be heard in the United States Supreme Court. There was no
3 discussion regarding holding a sister state liable for tortious conduct.

4 In *Mejia-Cabral v. Eagleton School, Inc.*,²¹⁰ a case extensively quoted by the FTB, the
5 defendant attempted through an indemnity claim to join the State of Connecticut as a cross-
6 defendant. There was a direct challenge to Connecticut's discretionary decision to place a
7 juvenile in a particular facility. But there was no claim of tortious conduct arising out of
8 operational acts of state employees. In denying the indemnity claim, the Massachusetts Supreme
9 Court also emphasized that the injured plaintiff was not suing Connecticut, but rather the
10 defendant was cross-claiming for indemnity. The court effectively distinguished the *Mejia-*
11 *Cabral* case from the this case by concluding that "[t]his case does not present the problem of an
12 injured [plaintiff] unable to obtain relief from a negligent foreign state."²¹¹

13 In *Reed v. University of North Dakota*,²¹² a college hockey player from Minnesota was
14 injured while in North Dakota attending the University of North Dakota. The case was filed in
15 Minnesota state court because at the time of the injury North Dakota had not waived sovereign
16 immunity. The Court found that North Dakota law must apply given that the injury took place *in*
17 *North Dakota* and Minnesota did not have sufficient, if any, contacts that would warrant
18 applying its own law. The decision therefore has no application to the present case given that the
19 injury here occurred in the forum state – Nevada.

20 In *Montana v. Gilham*,²¹³ the plaintiff alleged negligent highway design resulting from
21 decisions made in the design of the highway. The workmanship in building the highway or other
22 operational acts in carrying out the design decisions were not at issue. In other words, there were
23 no allegations that the actual condition of the highway was subpar or had been improperly
24

25 ²¹⁰ 1999 W.L. 791957, 10 Mass. L. Rptr. 452 (Mass. Super. 1999).

26 ²¹¹ *Id.* at 4.

27 ²¹² 543 N.W. 2d 106 (Minn. App. 1996).

28 ²¹³ 133 F.3d 1133 (9th Cir. 1998).

1 constructed. The suit was a direct challenge to the design of the highway chosen by the state. As
2 a result, the case has no application to the present case where the FTB's discretionary decision to
3 commence an audit is not at issue.

4 In sum, the cases cited by the FTB do not support its assertion that the footnote from
5 *Nevada v. Hall* is a viable exception where the tortious conduct stemmed from intentional torts
6 or deficient operational acts of state employees.

7
8
9 **VIII. The U. S. Supreme Court's five recent sovereign-immunity cases**
10 **all deal with *federal* regulation of states and do not overrule**
***Nevada v. Hall*.**

11 The U. S. Supreme Court has issued five sovereign-immunity cases cited by the FTB.
12 One deals with Native-American tribal sovereign immunity, a topic foreign to state-verses-state
13 relations and always recognized as involving special concerns.²¹⁴ All four of the other cases deal
14 with *federal* jurisdiction under the 11th Amendment or with *federal* regulation of states. None of
15 the five addresses whether a state can be sued in the courts of another state. For good reason, the
16 landmark case of *Nevada v. Hall* covered that territory.

17 None of these cases cited by the FTB even hints that *Nevada v. Hall* has lost its vitality.
18 Whether cited by the majority, or by dissenters, the continued vitality and forceful reasoning of
19 *Nevada v. Hall* is taken for granted. Leaving aside the favorable references to it by dissenting
20 and concurring justices in the first four cases, the majority opinion in the most recent case, *Alden*
21 *v. Maine*,²¹⁵ quite forcefully states that *Nevada v. Hall* was correct and that its ruling in the state
22 verses state context is much different from the state verses federal context:

23 In [*Nevada v. Hall*] we . . . acknowledged that "[t]he immunity of a
24 truly independent sovereign from suit in its own courts has been
25 enjoyed as a matter of absolute right for centuries. . . . *We sharply*
distinguished, however, a sovereign's immunity from suit in the courts
of another sovereign:

26
27 ²¹⁴ *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997).

28 ²¹⁵ 527 U.S. 706 (1999).

1 [B]ut [this explanation] affords no support for a claim of immunity in
2 another sovereign's courts. Such a claim necessarily implicates the
3 power and authority of a second sovereign; its source must be found
4 either in an agreement, express or implied, between the two
5 sovereigns, or in the voluntary decision of the second to respect the
6 dignity of the first as a matter of comity." [Citing *Nevada v. Hall*
7 with approval].²¹⁶

8 Significantly, *Alden* pointed out that "[t]he Constitution, after all, treats the powers of the
9 States differently from the powers of the Federal Government."²¹⁷ Here *Nevada* is a sovereign
10 and this case involves California's invasion of *Nevada's* sovereign right and obligation to protect
11 its citizens from torts and to provide a forum to its citizens. That is what distinguishes the
12 present case from the recent federal versus state sovereign-immunity cases.

13 **IX. Constitutional choice-of-law principles allow Nevada to apply its own**
14 **law because Nevada's interests in this case are significant.**

15 The FTB argues that Nevada has no real interest in this action, so therefore the Court
16 should apply California law. The FTB's contention that it can abuse and injure a Nevada resident
17 within Nevada without arousing Nevada's interest in protecting its citizens is strongly reflective
18 of the FTB's entrenched policy of searching out and preying on wealthy former California
19 residents living in Nevada. Creative taxing ploys are then developed as the vehicle for exacting
20 money from them.

21 The FTB has the audacity to charge Nevada with having no real interest in this action!
22 One of the most compelling obligations of a sovereign state is to provide to its citizens a forum
23 for the redress of their grievances. How dare the FTB again argue that it can abuse and injure a
24 Nevada resident, and assert that Nevada has no self interest. *Nevada v. Hall* and *Mianecki* have
25 already rejected this argument. A state has a significant interest in giving its citizens a forum to
26 seek redress for injuries occurring within the state.²¹⁸

27 ²¹⁶ 527 U.S. at 738 (emphasis added).

28 ²¹⁷ 527 U.S. at 739 (emphasis added).

²¹⁸ *Mianecki*, 99 Nev. at 97, 658 P.2d at 424.

1 A. Nevada must apply its own law and protect its significant interests.

2 Even ignoring the squarely-on-point holdings of *Nevada v. Hall* and *Mianecki*, application
3 of Constitutional choice-of-law principles allows Nevada to apply its own law, as it did in
4 *Mianecki*. Here, Nevada has significant interests to protect, and its election to choose its own
5 law rather than conflicting California law meets Constitutional standards. The leading U.S.
6 Supreme Court case, *Phillips Petroleum Co. v. Shutts*,²¹⁹ held that a forum state may choose its
7 own law despite the Full-Faith-and-Credit Clause, provided the forum state has "significant
8 contact or significant aggregation of contacts, creating state interests, such that choice of its law
9 is neither arbitrary nor fundamentally unfair."²²⁰

10 Here the victim is a long-time Nevada resident, much of the tortious activity either
11 occurred in or was directed into Nevada (although planning, lack of supervision, certain
12 activities, and control occurred outside), and the domicile of Hyatt is in Nevada. The
13 relationship between Hyatt and the FTB is centered in Nevada, for all the FTB's actions were
14 directed at extorting a \$22 million settlement from Hyatt — a Nevada citizen.

15 Nevada's rule in tort cases is to apply the law of the place where the injury took place.
16 Thus, under *Motenko v. MGM Dist., Inc.*,²²¹ Nevada should apply its law to the tort, the *lex loci*,
17 the place where Hyatt suffered his injury.²²² The Court need look no further than *Nevada v. Hall*
18 to see an example of the U.S. Supreme Court approving a choice of a forum state's law when the
19 relevant forum-state's contacts consist of plaintiff's residence and the place of the injury.

20
21
22 ²¹⁹ 472 U.S. 797, 821-22 (1985), *cert. denied*, 487 U.S. 1223 (1988).

23 ²²⁰ *Id.*

24 ²²¹ 112 Nev. 1038 (Nev. 1996).

25 ²²² California courts, as usual, are in the forefront of disregarding other states' laws in reliance on this
26 principle. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502-03 (1939), held that
27 California's only "significant contact" was injury in California to an out-of-state employee of an out-of-state
28 employer, but that alone created a state interest, such that choice of California law was neither arbitrary nor
fundamentally unfair. *See also People v. Shear*, 71 Cal. App. 4th 278, 83 Cal. Rptr. 2d 707 (1999) (refusing to give
full faith and credit to Arizona statute because protecting California citizens is more important); *Alaska Packers
Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 542 (1935) (holding that California may apply California law in
suit brought by a Mexican non-resident against an Alaska corporation for an on-the-job injury occurring in Alaska
because otherwise the plaintiff would be remediless).

1 Here Hyatt is a long-time Nevada resident, the injury took place here, and a significant
2 part of the tortious activity took place here, and indeed *all* of the torts were directed at a Nevada
3 resident.²²³ In addition, the testimony of former FTB-residency-auditor Candace Les and her
4 FTB documents demonstrate that FTB auditors regularly enter Nevada and target Nevada
5 citizens for investigation, surveillance, and assessment.²²⁴

6 **B. California law also imposes liability on the FTB for abuses alleged by Hyatt.**

7 The FTB demonstrates an affinity for the word "loopholes" when discussing
8 circumstances when it could be liable under California law for the conduct and resulting injuries
9 alleged by Hyatt. But as explained above in footnote 123, in a very real sense California law
10 does not conflict with Nevada law. California law provides remedies, constitutional and
11 statutory as opposed to common law, through which an individual may obtain redress for injuries
12 stemming from conduct akin to the FTB's actions in this case.²²⁵

13 In sum, Nevada has a strong interest in applying its own law and holding the FTB liable,
14 similar to any Nevada government agency, for injuries caused by intentionally tortious conduct
15 or deficient performance of operational acts. By doing so, there is no conflict with California
16 law.

17
18
19 **X. Comity does not require Nevada to defer to California, which has
20 refused to grant comity to Nevada.**

21 **A. California will not grant comity to Nevada.**

22 *Nevada v. Hall* related to a claim of sovereign immunity by Nevada in California courts
23 and ruled that "[s]uch a claim necessarily implicates the power and authority of a second
24 sovereign; its source must be found either in an *agreement*, express or implied, between the two
25

26 ²²³ See, e.g., Hyatt Affid. ¶¶ 2, 16, 18 (Hyatt Appendix, Vol. VIII, Exh. 12).

27 ²²⁴ C. Les depo., pp. 329-30, attached as Exh. 37 to Hyatt's Opp. for Mot. for Sum Judg.; CL 01428,
28 attached as Exh. 26 to Hyatt's Opp. for Mot. for Sum Judg. (Hyatt Appendix, Vol. VII, Exh. 11)

²²⁵ See footnote 123, *supra* at 36.

1 sovereigns, or in the *voluntary* decision of the second to respect the dignity of the first as a matter
2 of comity."²²⁶ *Nevada v. Hall* noted California's position: "the California courts have told us that
3 whatever California law may have been in the past, *it no longer extends immunity to Nevada as a*
4 *matter of comity*."²²⁷ California cases after *Nevada v. Hall* have been even bolder in rejecting
5 comity. U.S. Supreme Court jurisprudence "renders a forum state's prima facie right to choose
6 its own law virtually irrefutable" despite the Full-Faith-and-Credit Clause.²²⁸

7 **B. Nevada will not grant comity when it would impinge upon the rights of a**
8 **Nevada resident.**

9 Nevada's landmark case on comity is *Mianecki*.²²⁹ It approved and adopted the rationale
10 expressed by the California Supreme Court in *Hall v. University of Nevada*:²³⁰ "We approve the
11 reasoning of the California court and hold that where the injured party is a citizen of this state,
12 injured in this state and sues in the courts of this state, there is no immunity, by law *or as a*
13 *matter of comity*, covering a sister state's activities in this state."²³¹

14 The reasoning in *Mianecki* applies to this case. The Nevada Supreme Court first
15 recognized that "Nevada has a paramount interest in protecting its citizens,"²³² and that comity
16 cannot trump the rights of the citizens of Nevada: "[I]n considering comity, there should be due
17 regard by the court to the duties, obligations, rights and convenience of its own citizens and of

18
19 ²²⁶ 440 U.S. at 415-16 (emphasis added).

20 ²²⁷ 440 U.S. 410, 418 (1979) (emphasis added).

21 ²²⁸ *People v. Shear*, 71 Cal.App.4th 278, 287, 83 Cal. Rptr. 2d 707, 713 (1999). California actually has a
22 long history of choosing its law and refusing to give comity to other states. See *In re Marriage of Delotel*, 73 Cal.
23 App. 3d 21, 140 Cal. Rptr. 553 (1977); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr.
24 215, cert. denied, 429 U.S. 859 (1976); *Severn v. Adidas Sportschuhfabriken*, 33 Cal. App. 3d 754, 109 Cal. Rptr.
328 (1973); *Victor v. Sperry*, 163 Cal. App. 2d 518, 524-26, 329 P.2d 728, 732-33 (1958); *Hudson v. Von Hamm*,
85 Cal. App. 323, 329, 331, 259 P. 374, 377, 378 (1927); *In re Lathrop's Estate*, 165 Cal. 243, 247-48, 131 P. 752,
754 (1913).

25 ²²⁹ 99 Nev. 93, 658 P.2d 422, cert. dismissed, 464 U.S. 806 (1983).

26 ²³⁰ 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972), cert. denied, 414 U.S. 820 (1973). *Mianecki*
27 was consistent with the United States Supreme Court's holding in *Nevada v. Hall*, 440 U.S. 410 (1979).

28 ²³¹ 99 Nev. at 96 (emphasis supplied).

²³² *Id.* at 97.

1 persons who are within the protection of its jurisdiction."²³³ With these principles in mind, the

2 *Mianecki* court held:

3 [W]e believe greater weight is to be accorded Nevada's interest in
4 protecting its citizens from injurious operational acts committed
5 within its borders by employees of sister states, than Wisconsin's
6 policy favoring governmental immunity. Therefore we hold that the
7 law of Wisconsin *should not be granted comity where to do so would*
8 *be contrary to the policies of this state.*²³⁴

9 Indeed, the United States Supreme Court has recognized that a state has a particular
10 interest in exercising jurisdiction over those responsible for engaging in tortious activity within
11 its state. This is because torts involve wrongful conduct which a state seeks to deter, and against
12 which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages
13 which are the proximate result of his tort.²³⁵

14 Many states have refused to recognize sovereign immunity as a matter of comity. They
15 have generally done so because extending immunity would violate the public policy of the forum
16 state.²³⁶ Some of those cases, like *Biscoe v. Arlington County*,²³⁷ declined to recognize a sister

17 ²³³ *Id.* at 98, 658 P.2d at 425. (quoting *State ex rel. Speer v. Haynes*, 392 So. 2d 1183, 1185 (Ala. Civ.
18 App. 1979), *rev'd on other grounds*, 392 So. 2d 1187 (1980)).

19 ²³⁴ *Id.* at 425 (emphasis supplied).

20 ²³⁵ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (quoting *Leeper v. Leeper*, 114 N.H. 294,
21 298, 319 A.2d 626, 629 (N.H. 1974) (quoting *Restatement (Second) of Conflict of Law* sec. 36, comment c (1971))).

22 ²³⁶ *Mianecki v. District Court*, 99 Nev. 93, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983) (refusing to
23 grant sovereign immunity to Wisconsin); *Hernandez v. City of Salt Lake*, 100 Nev. 504, 686 P.2d 251 (1984)
24 (refusing to grant sovereign immunity to Utah); *Hall v. University of Nevada*, 8 Cal.3d 522, 503 P.2d 1363 (1972),
25 *cert. denied*, 414 U.S. 820 (1973) (refusing to grant sovereign immunity to Nevada); *Biscoe v. Arlington County*,
26 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (refusing to grant sovereign immunity to
27 Virginia); *Daughtry v. Arlington County*, 490 F. Supp. 307 (D.D.C.1980) (same); *Struebin v. Iowa*, 322 N.W.2d 84
28 (Iowa), *cert. denied*, 459 U.S. 1087 (1982) (refusing to grant sovereign immunity to Illinois); *Radley v. Transit*
Authority of City of Omaha, 486 N.W.2d 299 (Iowa 1992) (refusing to grant sovereign immunity to Nebraska);
Peterson v. Texas, 635 P.2d 241 (Colo. App.1981) (refusing to grant sovereign immunity to Texas); *Hansford v.*
District of Columbia, 329 Md. 112, 617 A.2d 1057, *cert. denied*, 509 U.S. 905 (1993) (refusing to grant sovereign
immunity to the District of Columbia); *Wendt v. Osceola County*, 289 N.W.2d 67 (Minn. 1979) (refusing to grant
sovereign immunity to Iowa); *Kent County v. Shepherd*, 713 A.2d 290 (Del. 1998) (refusing to grant sovereign
immunity to Maryland); *Head v. Platte County*, 242 Kan. 442, 749 P.2d 6 (1988) (refusing to grant sovereign
immunity to Missouri); *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala. 1992), *cert. denied*, 510 U.S.
1101 (1994) (refusing to grant sovereign immunity to Tennessee); *Haberman v. Washington Public Power Supply*
Sys., 109 Wash. 2d 107, 159-60, 744 P.2d 1032, 1066 (1987), *mod. on other grounds*, 109 Wash. 2d 107, 750 P.2d
254 (1988) (refusing to grant sovereign immunity to Oregon and Idaho).

²³⁷ 738 F.2d 1352, 1357 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

1 state's sovereign immunity even though the liability was partially based on misconduct by the
2 sister state that took place *entirely in the sister state*, but which caused injury in the forum state.
3 To the same effect is the *Head* case from Kansas finding that "immunity laws have no
4 extraterritorial force" and that Missouri should be liable for its *acts taken entirely within*
5 *Missouri* that led to injury of a Kansas resident.²³⁸ *Head* recognized that all sorts of defendants,
6 both private and governmental, are subject to liability in Kansas for *torts done out of state that*
7 *cause injury in the state*. It decided to reject comity because "Kansas courts should give primary
8 regard to the rights of its own citizens and persons who are within the protection of this state."²³⁹

9 *Faulkner v. University of Tennessee*²⁴⁰ dealt with fraud against a resident of Alabama
10 relating to Tennessee's exercising its sovereign rights as to higher education. The Alabama Court
11 in *Faulkner* declined to extend sovereign immunity to Tennessee because doing so would be
12 appreciably different from extending immunity to an Alabama agency.²⁴¹

13 The *Faulkner* case also emphasized the forum state's interest in protecting its citizens:

14 In determining whether to apply comity, we must remain sensitive to
15 the rights of our own citizens and our duties and obligations to them.
16 [Citation.] We cannot, absent some overriding policy, leave Alabama
17 residents without redress within this State, relating to alleged acts of
18 wrongdoing by an agency of another State, where those alleged acts
19 are associated with substantial commercial activities in Alabama.²⁴²

20 Comity is a matter of voluntary choice, not compulsion. Here Nevada has substantial
21 interests to protect. Its interest in providing a forum to injured Nevada residents, its interest in
22 regulating conduct within Nevada as well as conduct intended to affect Nevada citizens, its
23 interest in being a no-income-tax state in proximity to high-tax states, and its interest in

24 ²³⁸ 242 Kan. at 448, 749 P.2d at 10.

25 ²³⁹ 242 Kan. at 447-48, 749 P.2d at 9-10.

26 ²⁴⁰ 627 So. 2d 362 (Ala. 1992), *cert. denied*, 510 U.S. 1101 (1994).

27 ²⁴¹ *Id.* at 366.

28 ²⁴² *Id.* at 366 (emphasis added and citation omitted).

1 promoting the interstate travel and migration that has made Las Vegas the fastest growing
2 metropolitan area in the U.S. all militate toward rejecting the FTB pleas for comity.²⁴³

3 **C. The FTB's arguments pertaining to Nevada's gaming industry are inapposite**
4 **and misleading.**

5 The FTB argues that Hyatt's case should be dismissed as a matter of comity, at least in
6 part, because of Nevada's "special interest" in protecting the gaming industry.²⁴⁴ The FTB claims
7 that the State Gaming Control Board and the Nevada Gaming Commission "are the Nevada
8 agencies most analogous to the FTB," apparently because both agencies have a connection to
9 each respective state's taxes. Such a superficial comparison and analogy crumbles under the
10 simplest analysis.

11 **1. Nevada's gaming agencies obtain permission and consent to investigate.**

12 First and foremost, the inquiry and investigative powers of Nevada's gaming agencies are
13 based on the *express request, consent, and authorization* of the applicant. Contrast this to the
14 FTB's actions in this case, which were taken surreptitiously, without Hyatt's knowledge (let alone
15 express consent), and in violation of both FTB policies and California law. The Gaming Control
16 Board's Request to Release Information is signed by *all* license applicants and includes, *inter*
17 *alia*, complete releases, permission to obtain, review, and discloses confidential information,
18 acknowledgment of the privilege being sought, and an indemnity.²⁴⁵ It includes an express
19 acceptance of the risks of public notice, embarrassment, criticism, and possible financial loss.

20 The Release and Indemnity of All Claims applies to the State of Nevada, the Gaming
21 Control Board, the Gaming Commission, the Nevada Attorney General, and all of their members,
22 agents, and employees in their individual and representative capacities, from "any and all manner
23 of actions, causes of action, suits, debts, judgments, executions, claims and demands whatsoever,
24 known or unknown, in law or equity, which Applicant ever had, now has, may have, or claim to

25
26 ²⁴³ FTB Writ Petition, p. 36.

27 ²⁴⁴ FTB Writ Petition, pp. 35-37.

28 ²⁴⁵ The Request to Release Information is included in Hyatt's supplemental appendix (Supp. Hyatt
Appendix, Vol. XIII, Exh. 42).

1 have . . . arising out of or by reason of the processing or investigation of or other action relating
2 to this application."²⁴⁶

3 The FTB has presented no such authorization for the simple reason that none exists.
4 There simply is no comparison between (1) the Gaming Control Board and the Gaming
5 Commission's consensual *carte blanche* authority to investigate all aspects of an applicant's life
6 to determine whether the applicant is entitled to receive the privilege of a gaming license from
7 the State of Nevada; and (2) the FTB's non-consensual invasion of Hyatt's privacy, especially
8 *after* it assured Hyatt that his private information would remain private, to coerce Hyatt into
9 paying higher taxes, interest, and penalties to the State of California many years *after* the tax
10 years in question. *An FTB audit is not an investigation requested by the taxpayer to determine if*
11 *the taxpayer can have the privilege of not being deemed a California resident on a going-*
12 *forward basis.*

13 2. A Nevada gaming license is a privilege — unlike an FTB tax audit.

14 Next, the State of Nevada, by statute and by decisions of this Court, has established that a
15 gaming license is a *privilege* and that the State's interest in protecting the integrity of the
16 licensing process and the gaming industry is paramount. Nevada Rev. Stat. 463.0129(2)
17 provides that no applicant for a license or commission approval has any right to such license or
18 approval, and that "[a]ny license issued or other commission approval granted pursuant to the
19 provisions of this chapter or chapter 464 of Nevada Rev. Stat. *is a revocable privilege*, and no
20 holder acquires any vested right therein or thereunder." The FTB fails to cite the leading Nevada
21 case, *Nevada v. Rosenthal*:²⁴⁷

22 It is established beyond question that *gaming is a matter of privilege*
23 *conferred by the State rather than a matter of right.*

24 * * *

25 The legislature has been sensitive to these basic concepts. Members
26 of the Gaming Control Board and Gaming Commission must have

27 ²⁴⁶ The Gaming Control Board's Release and Indemnity of All Claims is included in Hyatt's supplemental
28 appendix (Hyatt Appendix, Vol. XIII, Exh. 43).

²⁴⁷ 93 Nev. 36, 559 P.2d 830, appeal dismissed, 434 U.S. 803 (1977).

1 special qualifications suited to the important duties with which they
2 are charged. *Their powers are comprehensive.*²⁴⁸

3 As before noted, *gaming is a privilege conferred by the state and does*
4 *not carry with it the rights inherent in useful trades and*
5 *occupations.*²⁴⁹

6 No such statutory or case law pronouncements are found in the FTB Petition to elevate
7 the FTB in California to the same or similar status as the Gaming Control Board and the Gaming
8 Commission within the State of Nevada.

9 **3. Unlike the FTB, Nevada's gaming agencies do not commit torts in other**
10 **states.**

11 Finally, because of the importance of the gaming industry to the State of Nevada, Hyatt
12 acknowledges that this Court and the legislature have given the Gaming Control Board and the
13 Gaming Commission broad investigative powers and authority, as the FTB points out in its writ
14 petition. But the FTB uses that reality to send a thinly-disguised threat, apparently to this Court
15 and to the entire State of Nevada: "If Nevada's courts [i.e., the Nevada Supreme Court] decline to
16 extend comity to California in Hyatt's case, then other forums [i.e., the State of California] will
17 likely deny comity to Nevada in similar tort suits against the Gaming Control Board for doing its
18 job. That is a Pandora's box that could cripple the State of Nevada's ability to regulate the
19 Nevada gaming industry effectively, and protect state revenues."²⁵⁰

20 The FTB believes that this Court should establish a rule that Nevada must cower to the
21 FTB's agents, permitting them to commit torts willy-nilly against Nevada residents, because this
22 Court must, first and foremost, protect the express powers of the Gaming Control Board and the
23 Gaming Commission so that their agents can also commit torts against California residents who
24 voluntarily seek a Nevada gaming license. The simple response to this threat is that Nevada's
25 agents do not proceed with any investigation without the applicant's express authority and
26 appointment as his agent.

27 ²⁴⁸ 93 Nev. at 40-41 (emphasis added and citation omitted).

28 ²⁴⁹ 93 Nev. at 44 (emphasis added).

²⁵⁰ FTB Writ Petition, p. 37.



COPY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

COPY

GILBERT P. HYATT,

Plaintiff,

vs.

CALIFORNIA STATE FRANCHISE
TAX BOARD,

Defendant.
.....

CASE NO. A-382999

DEPT. NO.

Transcription of
Proceedings

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FILED

BEFORE THE HONORABLE JESSIE WALSH, DISTRICT COURT JUDGE

**JURY TRIAL - DAY 72
(PENALTY PHASE)**

MONDAY, AUGUST 11, 2008

APPEARANCES:

FOR THE PLAINTIFF:

PETER C. BERNHARD, ESQ.
MARK HUTCHISON, ESQ.
DONALD J. KULA, ESQ.

FOR THE DEFENDANT:

PAT LUNDVALL, ESQ.
CARLA B. HIGGINBOTHAM, ESQ.
JAMES BRADSHAW, ESQ.

COURT RECORDER:

VICTORIA BOYD
District Court

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1 554 million.

2 Q Okay. Now, you're aware that Mr. Hyatt has obtained
3 a verdict from the jury of a little in excess of \$138,000,000?

4 A Yes.

5 Q That, if applied against the FTB would -- is a huge
6 part of its budget, isn't it?

7 A It's a very large part of its budget. It wouldn't
8 be applied against the FTB, however.

9 Q Explain that.

10 A Well, as far back as when I was working at the
11 Legislative Analyst Office and right when I was working for the
12 senate republicans and now today, I have been through many tight
13 state budgets. And in every single one we look hard at the
14 prospect of cutting every department and every program, and we
15 always look at FTB.

16 And we generally find that when we look at cutting
17 the Franchise Tax Board's budget, we actually lose more revenue
18 in our projections from not having the services of those various
19 people who work at FTB, than we save in money by not having
20 those people working.

21 So in other words, it's a real loser for us to cut
22 FTB. It's not that we grow them. We can't just keep adding,
23 you know, massive numbers of employees to FTB and always get
24 more money. But we try to staff them at an optimal level so
25 that they're collecting the correct amount of tax. And to do

1 that we need a certain number of people.

2 And every time we try to pair that down, we pretty
3 much come up against this realization that by doing that we're
4 going to lose revenue. So if we were to -- if somebody was to
5 tell me we -- we have to pay 138 million it's FTB's area, I -- I
6 would look at that, and I would try to find a way to cut FTB,
7 but my past experience, even as recently as this year's budget,
8 we tried that.

9 We went to -- we had in our budget -- one of the
10 concepts in our budget was to cut state operations and other
11 parts of state government by ten percent, just across the board.

12 We applied that to the Franchise Tax Board. We went to them
13 and said we have to get ten percent out of you because we have
14 to get ten percent out of everybody.

15 We sort of knew what we were going to find because
16 we've been through this drill many times. And what we found was
17 we would lose money. We would lose a lot more than we would
18 save. So we worked out with them that we could -- they could
19 achieve their ten percent target by us actually adding money to
20 their operational budget in targeted ways so that they could
21 collect more revenue.

22 So they were able to help us with our budget problem
23 by expanding their work force a little bit. It wasn't much.
24 Maybe a hundred -- I'm not sure the exact number.

25 Q Mr. Sjoberg indicated in his testimony that

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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Julie Lord
Julie Lord, Transcriber

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