

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 \* \* \* \*

3 FRANCHISE TAX BOARD )  
4 OF THE STATE OF CALIFORNIA, )  
5 Appellant/Cross-Respondent, )  
6 vs. )  
7 GILBERT P. HYATT, )  
8 Respondent/Cross-Appellant. )  
9 )

No. 53264

Electronically Filed  
Aug 06 2009 03:31 p.m.  
Tracie K. Lindeman

10 **OPPOSITION TO RESPONDENT GILBERT P. HYATT'S**  
11 **MOTION TO STRIKE *AMICUS CURIAE* OF THE STATE OF UTAH and**  
12 **MOTION TO STRIKE NOTICE OF CONCURRENCE**

13 This court should deny Respondents' motions to strike. This Memorandum deals  
14 specifically with the Motion to Strike the Amicus Brief of the State of Utah.

15 I. THE BRIEFS *AMICUS CURIAE* ARE PROPER UNDER NRAP 29

16 The first sentence of NRAP 29 provides: "A brief of amicus curiae may be filed  
17 only if accompanied by written consent of all parties, or by leave of the court granted on  
18 motion or at the request of the court, except that the consent shall not be required when  
19 the brief is presented by . . . a state, territory or commonwealth." With respect to the  
20 brief *amicus curiae* filed by Utah, and joined by a number of other states, NRAP 29 has  
21 already determined that such briefs are proper and appropriate. The rule contemplates  
22 that neither the consent of the parties or leave of the court is required. Amicus filed its  
23 brief in reliance on the rules of the court.

24 Respondent also argues that the briefs should be struck because they are "friends  
25 of the Appellant Franchise Tax Board" not "friends of the court". Respondent further  
26 ignores NRAP 29 which provides in part: "Save as all parties otherwise consent, any  
27 amicus curiae shall file its brief within the time allowed the party whose position as to  
28 affirmance or reversal the amicus brief will support unless the court for cause shown

1 shall grant leave for later filing; in which event is shall specify within what period an  
2 opposing party may answer." Under Respondent's logic any brief filed in support of the  
3 position of one of the parties would be a brief as a "friend" of that party. The fact the  
4 rule contemplates that an amicus brief may support either affirmance or reversal is  
5 evidence that supporting one party or the other is not grounds for objection to the brief,  
6 but that it is expected that the interest of the amici may align with one party or the other.

7 II. RESPONDENT MISCHARACTERIZES THE NATURE OF THE BRIEFS AS  
8 ADDRESSING QUESTIONS ALREADY ANSWERED BY THIS COURT  
9 AND THE UNITED STATES SUPREME COURT

9 The briefs of *amicus curiae* accept the rulings of this court and the United States  
10 Supreme Court. No argument is made that the California Franchise Tax Board should  
11 not be subject to the jurisdiction of the Nevada courts. They do argue, however, that the  
12 manner in which the district court allowed this case to be tried to the jury, and the  
13 damages that were awarded, did not follow the benchmarks established by those  
14 decisions.<sup>1</sup> It is not the prior rulings of this court or the United States Supreme Court  
15 which are to be reviewed on this appeal, but the application of those rulings at trial by  
16 the district court. Those are questions which are particularly in the province of this  
17 court.

18 *Amicus curiae* do raise an issue not considered previously because the trial had  
19 not yet occurred, i.e. whether the action of the district court in the trial of this matter and  
20 the damages awarded rise to such a level as to represent "hostility" to the State of  
21 California and the Franchise Tax Board so as to constitute a violation of the Full Faith  
22 and Credit Clause of the United States Constitution. Arguments regarding application of  
23 the Full Faith and Credit Clause to dismiss this matter were made by *amicus curiae* to  
24 the United States Supreme Court but were not considered by it, *Franchise Tax Board v.*

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25  
26 <sup>1</sup> There is one ruling of this court in this case which *amicus curiae* have noted that this court  
27 might address, whether the alleged "bad faith" of appellant Franchise Tax Board could be  
28 considered. This request is based upon a decision of this court, *Martinez v. Maruszczak*, 123  
Nev. 433 (2007) and its progeny which issued after its previous consideration of this matter, but  
was ignored by the district court.

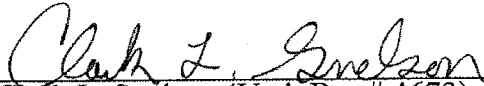
1 *Hyatt*, 538 U.S. 488, at 497, because at the time of its consideration of this case the  
2 Nevada courts had demonstrated "sensitivity" to the sovereign status of a sister state. *Id.*  
3 at 499. This issue is of particular concern to the States as it has the potential to impact  
4 future relationships among sister states.

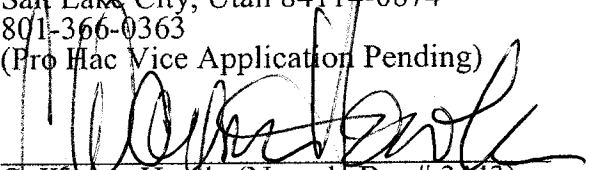
5 III. CONCLUSION

6 Respondent Hyatt in his Conclusion argues with respect to the role of *amicus*  
7 *curiae* that "the process should be limited to input from different perspectives on policy  
8 matters not adequately being addressed by the parties at the bar." That is precisely the  
9 role undertaken by *amicus curiae* in this case. They are not parties to the matter, they do  
10 not directly bear the burden, or receive the benefits of the verdict. They have a different  
11 and a unique perspective. *Amici*, and those joining, are sovereign States whose citizens,  
12 employees and agents have interactions with its neighboring states in matters ranging  
13 from personal to official state business. The interest of the States may align with the  
14 interests of California generally in this appeal, yet our interests are unique to States as  
15 sovereign entities. It is appropriate for the court to hear from this perspective. It is for  
16 this very reason that NRAP 29 grants to the States the unconditioned right of filing as an  
17 *amicus*.

18 Respondent Hyatt's motions to strike should be denied.

19 Dated this 6<sup>th</sup> day of August 2009.

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**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I hereby certify that I am an employee of the Utah Attorneys General Office, and that I served true and correct copies of the foregoing OPPOSITION TO RESPONDENT GILBERT P. HYATT'S MOTION TO STRIKE *AMICUS CURIAE* OF THE STATE OF UTAH and MOTION TO STRIKE NOTICE OF CONCURRENCE on this 6th day of August, 2009 by depositing said copies with Federal Express for overnight delivery, upon the following:

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