IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 80884

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
THE HONORABLE TIERRA JONES, District Judge, Department X

APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 8 OF 17

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	Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019		
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 8 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;

_____X_____ via Federal Express;

_____ via hand-delivery;

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This Court's June 13, 2001 Order concluded that the record proves FTB did nothing more than conduct a standard investigation to determine Hyatt's residency status pursuant to its statutory authority. Hyatt now has the burden to prove the Court overlooked or misapprehended any material point of law or fact. Hyatt has failed to meet that burden. His Petition and Supplemental Petition are nothing more than a condensed version of his Answers to FTB's two writ petitions and provide nothing new.

Contrary to Hyatt's arguments, this Court has the authority to decide the case on Rule 56 grounds. He has not presented any fact or point of law that was overlooked or misapplied by the Court to justify a rehearing under Nev. R. App. 40.

1. THE COURT PROPERLY DECIDED THE CASE ON RULE 56 GROUNDS

The Court decided the case in its June 13th order, admittedly not on the constitutional challenges at the heart of FTB's writs, but on the adequate alternative state law ground that Hyatt had failed to satisfy his burden under Nev. R. Civ. Rule 56. After all, a necessary threshold to the FTB's constitutional and jurisdictional issues was any admissible evidence of actual tortious misconduct. The factual issues and requirements are the same whether the remedy sought is a writ precluding the district court from proceeding with the case on constitutional and jurisdictional grounds or an order granting summary judgment on the merits. The Court saw no reason to address the constitutional and jurisdictional issues because:

> There is no evidence, aside from Hyatt's own conclusory allegations, that Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority. Merely because a state agency is performing an investigation in the course of its duties does not automatically render its acts an invasion of privacy or otherwise intentionally tortious absent evidence of unreasonableness or falsity of statements. No such evidence has been presented in this case.
>
> There is also insufficient evidence of Hyatt's remaining claim of negligent misrepresentation. As with Hyatt's claims for intentional torts, there is no evidence that Franchise Tax Board supplied any false information regarding confidentiality or business relations. Order at pages 4-5 (footnote omitted).

Since Hyatt is merely rearguing issues he previously argued, rehearing should be denied.

If, for some reason, the Court should decide to reverse its June 13th decision, then, of course, the State of California respectfully requests the Court to decide the remaining constitutional and evidentiary issues.

2. THE COURT CORRECTLY HELD THAT FTB CONDUCTED A STANDARD INVESTIGATION TO DETERMINE RESIDENCY STATUS

As the FTB previously showed at pages 5-16 of its July 7, 2000 Jurisdiction Writ[1] (FTB App. Ex. 1), and at pages 3-8 of its December 28, 2000 Reply in Support of Jurisdiction Writ, (FTB App. Ex. 2), FTB employees took various actions during the audit to try to verify Hyatt's change of residency claim. FTB auditors requested relevant information from Hyatt's taxpayer representatives. Some FTB information requests required multiple request letters to Hyatt's representatives; some FTB information requests were never satisfied despite repeated requests. Some information that Hyatt provided raised more questions with FTB auditors than it answered. (See Cox Affidavit, FTB App. Ex. 3 at ¶¶ 7-22).

The essential issue of the audit was the effective date of termination of Hyatt's California residency. (Cal. Rev. & Tax Code §§17014, *et. seq.*). Critical to that was Hyatt's whereabouts between September 24, 1991 (the final date he claimed to have moved to Nevada), and October 20, 1991 (the date his rental of his Las Vegas apartment began). The exact date of termination of Hyatt's California residency was important because Cal.Rev. & Tax Code § 17016 raised a presumption of full-year residency if the termination date was after September 30th, and Hyatt had received $40 million of income from two of his Japanese licensees during the fourth quarter of 1991.

The auditor's attempt to verify Hyatt's claim of September 24th as the date he moved to Nevada is at the heart of Hyatt's allegations of FTB misconduct. Contrary to Hyatt's conclusory allegations, the undisputed evidence concerning the auditor's actions are as follows:

1. In her August 2, 1995 tentative position letter, the auditor explained her understanding of the facts at that time and specifically informed Hyatt's taxpayer representative that she had no information as to where Hyatt resided from September 24, 1991 through November 1, 1991. (FTB App. Ex. 4 at 05947,

[1]For the Court's convenience, copies of those portions of the record cited by FTB are submitted herewith in FTB's Appendix of Exhibits in Answer to Rehearing Petition, hereafter "FTB App."

05952, 05954 and 05955). She concluded the letter with a request that, if her understanding of the facts was incorrect, she be provided with additional information since her position was still only tentative. (*Id.* at 05975).

2. On August 29, 1995, Hyatt's representative responded *only* that while Hyatt's lease commenced on November 1, 1991, he actually moved in on a paid pro-rated rent on October 20, 1991. (FTB App. Ex. 5 at 05992 at fn. 3).

3. On August 31, 1995, the auditor responded, *again* specifically asking where Hyatt lived from September 24,1991, until October 20, 1991, and asking for documentation such as credit card statements and receipts to substantiate where Hyatt resided. (FTB App. Ex. 6 at 06012).

4. On September 22, 1995, Hyatt's representative simply restated that Hyatt had signed the lease and moved into his apartment on October 20, 1991. (FTB App. Ex. 7 at 06036-37).

5. On September 26, 1995, the auditor *again* specifically requested documents and information to substantiate where Hyatt resided from September 24, 1991 through October 20, 1991. (FTB App. Ex. 8 at 06170).

6. On October 13, 1995, Hyatt's representative merely stated that Hyatt was researching that period to find receipts. (FTB App. Ex. 9 at 06175).

No such receipts or other information concerning the September 24 - October 20 time period were provided to FTB during the audit. Nor did Hyatt ever tell the auditor during the audit *where* he resided during that period. Against this background, FTB had discovered that Hyatt had not registered to vote in Nevada until November 27, 1991, declaring his apartment as his residence. (FTB App. Ex. 10). Hyatt thereafter on July 5, 1994 changed his voter registration, swearing on penalty of perjury that he resided at a different address, 5441 Sandpiper Road in Las Vegas, a residence that was owned by his taxpayer representative, Michael Kern. Hyatt had never resided there. (FTB App. Exs. 11 (Cox Affidavit ¶35), and 22 (Leatherwood Affidavit ¶12)). Necessarily, the auditor, Sheila Cox, had no choice but to find independent corroboration of Hyatt's Nevada residence. Notwithstanding all of that, she ultimately gave Hyatt the benefit of her doubts and concluded that he terminated his California residency on April 2, 1992, when he purchased a house on Tara Avenue in Las Vegas.

Hyatt alleges that the FTB's attempt to verify his claim of residency change was completely improper and part of an FTB conspiracy against him. The essence of his entire case is that he was entitled to special treatment during the audit. In the final analysis, Hyatt's case

boils down to the simple proposition that the FTB was obligated to accept his change of residency claim and should never have audited him, and by attempting to verify the effective date of termination of his California residency in light of Hyatt's failure to provide the needed information, the FTB violated his privacy and committed various "torts."

This Court correctly saw through Hyatt's conclusory allegations; he had not met his threshold burden under Rule 56 to present evidence to support any of his tort claims.

3. THE MERITS OF HYATT'S TORT CLAIMS WERE BEFORE THE COURT

A central theme of Hyatt's rehearing argument is his complaint that the merits of his tort claims were not before the Court. Hyatt begins his Petition for Rehearing:

> Hyatt sued the FTB for torts based on its invasion of his privacy and its fraudulent conduct. Since the Court decided the Writ Petition on issues not raised, briefed or argued, Hyatt has minuscule space to describe – *for the first time to this Court* - his specific claims and the evidence that has been overlooked or misapprehended by the Court. (Page 1, lines 6-9). (Emphasis in original).

In his Supplemental Petition, Hyatt repeats:

> *Before* the Court *rules* in a writ petition on an issue which it declares as determinative of Hyatt's entire case, and which he was not *allowed* to address... he should be given the right to be heard on the issue. Page 14, lines 13-16. (Emphasis in original).

Once again, however, Hyatt is saying whatever he thinks will advance his position, regardless of the truth or his prior statements in this very case. As with Hyatt's allegations of tortious misconduct, those statements are not true. They are just more of his distortion and misrepresentation that is completely refuted by the record. The lack of admissible evidence to support any of Hyatt's tort claims was raised by FTB before this Court - *and Hyatt admitted the petition would stand or fall based on his evidence.*

The FTB filed its first writ (the "Discovery Writ") on January 27, 2000. At pages 3-6, FTB provided a short statement of background facts leading up to the discovery disputes that caused FTB to file the Discovery Writ. (FTB App. Ex. 12). Hyatt filed his Answer to the Discovery Writ on July 7, 2000. At pages 1-6, he provided his summary of argument addressed to the discovery dispute. (FTB App. Ex. 13). But then, at pages 9-23, Hyatt presented his

version of the merits of his tort claims. *Id.* He even included in his appendix, his entire opposition to FTB's summary judgment motion that he had filed in the district court.[2] Hyatt clearly put the merits of his entire case before this Court. At page 15, lines 6-10 and footnote 48:

> While alleged in various forms, Hyatt's invasion of privacy claims are all based on the FTB's mishandling and illegal and improper disclosures of Hyatt's private and confidential information. The legal and factual basis for the invasion of privacy claims are set forth in detail in Hyatt's opposition to the FTB's ill-fated motion for summary judgment. [48]
>
> [48] Hyatt's opposition papers to the FTB's Motion for Summary Judgment are attached as Exhibits 11 through 15, to Vols. VII and VIII, to the accompanying Appendix of Exhibits filed with the Supreme Court.

Page 15, lines 11-13:

> Hyatt's fraud and negligent misrepresentation claims are based on both the FTB's written and verbal, but, promises to keep Hyatt's private information confidential and the FTB's written, but false, promises to conduct a fair and unbiased audit of Hyatt.

Page 15, line 25, page 16, line 2 and footnote 49:

> The legal and factual basis for these conclusions are set forth both in Hyatt's opposition to the FTB's motion for summary judgment as well as the Hyatt Appendix re Crime-Fraud filed in conjunction with Hyatt's briefing on the discovery motion at issue in this writ Petition.[49]
>
> [49] Hyatt's Appendix re Crime-Fraud is attached as Exhibit 4, to Vol. II of the accompanying Appendix of Exhibits filed with the Supreme Court.

Page 16, lines 3-5:

> The abuse of process and outrage claims are also based on misconduct by the FTB during the course of the audits. The legal and factual basis of these claims are also set forth in Hyatt's opposition to the FTB's motion for summary judgment.

On August 8, 2000, FTB replied to Hyatt's Answer to the Discovery Writ. At pages 2-11 (FTB App. Ex. 14), FTB showed Hyatt's allegations of tortious misconduct were not true:

> FTB rejects Hyatt's spin and obfuscation as untrue, and refers the Court to the statement of facts set forth in FTB's Second Writ in Case No. 36390.
>
> It is important to remember that while Hyatt treats his allegations as established fact, they are nothing more than allegations. Hyatt's Answer is replete with citations to his own affidavit and the affidavits of his representatives. . . Hyatt's

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[2] *See, Id.* at page 9, footnote 16 at line 26 ("Hyatt's opposition papers to the FTB's Motion for Summary Judgment are attached. . ."), and page 11, footnote 27 at lines 23-24 (". . . Hyatt has attached . . . Hyatt's opposition to the FTB's summary judgment motion").

"affidavits" are really nothing more than self-serving conclusory arguments in flagrant violation of Nev.R.Civ.P. Rule 56(e). *Id.* at page 3, lines 3-16.

Previously, on July 7, 2000, FTB had filed the Jurisdictional Writ (Docket No. 36390). At pages 5-22, FTB provided its statement of facts based upon the undisputed events that occurred during the audit. (FTB App. Ex. 15).

Hyatt answered the Jurisdictional Writ on October 13, 2000. At pages 2-4 he provided another summary of his tort claims and at pages 10-20 he restated his allegations of tortious misconduct. (FTB App. at Ex. 16). In particular, Hyatt said at page 10, lines 11-12:

> "The FTB's writ petition must stand or fall *on Hyatt's evidence* because the FTB asserts that it is not liable as a matter of law . . .". (Emphasis added).

Hyatt's "evidence" upon which FTB's writ petition ultimately prevailed was his entire opposition to the summary judgment motion he had reasserted before this Court (which still failed to comply with Rule 56). That is the same "evidence" upon which Hyatt seeks rehearing.

The FTB filed its Reply in Support of the Jurisdictional Writ on December 28, 2000. At pages 3-8 (FTB App. Ex. 17), FTB once again showed that Hyatt's tort claims were based upon unsupported conclusory allegations rather than evidence of facts.

Both writ petitions were consolidated by Order dated September 13, 2000. Oral argument was conducted on February 8, 2001. Despite being asked several times "Where is the tort?" Hyatt was not able to point to a single fact to support any of his tort claims.

The record is clear that the merits of Hyatt's tort claims were before the Court.

4. HYATT CONTINUES HIS STRATEGY OF ARGUING CONCLUSORY ALLEGATIONS RATHER THAN PRESENTING EVIDENCE OF MATERIAL FACTS

At page 4 of its June 13th Order, this Court admonished that:

> Hyatt then has the burden of demonstrating *specific evidence* indicating a genuine dispute of fact. (Emphasis added, footnote omitted).

Despite the Court's admonishment, Hyatt reasserts his improper affidavits to support his rehearing request. FTB renews its objections as previously set forth at page 3 of FTB's August 8, 2000 Reply in Support of Discovery Writ and Exhibit 1 thereto. (FTB App. Ex. 19). All of

Hyatt's affidavits consist of almost nothing but conclusory allegations and argument. Then, Hyatt cites to his improper affidavits as "evidence" to support his rehearing request.

In addition to reasserting his improper affidavits, and in further disregard of the Court's admonishment, Hyatt cites to his own prior arguments as further "evidence" and constantly misrepresents the actual evidence he does cite. Worst of all, Hyatt continues to advance an outrageous personal attack against the FTB auditor based upon nothing more than conclusory allegations and distortions rather than specific, admissible evidence.

In his attacks against the auditor, Hyatt tries to make much of certain deposition testimony by a fired FTB employee, Candace Les. But most of Les' deposition testimony cited by Hyatt is inadmissible and irrelevant. A key part of her testimony, however, actually exonerates the FTB auditor from Hyatt's allegations of improper motive and bad faith.

Candace Les and the FTB auditor (Sheila Cox) were in Las Vegas in November 1995 when Les testified they stopped at Hyatt's house. (FTB App. Ex. 20; Les Depo pg. 262, lns. 11-14). That was five months before even the first Notice of Assessment was issued on April 23, 1996. (FTB App. Ex. 21). While Les said: "I knew the audit was over" (FTB App. Ex. 20; Les Depo pg. 273, lns. 17-18), she was mistaken because the audit was still open. The fact that the audit was still open completely negates Hyatt's allegations that the November 1995 drive-by was improper or that Cox was violating FTB procedures in checking out Hyatt's house.

More importantly, when asked what Cox told her after Cox allegedly returned to their car, Les testified: *"She did say that she didn't think he lived there."* (FTB App. at 20; Les Depo pg. 270, lns. 20-24). (Emphasis added).

Despite not believing Hyatt was living at his Las Vegas house even as late as November 1995, the FTB auditor still gave Hyatt the benefit of her doubts by giving him April 2, 1992 (the date escrow closed) as the effective date of termination of his California residency. For that, Hyatt villanizes her and accuses the FTB of conducting an "extortive" and "tortious" audit. The auditor was simply trying to do her job and get the facts concerning Hyatt's move because he would not give them to her. The record is undisputed that FTB conducted an audit; there is no

admissible evidence that it committed any tort. Nothing Hyatt presents in his rehearing request shows that the Court overlooked or misapprehended anything.

5. HYATT'S PETITION MERELY RESTATES HIS PRIOR ERRONEOUS ARGUMENTS

Hyatt's Petition repeats nearly verbatim his prior erroneous arguments:

A. Hyatt wrongly argues at pages 6-8 of his Petition that FTB conducted a one-sided fraudulent audit.

i) Hyatt previously made this argument in his July 7, 2000 Answer to Discovery Writ at pages 58-61, (FTB App. Ex. 23); and October 13, 2000 Answer to Jurisdictional Writ at pages 13-14. (FTB App. Ex. 24).

ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ at pages 2-7; (FTB App. Ex. 25); July 7, 2000 Jurisdiction Writ at pages 5-16, (FTB App. Ex. 26); and December 28, 2000 Reply in Support of Jurisdiction Writ at pages 3-8. (FTB App. Ex. 27).

iii) As FTB showed, it simply audited Hyatt. The conduct he complains of resulted from his own failure to provide the information the FTB requested from him in order to verify his claim of change of residency. For example, as shown at pages 2-3, *supra*, Hyatt refused to tell the auditor where he lived September 24, 1991 - October 20, 1991 despite repeated requests for that information; Hyatt instead provided various claimed departure dates from California to Nevada; he did not move into his apartment until well after his claimed move date; he provided a false Nevada voter registration, and his patent license agreements signed after his claimed move suggested he was still in California.

B. Hyatt wrongly argues at pages 8-9 of his Petition that FTB attempted to extort a settlement as an alternative to the audit becoming publicly known.

i) Hyatt previously made this argument in his July 7, 2000 Answer to the Discovery Writ at pages 61-62, (FTB App. Ex. 28); and his October 13, 2000 Answer to the Jurisdiction Writ at page 14. (FTB App. Ex. 29).

ii) FTB responded in its August 8, 2000 Reply in Support of the Discovery Writ at pages 7-9, (FTB App. Ex. 30); and its December 28, 2000 Reply in Support of Jurisdiction Writ at page 7. (FTB App. Ex. 31).

iii) As FTB showed, any settlement would have been a matter of public record requiring disclosure of Hyatt's name, total amount in dispute, amount of settlement, explanation of why such a settlement would be in the best interests of the State of California and an opinion from California Attorney General as to the overall reasonableness of the settlement. Cal.Rev. & Tax Code §19442. Moreover, the FTB lawyer who allegedly made the threat had no authority to even negotiate a settlement. Yet Hyatt claims she threatened to make Hyatt's audit public if he did not settle.

C. Hyatt wrongly argues at pages 5 and 9 of his Petition that FTB destroyed his patent licensing business.

i) Hyatt previously made this argument in his July 2, 2000 Answer to the Discovery Writ at pages 12-13, (FTB App. Ex. 32); and October 13, 2000 Answer to Jurisdiction Writ at pages 11-13. (FTB App. Ex. 33).

ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ at pages 9-10, (FTB App. Ex. 34); and December 28, 2000 Reply in Support of Jurisdiction Writ at pages 6-7. (FTB App. Ex. 35).

iii) As FTB showed, Hyatt's patent licensing business died when his patents were successfully challenged, and, in effect became worthless. *See Hyatt v. Boone*, 146 F.3d 1348 (Fed.Cir. 1998). Texas Instruments had challenged Hyatt's patent by filing an "interference" action in the U.S. Patent Office in April 1991, even before Hyatt's alleged move to Nevada. As Hyatt's own representative during the audit, Mr. Cowan, said in his October 13, 1995 letter to the auditor: "Many companies who produce products that might infringe on patents held by others . . . *wait until the validity of the patent has been tested in court.*" The Japanese companies had paid Hyatt before his patents became worthless; (FTB App. Ex. 36; PBKT 06176 at pg. 2, fn. 1). (Emphasis added).

D. Hyatt wrongly argues at page 5 of his Petition that FTB improperly disclosed to Hyatt's Japanese licensees that he was being investigated.

i) Hyatt previously made this argument in his Answer to Discovery Writ at page 13, (FTB App. Ex. 37); and his October 13, 2000 Answer to the Jurisdiction Writ at pages 11-13, (FTB App. Ex. 38).

ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ at pages 9-10, (FTB App. Ex. 39); and its December 28, 2000 Reply in Support of Jurisdiction Writ at pages 6-7, (FTB App. Ex. 40).

iii) As FTB showed, both the Fujitsu and Matsushita agreements contained the identical provision in Paragraph 7.4 authorizing disclosure of their terms and conditions, including the payment amounts, to any governmental agency or as otherwise required by law. (FTB App. Ex.41 and 42). All the FTB did was send a single page letter to each company asking only what date they wire transferred payments to Hyatt. (FTB App. Ex. 43 and 44). Sheila Cox had written Mr. Kern on March 1, 1995: "I need a copy of the bank statement to determine the dates that the wire transfers were made." (FTB App. Ex. 45). She repeated that request on March 23, 1995. (FTB App. Ex. 46). A formal legal demand for the information was made on April 11, 1995. (FTB App. Ex. 47). On April 13, 1995, Mr. Kern finally responded but provided only the following statement: "Union Bank – Account Name Pretty, Schroeder, Brueggman and Clark Client Trust Account. This account appears to be a trust account ... and Mr. Hyatt does not have access to this information." (FTB App. Ex. 48). Faced with such an evasive response, Cox had no other choice and wrote directly to the Japanese companies asking merely what dates they wired their payments to Hyatt.

E. Hyatt continues his self-serving argument that he expected an audit with no "public disclosure" of his "private information" at pages 2-4 of his Petition.

i) Hyatt previously made this argument in his July 7, 2000 Answer to Discovery Writ at pages 12-13 and 62-64, (FTB App. Ex. 49); and in his

October 13, 2000 Answer to the Jurisdiction Writ at pages 2-3 and 12-13 (FTB App. Ex. 50).

ii) Hyatt's personal expectations about how the audit would be conducted are irrelevant. FTB documented every oral and written statement that FTB made to Hyatt or his representatives. (FTB App. Ex. 3 at ¶¶ 32 and 33 (Cox Affidavit) and FTB App. Ex. 51 (Exhibits 2, 4, 7, 9, 13, 28 and 29 to Cox Affidavit). None of those statements constituted a promise to Hyatt that the FTB would not disclose to third parties the basic information FTB learned during the audit (his "secret" Las Vegas address), or the basic information FTB already knew before the audit (his name and social security number), when such disclosures were used to identify him to third party sources of information needed to verify his change of residency.

iii) Even if any statement had constituted such a promise, California law put Hyatt on notice that such disclosures of identifying information to third parties could happen during an audit, negating any justifiable reliance on any such promise:

> A return or return information may be disclosed in a judicial or administrative proceeding pertaining to tax administration, if any of the following apply:
>
> > (a) The taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability... .Cal. Rev. & Tax. Code § 19545.

F. Hyatt wrongly argues at pages 4-5 of his Petition that FTB illegally disclosed Hyatt's "private facts," his "secret" address and his social security number.

i) Hyatt previously made these arguments in his October 13, 2000 Answer to Jurisdiction Writ at pages 40-47. (FTB App. Ex. 52).

ii) Any disclosure of Hyatt's tax return information (name, address, social security number and fact of an audit) was pursuant to the FTB's administration of California's income tax and was authorized by law. Cal. Rev. & Tax. § 19545. The undisputed evidence shows that the FTB auditor was only trying to verify the truthfulness of Hyatt's claim of residency change. Every disclosure of which Hyatt complains was aimed at obtaining information the auditor needed to do her job after Hyatt's failure to give her the information she needed. As a matter of law, it is not reasonable to expect that Mr. Hyatt's name, address and social security number would not be used to identify him to third parties such as utility companies and government agencies able to verify Hyatt's residency claim.

iii) Hyatt's constant argument that use of his social security number to identify him during the audit was tortious, ignores the fact that the IRS may disclose a taxpayer's name, address and social security number during an audit. Title 26 U.S.C. §§ 6103(b)(6); 6109(d); and 6103(h)(4). FTB had the same authority to use Hyatt's name, address and social security number. Cal. Rev. & Tax Code §§ 19545 and 19549; *Cal. Civ. Code* § 1798.24(p).

iv) The Privacy Notice that FTB gave Hyatt clearly states he was being asked for his identification information "to carry out the Personal Income Tax

Law of the State of California" and that he was required to provide his social security number "for identification and return processing." (FTB App. Ex. 53).

6. THE SUPPLEMENTAL PETITION REPEATS HYATT'S SELF SERVING AND CONCLUSORY ALLEGATIONS

Hyatt's 15-page Supplemental Petition simply continues his strategy of inundating the Court with conclusory allegations. It is also riddled with distortions and outright fabrication of the evidentiary record. There are so many improper cites to the record in Hyatt's footnotes that it is impossible to respond fully to each one within the page limitation imposed by the Court. The fact that FTB does not have sufficient time and space to respond to each false statement should not be construed as any type of acquiescence to Hyatt's distortions and misrepresentations.

7. HYATT HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT THE COURT OVERLOOKED OR MISAPPREHENDED ANY POINT OF FACT OR LAW IN FOOTNOTE 12

This Court has recognized that the FTB conducted a standard investigation to determine residency status, and that because Hyatt failed to provide evidence of unreasonableness or falsity of statements, that investigation was not tortious. Order at 4-5. In footnote 12 of its Opinion, this Court held that the FTB has presented evidence to establish the four conclusions stated therein, and that the establishment of those conclusions negated at least one element of each of Hyatt's torts. The Court also recognized that Hyatt presented no evidence in the record to contradict these four established conclusions.

Hyatt now has the burden to prove to this Court that it overlooked facts in the record which negate the conclusions in footnote 12. Hyatt cannot and has not satisfied this burden. He has presented this Court with a series of alleged "facts," all of which have been presented to this Court before in great detail, and most of which have been asserted elsewhere in his Petition and Supplement as alleged proof that Hyatt presented facts in the record to support each of his tort claims. Additionally, Hyatt repeatedly misstates what is in the record by including quotes that do not exist in the record and by citing to testimony that most times does not support the allegations. Even when the allegations are supported, they do not establish that this Court erred in reaching its conclusions in footnote 12, or in concluding that none of the FTB's acts constituted torts.

A. Hyatt has failed to provide specific evidence to disprove the Court's Conclusion that the FTB "never produced false statements."

The Court first concluded in footnote 12 "that Franchise Tax Board (1) never produced false statements."[3] Hyatt claims that this conclusion is false because the FTB "produced false statements" by assuring him in written and verbal forms that it would keep his information confidential and would conduct a fair audit. Hyatt Supplemental Petition ("Supplement") at page 1, lns. 15-18. Hyatt has presented no specific evidence to prove this allegation. The FTB forms that Hyatt cited to in footnotes 4 and 5 of his Supplement clearly state that the information he provided could be disclosed to government officials as provided by law, and the California statutes permit the FTB to use the information to conduct an audit. *See Sections 7(c) below and 5(E)(F) above.* Hyatt has presented no evidence that the FTB agreed to abrogate its statutory authority and provide Hyatt with complete confidentiality with regard to the audit; this lack of evidence is not surprising because in order to conduct the residency audit, the FTB had to contact third parties to verify Hyatt's information and to investigate Hyatt's claims of Nevada residency. It was impossible for the FTB to keep the investigation completely confidential because the investigation, by its very nature, required contact with third parties. For that reason, the FTB did not and would not have informed Hyatt that it would shield his audit and investigation from third parties.

Hyatt claims that the FTB promised to conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt. Supplement at page1, line 18. This is not a fact, it's an argument against the conclusion of the residency auditor, the audit supervisor and FTB audit review staff. Hyatt's charge is currently being considered in the administrative review process in California, where Hyatt is free to present any evidence.

Hyatt argues that Candace Les claimed the "Audit narrative report re Hyatt was 'fiction,'" and cites to Candace Les' deposition as support. Supplement at page 1, line 19 and n.7. However, the cited pages 10 and 25 of that deposition do not discuss Les' opinion of the audit,

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[3]It appears from the Order that the Court meant that the FTB did not produce false statements about Hyatt to third parties. Hyatt has alleged that the FTB made false statements to him during the audit. Even if the Court intended this statement to refer to false statements made to Hyatt, Hyatt had not produced specific evidence of any such false statements.

and pages 172 and 176 of the deposition are not attached as exhibits. In short, there is no evidence of Les' opinion of the audit in the portions of the record cited by Hyatt, and nowhere does Les state that the report was "fiction."

Hyatt next claims that Cox's statements regarding interviews with Hyatt's apartment managers was directly contradicted by the deposition testimony of the apartment manager. *Id.* at page 5, line 1. First, Hyatt does not state what Cox's statements were, and there is no explanation of how her statements were contradicted by the testimony of the apartment manager. Furthermore, there is no evidence of a false statement; Hyatt has merely made a conclusory allegation that Cox made unknown "false statements" because her version of events differs in some unknown way from the apartment managers. Again, there is no "specific evidence" of tortious conduct.

Hyatt also claims that the FTB sent Demands for Information which falsely represented to Nevada respondents that they were required by Nevada law to respond. *Id.* at page 2, line. 2. The FTB has provided ample authority to this Court that it is permitted to send such Demands pursuant to California law. *See* Section 7(c) below. Hyatt also overstates the effect the "Demands to Furnish Information" had on Nevada residents by alleging they "gave the false, yet distinct appearance that Hyatt was a fugitive from California being investigated as a tax cheater." *Id.* at page 8, lines 7-10. The standard form document nowhere suggests that Hyatt is a "fugitive" or a "tax cheat." Hyatt has not identified a single business associate, neighbor, or other Nevada resident who would support such a contention. Hyatt also fails to mention the language in the accompanying cover letter to a Demand to Furnish that reads: "[f]or purposes of administering the Personal Income Tax Law of the state of California and for that purpose only, we would appreciate your cooperation in providing a photocopy of..." (*See* Hyatt Appdx. Exhibit 8)

Finally, Hyatt claims that while the FTB claimed that the audit file had been through extensive levels of review, this was false because the reviewers admitted that they relied on Cox's work in their review. Supplement at page 2, line 5. Hyatt's allegation is false. Hyatt cites the Lou deposition as support. However, in that deposition, Lou stated only that he relied on certain items that Cox had obtained during her investigation; he never stated that he did not

conduct his own extensive review of the audit file. Hyatt also claims that "This cursory review also lead to the assessment of an additional $6.4 million in taxes and penalties for a total assessment of $9.9 Million." *Id.* at page 2, line 8 and n.12. Hyatt cites to the Ford deposition for support, but again the record is devoid of any support for this proposition. Nowhere did Ford claim that her review, or the FTB's review, was "cursory." In fact, FTB spent over 500 hours investigating and reviewing this matter.

In conclusion, Hyatt has produced no evidence that the FTB made or published false information to any third parties.

B. Hyatt has failed to provide specific evidence to disprove the Court's Conclusion that the FTB "never publicized its investigation or findings outside the scope of the investigation."

Hyatt also presented no evidence to refute the finding that the FTB never publicized its investigation outside the scope of the investigation.

Hyatt claims that Cox publicized her investigation findings outside the scope of the investigation, but provides no such evidence. Hyatt alleges that Cox told Candace Les about the findings and that Les did not "need to know" the information. *Id.* at page 2, line15. Hyatt did not cite to the record to support his allegation that Les did not "need to know" the information. In fact, Les also was an auditor of the FTB, with whom Cox discussed the audit as a co-professional.

Hyatt also claims that Cox disclosed her findings to non-FTB personnel, including to Hyatt's ex-wife. *Id.* at page 2, lines 16-19. Hyatt claims that during its investigation, the FTB contacted people, entities and associations and asked them questions about Hyatt, and that such conversations illegally disclosed to third persons that Hyatt was under investigation in California. *Id.* at page 8, line 5. However, all of the conversations Hyatt complains of were part of the FTB's audit, and do not constitute a publication outside of the scope of the audit; in fact, the disclosure was a necessary part of the audit.

Hyatt claims that Cox told non-FTB personnel about the audit. *Id.* at page 2, line 16, citing to page 7-8 of the Supplement. The only allegations made on those pages were that "[Cox] disclosed facts to her friend about family members, his colon cancer, his patent business, the

amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her interviews with Hyatt's Nevada Landlord, the tenor of her dealings with Hyatt's tax representatives, and that the Hyatt audit was one of the largest, if not the largest, in history." Hyatt cites to the Ford Depo at pages 148-155 as support (Ford is an FTB auditor supervisor), but nowhere in that deposition is there any discussion of statements made by Cox. All of the cited deposition transcript concerned Ford's work as an auditor at the FTB, and Cox's name is mentioned only once to confirm that she was not an auditor on a fraud case Ford had worked on. Again, there is no specific evidence that the FTB publicized its findings.

Hyatt also alleges that Cox "boasted" to Hyatt's ex-wife, Mrs. Maystead, that "we got him." This quote exists nowhere in the Maystead deposition cited by Hyatt, and it has been fabricated. The transcript of the Maystead deposition actually states that Hyatt's ex-wife had one very brief conversation in which Cox told her that Hyatt "had been convicted or and had – or had to pay some taxes or something like that." There is no evidence that Cox "boasted" or even when the conversation took place. In short, this is not evidence of a publication of the investigation.

Hyatt also claims that the FTB contacted the Japanese customers, however that contact was made explicitly within the confines of the audit, and was permitted by the terms of the contracts at issue. *See* section 5(d), *supra*.

Finally, Hyatt claims that the FTB published his "private information" to three newspapers. This is deliberately misleading. The FTB sent Demands for Information to the newspaper circulation departments during the audit requesting information regarding whether Hyatt subscribed to their newspapers during certain dates. This was done as part of the audit to verify Hyatt's claims of residency in Nevada; it was not done, as Hyatt suggests, so that the newspapers could publish that information to the world.

C. Hyatt has failed to provide specific evidence to disprove the Court's conclusion that the FTB "complied with its internal operating procedures with regard to contacting individuals."

Hyatt first claims that "Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt, or his close associates and close family members, thereby

failing to conduct a fair, unbiased audit." *Id.* at page 3, lines 10-11. However, this is a conclusion only, and is not specific evidence that the FTB failed to comply with its internal procedures when conducting the audit.

Hyatt admittedly was a long-time resident of California who paid California income taxes for many years until he moved to Nevada. The FTB had the legal and statutory right, and a public duty, to investigate Hyatt's claim of change of residency. To do that, it was necessary to contact persons and entities in Nevada which Hyatt had listed as sources who could verify his Nevada residency. *See Industrial Welfare Com. v. Superior Court of Kern County,* 27Cal.3d 690, 613 P.2d 579, 587 (1980)(citing a United States Supreme Court case stating that the duty to investigate involves the making of such an investigation as the nature of the case requires, and it is not required to take any particular form.) In the course of the investigation, an agency may seek information through those channels likely to produce the necessary information, including official records and reports, and may supplement such means of inquiry by correspondence or personal investigation. *Barnett v. Fields*, 196 Misc. 339, 92 N.Y.S.2d 117, 124 (1949).

Hyatt wrongly claims that FTB's auditor failed to conduct a fair and unbiased audit because the auditor never spoke to him, his "close associates" and "close family members." Supplement at 3:10. This is not a material fact, it's an argument against the conclusion of the residency auditor, the audit supervisor and FTB audit review staff. Hyatt's charge is currently being considered in the administrative review process in California, where Hyatt is free to present any evidence.

Hyatt next claims that FTB failed to notify Hyatt or obtain information directly from Hyatt before using his social security number and other information in contacting businesses or individuals. Supplement at page 3, line 12. The Privacy Notice FTB gave Hyatt clearly states he was being asked for his identification information "to carry out the personal income tax law of the State of California" and that he was required to provide his social security number "for identification and return processing." (FTB App. Ex. 53.)

Some of the information obtained by FTB during the residency audit of Mr. Hyatt was obtained directly from third parties, which is permitted under the California statutes, and is

consistent with the duty of the FTB to conduct tax audits. Disclosures made of tax return information during the course of any tax audit, including the use of a social security number, are those required to complete the audit. In asserting this "fact" Hyatt has fabricated a legal requirement where none exists.

Additionally, as the FTB has already shown *supra*, at pgs. 2-3, Hyatt refused to cooperate with the FTB auditors to provide information regarding his residency in September and October of 1991; and the FTB was forced to obtain information on his residency status through third persons. Hyatt has no room to complain on this issue.

Hyatt next claims that the FTB failed to contact him prior to contacting third parties, and that such action violated the FTB's internal policies. Supplement at page 3, line 13. *Id.* at 3:13. Specifically, Hyatt claims the FTB violated a general provision of the California Civil Code and its own security and disclosure manual when it failed to first contact him during the audit. Both allegations are false. California Civil Code § 1978.15, cited by Hyatt, states only that "Each agency shall collect personal information to the greatest extent practicable from the individual who is the subject of the information rather than from another source." FTB has shown that Hyatt refused to cooperate with the audit and that it was required to collect information from third parties. Furthermore, Section 1798.25(p) of the California Civil Code expressly permitted the FTB to disclose Hyatt's taxpayer information in order to investigate Hyatt's failure to comply with the tax laws of the State of California. Additionally, specific provisions of the California Revenue and Taxation Code allow FTB to conduct audits, contact third parties, and use taxpayer information. Common sense and basic statutory construction arguments tell us so. Hyatt's argument to the contrary, made here by attorneys, are disingenuous to say the least.

Also, FTB's Security and Disclosure Manual contains no prohibition on third party contacts, as Hyatt seems to allege. It merely restated Cal. Civil Code §1978.15.

Hyatt next claims that "Sending 'Demands for Information' to individuals outside the State of California, absent special circumstances" is a violation of FTB's internal policies. Supplement at page 3, line 14. This is false. California law does not require good cause or "special circumstances" to justify the issuance of a Demand to Furnish Information. Here, no

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DISTRICT COURT

CLARK COUNTY, NEVADA

GILBERT P. HYATT,

Plaintiff,

v.

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

Defendants.

Case No. A382999
Dept. No. X

EXHIBITS 35 - 66 TO PLAINTIFF GILBERT P. HYATT'S BRIEF IN SUPPORT OF PROPOSED FORM OF JUDGMENT THAT FINDS NO PREVAILING PARTY IN THE LITIGATION AND NO AWARD OF ATTORNEYS' FEES OR COSTS TO EITHER PARTY

Plaintiff Gilbert P. Hyatt hereby submits Exhibits 35 to 66 to Plaintiff Gilbert P. Hyatt's

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Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party.

Dated this 15th day of October, 2019.

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EXHIBIT 35

formal subpoenas were ever served on any Nevada resident, company or government agency during the audit. Instead, the FTB only sent its informal (and standard) "Demands for Information""to third parties in an effort to verify Hyatt's claimed change of residency.

The FTB's authority to issue the informal "Demands for Information" to Nevada residents is clear.[4] With respect to the fact that FTB merely mailed the demands for information to Nevada residents, there is nothing improper, let alone illegal, with such a procedure.[5]

Hyatt also mischaracterizes a statement in the Residency Audit Training Manual as requiring an auditor to determine if a third party is"uncooperative" before issuing a Demand for Information.[6] The manual broadly interprets "Section 19504 (formerly Section 19254) [as authorizing] the Department to request and obtain information from third parties." (*See* FTB 00844 (FTB App. Ex. 54)).[7]

On a related note, Hyatt incorrectly asserts that FTB improperly sent Demands for Information to third parties without his knowledge in violation of the Information Practices Act. Supplement at page 10, line 2, n. 59. Such Demands do not violate California's privacy act. California Civil Code § 1798 et seq.[8]

Hyatt's final allegation is that "Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private information, inferring that 'this could happen to you, too, if you don't agree to settle" is a violation of FTB internal policies. Supplement at page 3, line 16.

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[4]Cal. Rev. & Tax Code §19504 empowers the FTB to examine records, require attendance, take testimony, and issue subpoenas. Cal. Govt. Code § 11189 provides for enforcement of § 19504 demands from "persons residing within or without the state."

[5]See, e.g., *Wilentz v. Edwards*, 134 N.J.Eq. 522, 36 A.2d 423, 1944 (use of certified mail to serve an administrative order to show cause outside the state validly conferred jurisdiction over the defendant).

[6]The Supplemental Petition asserts: " [s]he did so without first ascertaining that the third party was uncooperative, as required by the FTB's Residency Manual." (Supp. Petition, 9:25-10:1) The pertinent section of the manual actually provides: "[t]o obtain information from uncooperative third parties, the auditor should use the Demand for Information form (FTB Form 4973)." Nothing in the referenced material mandates that an auditor make a threshold finding that a third party is uncooperative or that such Demands can only be used when a third party source refuses to cooperate.

[7]A Demand for Information is not a subpoena and need not comply with the Civil Discovery Act. § 19504 does not require a "Notice to Consumer" when the FTB uses Form 4973.

[8]The Information Practices Act authorizes a state agency to make disclosures of "personal information" when "necessary for an investigation by the agency of a failure to comply with a specific state law which the agency is responsible for enforcing." (Quoting California Civil Code § 1798.24 (p)).

First, the quote "this could happen to you, too, if you don't agree to settle"does not exist in the record. This is an egregious fabrication of the record.

Hyatt also wrongly infers that FTB's statutory tax settlement program is a vehicle to extort money from taxpayers in exchange for not publicizing their private information, which is untrue. Hyatt has claimed that a telephone conversation between FTB attorney Jovanovich and Hyatt's tax attorney Cowen amounted to an extortive threat. The record shows this is not true. When Jovanovich was assigned Hyatt's protest of the 1991 proposed assessment, she explained to Cowan the administrative protest process, appeal process and settlement options. She kept contemporaneous and detailed notes of that conversation. (FTB App. Ex. 55). The record shows that absolutely nothing in this conversation between two tax professionals was untrue or threatening. Cowan claims that he relayed this conversation to Hyatt who then interpreted Jovanovich's settlement reference as a threat, because absent administrative settlement some facts regarding Hyatt's audit may become public. In point of fact, a settlement is public as required by California law. In fact, Cowan later admitted that, when he talked to Hyatt, he did not know that a tax settlement in California results in a public document containing the audited taxpayer's name, the amount of tax at issue and the amount approved for settlement, and the reasons why the settlement is in the public interest in the opinion of the California attorney general. (FTB App. Ex. 56). (Cowen deposition page 83). This fact renders illogical Hyatt's charge that FTB was attempting to force him to settle to avoid publicity. *See* also, page 9 supra.

D. Hyatt has failed to provide specific evidence to disprove the Court's conclusion that the FTB "merely visited his house and conducted investigation through phone calls and letters".

Hyatt claims that FTB visited Hyatt's apartment managers and made records of "questionable accuracy." Supplement at page 3, line 10. FTB has already explained that Hyatt has not provided specific evidence of such "questionable" records, and it is undisputed that FTB interviewed the apartment manager as part of the audit. *See*, page 13, *supra*.

Hyatt also claims that the FTB sent out an "unprecedented" amount of Demands for Information." Supplement at page 4, line 1. First, the California statutes permit the FTB to send the Demands, and there is no limit to how many the FTB can send. Hyatt's citations to the

record do not support a claim that the amount of Demands was "unprecedented." Some of the people Hyatt deposed stated that they had not used the Demands for Information as extensively as they were used in the Hyatt matter, but Hyatt makes only a conclusory allegation when he stated that this amount was "unprecedented." In fact, many of the auditors Hyatt deposed stated that normally they did not need to use the Demands because those taxpayers provided all of the information requested. The FTB has provided ample evidence that Hyatt did not cooperate, and that the Demands were a part of the normal investigation to determine Hyatt's residency.

FTB has already addressed Hyatt's contentions regarding conducting a "fair and unbiased audit" and his allegations against Cox. Hyatt claims that in 1995 Cox "searched" through Hyatt's trash and mail. *Id.* at page 4, line 4. In fact, the only testimony was from the Les deposition where she stated that Cox "lifted up the trash lid" on Hyatt's trash can and that Cox "looked through" Hyatt's mailbox. There is no evidence of an invasive "search," as Hyatt leads the Court to believe. These actions were taken to help ascertain whether Hyatt was living in the Las Vegas house as he had claimed. The presence of mail and garbage is an indicator of whether a person is residing in the house. Cox, in fact, concluded, notwithstanding her doubts, that Hyatt did reside in the home as of close of escrow, April 2, 1992.

Hyatt claims that someone in the FTB took a "trophy" picture in front of Hyatt's Las Vegas house, and cited to the Les deposition as support. *Id.* at page 4, line 5 (citing to Les Deposition pp 264. 402-03). However, Hyatt has not included the pages of the Les deposition he has cited, and again has produced no "specific evidence" to support his claims. In any event, such facts do not establish tortious conduct.

Hyatt also claims that the FTB initiated audits of his close associates. *Id.* at page 4, line 6. As support, Hyatt cites only to the conclusory allegation of his own affidavit as support. Hyatt has not produced specific evidence regarding such audits or the fact that the audits were not proper.

Finally, Hyatt claims that the FTB acknowledged that Hyatt was "paranoid" about privacy, and then infers that the FTB attempted to use that paranoia to extort a settlement, citing to the Jovanovich deposition. *Id.* at page 4, line 7. Jovanovich testified that Hyatt's

representative, Mr. Cowan, had sent her a letter stating that there had been lapses in confidentiality in the case, and Jovanovich thought that Cowan's statement might have been a paranoid concern because she did not notice any breaches of confidentiality. Hyatt Supp., Ex. 23, pages 125-26. Jovanovich also stated in two separate places in Hyatt's Exhibit 23 that she honored Hyatt's wishes for privacy. *Id.* at page 125, line 2, and page 126, lines 4-6. Furthermore, there is no evidence that Jovanovich told Cowan that if Hyatt did not settle, his finances would become public. The FTB has addressed this issue before at page 9, *supra.* Hyatt wants this Court to believe that specific evidence exists that FTB knew Hyatt was paranoid about his secrecy and then capitalized on that fear by extorting a settlement. However, all Hyatt has presented is conclusory allegations and no specific facts to prove the same.

One of Hyatt's more offensive arguments is his claim that the June 13th Order is a "hunting license" for FTB "predatory conduct" against other Nevada residents. *See, e.g.,* Supplemental Petition at pages 4-5. FTB did not improperly target Hyatt for an audit. Substantial publicity surrounded the issuance of Hyatt's patents, including a newspaper article that attracted an FTB auditor's attention in 1993. The article reported that Hyatt lived in Las Vegas, but was involved in a California legal dispute with his ex-wife about earnings from recent patent awards. (FTB App. Ex. 57 at ¶8). FTB reviewed its records and found that Hyatt filed only a part-year California income tax return for 1991, in which he claimed to have terminated his California residency on October 1, 1991. He reported $613, 606.00 as California business income from total receipts of over $42 million for the full year. (FTB App. Ex. 58.) It would have been a dereliction of public duty not to inquire further.

8. HYATT HAS FAILED TO PRESENT EVIDENCE TO SUPPORT HIS INVASION OF PRIVACY CLAIMS

In Part II at pages 5-8 of his Supplemental Petition, Hyatt purports to set forth the evidence supporting his invasion of privacy claims.

There simply is no evidence from which a jury could reasonably find that FTB committed any of the invasion of privacy torts Hyatt asserts in his First Amended Complaint. Hyatt's privacy tort for intrusion requires evidence of: "(1) intentional intrusion (physical or otherwise);

(2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable person." *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630-31, 895 P.2d 1269 (1995), *modified on other grounds*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997) (citing Restatement (Second) Torts § 652A). Hyatt's second privacy tort for public disclosure of private facts required evidence "that a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities." *Montesano v. Donrey Media Group*, 99 Nev. 644, 649, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984). Hyatt's false light claim requires proof that the FTB put Hyatt before the public in a false light in a manner that "would be highly offensive to a reasonable person," and also that the FTB "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which [Hyatt] would be placed." *Rinsley v. Brandt*, 700 F.2d 1304, 1306 (10th Cir. 1983); *see also PETA*, 111 Nev. at 622 n.4 (citing *Brandt*); Restatement (Second) of Torts § 652E. This last variety of privacy tort requires proof by "clear and convincing evidence..." *Machleder v. Diaz*, 801 F.2d 46, 56 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *see also PETA*, 111 Nev. at 622 n.4 (citing *Diaz*).

Any evidence which would unite all of these privacy torts, which is wholly absent here, is evidence of conduct that is at least offensive and objectionable to a reasonable person. Offensiveness is a legal issue as a threshold matter, *PETA*, 111 Nev. at 634-635, and there is no evidence that FTB did anything other than conduct a standard residency audit in response to Hyatt's evasiveness. Whether or not Hyatt was offended by FTB's actions is irrelevant. Just like a personal injury plaintiff alleging damages, a taxpayer "must expect reasonable inquiry and investigation to be made" of his claims to the taxing agency. "[T]o this extent [their] interest in privacy is circumscribed." *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975) (quoting *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963).

Hyatt also argues he has a claim for "informational privacy" even though it is not pled in his First Amended Complaint. Nevada, however, recognizes only "four species of privacy tort" (all of which Hyatt has pled), and none of which is "informational privacy." *PETA*, 111 Nev. at 629, 895 P.2d at 1278. Moreover, disclosure of Hyatt's return information (name, address and

social security number) is authorized by Cal. Rev. & Tax. Code § 19545 during an audit. As previously shown, such disclosures are not tortious regardless of the label.

9. HYATT HAS FAILED TO PRODUCE EVIDENCE TO SUPPORT HIS ABUSE OF PROCESS CLAIM

In Part III at pages 8-10 of his Supplemental Petition, Hyatt purports to set forth the evidence supporting his abuse of process claim.

Hyatt does not even allege that FTB took any court action or employed any court process. Instead, he alleges FTB sought to "extort" a settlement by conducting the audit and, in particular, by sending Demands to Furnish Information into Nevada. California law, however, authorizes FTB to send such forms to "persons residing within or without the state." Cal. Govt. Code § 11189; Cal. Rev. & Tax Code § 19504.

Abuse of process requires: 1) an ulterior purpose other than resolving a legal dispute; and 2) a willful act in the use of process not proper in the regular conduct of the proceeding. *Dutt v. Krump,* 111 Nev. 567, 575, 894 P.2d 354 (1995). Although this Court has not addressed the issue, the U.S. District Court has interpreted Nevada law as being consistent with the majority rule that limits the tort to abuse of judicial process, as opposed to abuse of administrative process. *Laxalt v. McClatchy Newspapers*, 622 F. Supp. 737, 750-51 (D.Nev. 1985); *see also, Gordon v. Community First State Bank*, 255 Nev. 637, 646-651, 587 N.W.2d 343 (Neb. 1998); *Foothill Ind. Bank v. Mikkelson*, 623 P.2d 748, 757 (Wyo. 1981). The few jurisdictions extending the tort to abuse of an administrative process do so only as to a private party's misuse of the agency's process, as opposed to a misuse of the process by the agency itself. *See, Hillside Associates v. Stravato*, 642 A.2d 664, 669 (R.I. 1994).

Hyatt has simply failed to produce any evidence upon which FTB can be held liable for abuse of process.

10. HYATT'S DISTORTS THE PRECEDENTIAL IMPACT OF THE COURT'S ORDER

In parts IV-VII at pages 10-15 of his Supplemental Petition, Hyatt attempts to "spin" this Court's June 13th Order and process. For example, he ignores the constitutional and jurisdictional issues raised by FTB's writ petitions and argues that the Court's June 13th Order

somehow changes the existing standards for summary judgment and the circumstances in which this Court will review a denial of a summary judgment motion in cases not involving such issues.

Ignoring Rule 56(e), Hyatt also asserts that, if this Court does not accept his inadmissible and conclusory allegations then henceforward: "In essence, any civil case will require 'smoking gun' direct evidence of each element of each claim, and circumstantial evidence and reasonable inferences will not be available to establish such elements for the fact-finder." Supplemental Petition at page 12, lines 14-16. That is a gross distortion of this Court's reasoned June 13th Order.

Hyatt succeeded in litigating this case under seal. As FTB understands, the June 13th Order is an unpublished decision subject to the restrictions of Supreme Court Rule 123. Therefore, the unpublished order "shall not be regarded as precedent and shall not be cited as legal authority" except in the circumstances specified in Rule 123.

One final argument by Hyatt requires response. Hyatt argues that if the Court does not reverse its decision, then Nevada residents audited by FTB will have fewer rights and less privacy than their counterparts in California. As FTB previously showed, however, former California citizens residing in Nevada (like Hyatt) as well as California citizens residing in California, have the exact same remedies for any actual FTB misconduct: they can bring statutory actions against FTB in California's own courts. *See*, Reply in Support of Jurisdiction Writ at pages 18-21. (FTB App. Ex. 59).

CONCLUSION

This Court properly accepted the FTB's original Discovery Writ and the later Jurisdictional Writ, consolidated them and decided them on the alternative adequate state law ground that Hyatt failed to meet his burden under Rule 56(e) to produce admissible evidence of any FTB tortious misconduct. Instead of criticizing the Court, he should read Rule 56 (e) and the Nevada Rules of Evidence.

Hyatt's Petition and Supplemental Petition for Rehearing should be denied because this Court did not overlook or misapprehend any material point of law or fact.

Dated this 7th day of August, 2001.

McDONALD CARANO WILSON McCUNE
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Certificate of Compliance

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of August, 2001.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing** on this 7th day of August, 2001, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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Eighth Judicial District Court
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in and for the County of Clark
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Dated this 7th day of August, 2001.

Carol Ferguson

An Employee of McDonald Carano Wilson
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EXHIBIT 36

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FILED

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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

ERRATA TO REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

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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 **ERRATA TO REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** ***CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL***

Real Party in Interest Gil Hyatt submits this Errata to his 15-page Supplement to his Petition for Rehearing. The 15-page Supplement was filed with this Court on July 23, 2001, and the FTB's Answer was served on August 7, 2001.[1]

[1] The FTB's August 7 Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing pointed out certain errors in the footnotes and Appendices to Hyatt's 15-page Supplement. Hyatt appreciates the FTB pointing these out and apologizes to the FTB and this Court for the fact that Hyatt's Rehearing Appendices did not include copies of all pages of the record which are referenced in his footnotes. By way of explanation (but not to excuse the errors corrected herein), Hyatt submits that he was attempting in his Rehearing Appendices to cull through the large official record and include only certain pages of depositions and other exhibits for the convenience of the Court in its consideration of the Petition for Rehearing, and the omission of some of these

Errata No. 1: Footnote 7: "[Appedx., Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 2: Footnote 10: "[Appdx. Exh. 25]" should be "[Supp. Hyatt Appendix Vol. VIII, Exh. 13]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 3: Footnote 22: The reference to page "268" should be changed to "168" (typographical error).

Errata No. 4: Footnote 27: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 5: Footnote 34: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 6: Footnote 35: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 7: Footnote 36: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 8: Footnote 37: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 9: Footnote 40: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 10: Footnote 44: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 11: Footnote 45: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 12: Footnote 46: "[Appdx. Exh. 17]" should be "[Supp. Hyatt Appendix, Vol. XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 13: Footnote 50: The footnote correctly references "Chang Depo, pp. 32-33 *[Supp. Appdx. Exh. 32]*". However, p. 33 of the Chang Depo was inadvertently omitted from Supp. Appdx.

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cited pages from the Rehearing Appendices was inadvertent. This Errata substitutes the citation to the official record for the citation to the Rehearing Appendices so the actual cited pages can be located in the record, and it also corrects a couple of typographical errors in the footnotes. All of these errata correct footnotes in Hyatt's 15-page Supplement. The "Hyatt Appendix" and the "Supp. Hyatt Appendix" refer to the volumes submitted as appendices to Hyatt's answers to the FTB's writ petitions.

Exh. 32 and both pages are attached hereto as Exhibit A.

Errata No. 14: Footnote 54: "[Appdx. Exhs. 9-10]" should be "[Hyatt Appendix, Vol. VII, Exh. 11 (Exh. 13 attached thereto)]" (change citation to official record, rather than to Rehearing Appendix).

Errata No. 15: Footnote 55: "FTB" should be deleted, and "Exh. 35" should be "Exh. 33" (typographical error).

Errata No. 16: Footnote 71: "[Appdx. Exh. 27]" should be "[Hyatt Appendix, Vol. VII, Exh. 11]" (change citation to official record, rather than to Rehearing Appendix).

For the convenience of the Court and the FTB, a copy of Hyatt's 15-page Supplement, with these corrections, is attached hereto as Exhibit B.

DATED this 10 day of August, 2001

HUTCHISON & STEFFEN

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Bernhard & Leslie, and that on this 10th day of August, 2001, I served a true and correct copy of the foregoing **ERRATA TO REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** via regular mail, in a sealed envelope upon which postage was prepaid, to the addresses noted below, upon the following:

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Michelle Weigel-Nash
An employee of Bernhard & Leslie, Chtd.

DISTRICT COURT

CLARK COUNTY, NEVADA

CERTIFIED COPY

GILBERT P. HYATT,

Plaintiff,

vs.

NO. A382999

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

Defendants.

DEPOSITION OF LOBO CHANG

LOS ANGELES, CALIFORNIA

MONDAY, NOVEMBER 29, 1999

REPORTED BY:

Jean F. Holliday

CSR No. 4535

G&G COURT REPORTERS
A U.S. Legal Company

15250 Ventura Boulevard, Suite 410 • Sherman Oaks, CA 91403
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A. I do not have a complete recollection of their visit. After they came in the first thing they did was to show me that one-page document, and I didn't quite understand what they were saying but from what I did understand, they were there looking for some kind of information. So I figured these people must be either from the State or the IRS conducting an audit there. Then they showed me their business cards. So one sat down, the other one started walking around, and he asked me when I started working there, where was I working, and I told him that I started by working in Costa Mesa. At that time I was the owner, and approximately three years ago we changed the name of the owner to my older brothers. I worked in Costa Mesa for a little more than a year and then we went to another place for like maybe four or five years and after that we moved to a few other locations. Eventually we settled in where we were.

Then he said he wanted to look into the record of Hyatt, so I went to look for it. Well, after I found it he saw it. I showed it to him as well, and then they copied a telephone number and the names and also the travel plans. Later on I realized that they were not there auditing my books. They

were there looking into Hyatt's records. So I stopped cooperating.

Q. If you had realized that sooner, would you have stopped cooperating sooner?

A. Yes, that's right.

Q. Did they tell you that they were investigating your tax regarding a special item?

A. No.

Q. Did they tell you that they wanted to look into the Youngmart record relating to the travel schedule of Mr. Hyatt?

A. They didn't say that but they said they wanted to look into some information regarding Hyatt.

Q. Did they imply that they were investigating whether or not Youngmart was cheating on its taxes respecting Mr. Hyatt?

A. No. Well, I figured that they were there looking for information relating to Hyatt and something was wrong with his records.

Q. Now, when you did provide information before you realized all this, were you giving as much information as you did because you were trying to prove that Youngmart did not cheat on its taxes?

A. Yes.

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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 **REAL PARTY IN INTEREST GILBERT P. HYATT'S 15 PAGE SUPPLEMENT TO HIS PETITION FOR REHEARING RE THE COURT'S JUNE 13, 2001 ORDER GRANTING PETITION FOR WRIT OF MANDAMUS** ***CONFIDENTIAL INFORMATION TO BE FILED UNDER SEAL***

Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first demonstrates that there are material facts in dispute in regard to the four issues upon which the Court based its order granting the FTB's petition and then discusses additional facts, evidence and law that the Court overlooked or misapprehended in its order granting the FTB's petition.

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1. Genuine issues as to material fact exist as to the four conclusions reached by the Court in footnote 12 of the June 13 Order.[1]

The Court's June 13 Order concluded that the FTB had met its burden that at least one element of each of Hyatt's claims had not been shown. The Order said the FTB did that "...by demonstrating undisputed facts that Franchise Tax Board (1) never produced false statements, (2) never publicized its investigation or findings outside the scope of the investigation, (3) complied with its internal operating procedures with regard to contacting individuals, and (4) merely visited Hyatt's house and conducted its investigation through phone calls and letters."[2] Based on this, the Court then found no genuine dispute "that Franchise Tax Board's acts during its investigation constituted intentional torts[,]" citing Nevada law as to Hyatt's causes of action, at footnote 13. The evidence cited throughout the Petition and this Supplement refutes this. A brief summary of the evidence, and reasonable inferences which can be derived therefrom, contradicts each of these allegedly undisputed issues."[3]

A. Evidence of record shows that the FTB "produced false statements". Genuine issues of material fact exist as to issue (1) in footnote 12. Evidence of the FTB's false statements include:

(1) FTB written confidentiality promises contained in its communications to Hyatt;[4]

(2) FTB verbal confidentiality promises, given when Hyatt's representatives insisted on specific pledges of confidentiality in return for Hyatt providing additional information;[5]

(3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt;[6]

(4) Audit narrative report re Hyatt was "fiction" according to a former FTB employee;[7]

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[1] The Petition cited to an Appendix of Exhibits 1 through 29 attached thereto in the following format: *[Appdx., Exh. "x"]*. For clarity, this Supplement cites to exhibits in the same manner, with additional exhibits attached to a Supplemental Appendix. Citations to the record for the exhibits attached to the Supplemental Appendix are set forth in its table of contents.

[2] See footnote 12 of June 13 Order. In addition, Hyatt urges the Court to review pages 21 through 26 of Hyatt's opposition to the FTB's motion for summary judgment *[Appdx., Exh. 27]* that discusses the Constitutional and statutory basis and origin of the invasion of informational privacy alleged by Hyatt. The informational privacy rights of Hyatt, and corresponding obligations of the FTB, establish in great part the objective reasonableness of Hyatt's invasion of privacy claims. Moreover, and as discussed below, the FTB is not immune under California law for the invasions of privacy, particularly, the informational privacy, asserted by Hyatt.

[3] These facts represent, at a minimum, sufficient evidence to refute the four "undisputed" facts. Because of the FTB's invocation of the "deliberative process" privilege, Hyatt was prevented from getting further facts from the FTB (this was the subject of the FTB's other writ, declared moot in this Court's June 13 order). Since discovery was stayed by this Court's earlier order, Hyatt has not been able to complete his investigation of these and other relevant facts.

[4] Petition, at 2-3. (Hyatt cites to the Petition or this Supplement, *infra*, when the supporting evidence is summarized therein).

[5] Petition, at 3.

[6] Petition, at 6-8.

[7] Les Depo., pp. 10, 25, 172, 176 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

(5) Auditor Cox's statements re interviews with Hyatt's Las Vegas apartment managers, directly contradicted by deposition testimony of the apartment manager;[8]

(6) FTB "Demand for Information" form, which falsely represented to Nevada respondents that they were required by California law to comply with these demands;[9]

(7) FTB false "affidavits," which were not even sworn to, and which were falsely represented by Auditor Cox as containing damaging information about Hyatt;[10]

(8) The FTB falsely stated that the audit file had been through extensive levels of review by FTB reviewers: "The reviewers in Sacramento have finished their extensive examination of the audit file and all of the information regarding Mr. Hyatt's residency status." However, in deposition, the reviewers expressly admitted that they simply relied upon Cox's work in their review of her assessment.[11] This cursory review also led to the assessment of an additional $6.4 million in taxes and penalties for a total assessment of $9.9 million.[12]

Therefore, this Court cannot say that the FTB "never produced false statements". If the Court believes that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

B. Evidence of record shows that the FTB publicized its investigation or findings outside the scope of the investigation. Genuine issues of material fact exist as to issue (2) in footnote 12. Evidence of the FTB's publication of its investigation or findings outside the scope of its investigation include:

(1) Auditor Cox's publication of her investigation and findings, and personal defamatory opinions of Hyatt, to Candace Les who had no "need to know."[13]

(2) Auditor Cox's publication of her investigation and findings, and personal defamatory opinions of Hyatt, to non-FTB personnel;[14]

(3) Auditor Cox's publication of her work and findings to Priscilla Maystead, Hyatt's ex-wife when Cox boasted, "We got him."[15]

(4) Disclosure to Hyatt's Japanese customers that he was under investigation, and revealing that Hyatt had provided the FTB with copies of their confidential agreements;[16] and

[8] Kopp Depo., pp. 75 - 76 *[Supp. Appdx., Exh. 39]*; Lewis Depo., pp. 29, 45, 51 *[Supp. Appdx., Exh. 30]*.
[9] *Infra*, at 8-9.
[10] Bourke Affid., ¶¶ 15, 16, 51, 73 (evidence is cited and summarized therein) [Supp. Hyatt Appendix Vol. VIII, Exh. 13]. The FTB knew that what it labeled as an affidavit was indeed not a true affidavit – the FTB has reverted to calling them "interview summaries." However, Cox clearly intended to misrepresent these "interview summaries" in her Narrative Report because they served as the foundation for Cox's assessment of fraud penalties (an extremely serious penalty requiring clear and convincing evidence to support): "[A]s evidence of the taxpayer's specific intent to defraud the government, we have gotten affidavits from several individuals that the taxpayer may have cheated on his taxes in the past." See FTB audit work-papers, at H 01892. *[Supp. Appdx., Exh. 45]*.
[11] Lou Depo., p. 81 *[Supp. Appdx., Exh. 44]*.
[12] Ford Depo., p. 90-92 *[Supp. Appdx., Exh. 43]*.
[13] *Infra*, at 7-8.
[14] *Infra*, at 7-8.
[15] Maystead Depo., pp. 182-84. *[Appdx., Exh. 18]*.
[16] Petition, at 9.

(5) Disclosure of Hyatt's private information to three newspapers.[17]

Again, this Court cannot say that the FTB never publicized its investigation or findings outside the scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing, inappropriately, a fact-finder's function.

C. Evidence of record shows that the FTB did not comply with its internal operating procedures with regard to contacting individuals. Genuine issues of material fact exist as to issue (3) in footnote 12. Evidence of the FTB's failure to comply with its internal operating procedures with regard to contacting individuals include violating its policies, rules and procedures:

(1) Despite talking to Hyatt's adversaries, Auditor Cox never interviewed or spoke with Hyatt, or his close associates and close family members, thereby failing to conduct a fair, unbiased audit;[18]

(2) Failure to notify Hyatt or obtain the requested information from Hyatt before disclosing social security numbers and other confidential Hyatt information to individuals or businesses;[19]

(3) Failure to contact Hyatt before contacting third parties;[20]

(4) Sending "Demands for Information" to individuals outside the State of California, absent special circumstances;[21]

(5) Advising Hyatt that other taxpayers usually settle to avoid further dissemination of private information, inferring that "this could happen to you, too, if you don't agree to settle".[22]

Therefore, this Court cannot say that the FTB complied with its internal operating procedures with regard to contacting individuals. If the Court believes that these false statements are *de minimus*, it is performing, inappropriately, a fact-finder's function.

D. Evidence of record shows that the FTB did more than "merely visit Hyatt's house and conduct its investigation through phone calls and letters." Genuine issues of material fact exist as to issue (4) in footnote 12. Evidence of the FTB's additional actions include:

(1) Visits to Las Vegas apartment complexes and making records of questionable accuracy regarding interviews with apartment managers;[23]

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[17] Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 *[Appdx., Exh. 10]*.
[18] Petition, at 6-8.
[19] Petition, at 5.
[20] Cal. Civ. Code 1798.15; FTB Security and Disclosure Manual, at H06706 *[Appdx., Exh. 4]*.
[21] *Infra*, at 9-10.
[22] Jovanovich Depo., 50-52, 168, 185-86 *[Appdx., Exh. 23]*; Cowan Affid., ¶¶ 38 to ¶¶ 41 *[Appdx., Exh. 6]*.
[23] Kopp Depo., pp. 75-76 *[Supp. Appdx., Exh. 39]*; Lewis Depo., pp. 29, 45, 51 *[Supp. Appdx., Exh. 30]*

(2) Sending an unprecedented number of "Demands for Information" to individuals outside the State of California;[24]

(3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but instead buried all evidence favorable to Hyatt;[25]

(3) Searching through Hyatt's Las Vegas trash and mail;[26]

(4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;[27]

(5) Initiating tax audits of close Hyatt associates;[28]

(6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his tax attorney that without a settlement, Hyatt's finances would become public;[29]

(7) Vowing to "get that Jew bastard."[30]

Therefore, this Court cannot say that the FTB did nothing more than visit Hyatt's house and conduct its investigation through phone calls and letters. If the Court believes that these actions are *de minimus*, it is performing, inappropriately, a fact-finder's function.

In effect, the June 13 Order has validated, for all Nevada residents, that the FTB's predatory conduct against Hyatt is reasonable and free of falsity as a matter of law – a cause for celebration at the FTB since such treatment of a California resident would be unlawful and subject to redress under California's Constitution and statutes. The FTB conduct reflected in the record against Hyatt now becomes a "hunting license" for the FTB, where everything it has done against Hyatt may be done with impunity against other Nevada residents. Even deceptive, unauthorized, quasi-subpoenas may now be directed at Nevadans with this Court's blessing in the FTB's most-certain future efforts to target former California residents who have moved to Nevada. Private addresses for celebrities living in Nevada, along with their social security numbers and allegations of possible criminal accountability to California, are now Nevada Supreme Court-approved methods to achieve the FTB's objectives against wealthy Nevada residents, as the June 13 Order has determined that these are reasonable invasions of a Nevada citizen's privacy rights as a matter of law. And under this Court's new standard, any tort claims brought by a Nevada citizen against the FTB will, if not summarily dismissed at the district court level,

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[24] *Infra*, at 9-10.
[25] Petition, at 6-8.
[26] Cox Depo., pp. *1077 [Appdx. Exh. 16]*; Les Depo., pp. 268-69, 405 *[Appdx., Exh. 17]*.
[27] Les Depo., pp. 264, 402 - 03 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].
[28] Hyatt Affid., ¶ 164 *[Appdnx., Exh. 7]*.
[29] Jovanovich Depo., pp. 50-52, 168, 185-86 *[Appdx., Exh. 23]*; Cowan Affid., ¶¶ 38 to ¶¶ 41 *[Appdx., Exh. 6]*.
[30] Les depo., p. 10 *[Appdx. Exh. 17]*.

enjoy a *de novo* review by this Court as to the facts, and, unless they are found to be more egregious than those against Hyatt, be ordered dismissed in the district courts.

II. Substantial, probative evidence supports Hyatt's invasion of privacy claims.

A. Substantial evidence of the FTB's illegal disclosures of Hyatt's private facts.

As Hyatt briefly addressed in footnote 1 of the Petition, Hyatt's invasion of privacy claim for disclosure of private facts encompasses both the newer, well-recognized claim for invasion of informational privacy as well as the more traditional claim of public disclosure of private facts. The district court so found in liberally construing Hyatt's claims as consistent with Nevada's notice-pleading standard.[31] Hyatt summarized the supporting evidence in the Petition and through various exhibits attached to the appendix submitted with the Petition.[32] Hyatt's additional invasion of privacy claims are interrelated with this claim, and each is supported by the evidence summarized in the Petition, and further by the additional evidence summarized below.

B. Substantial evidence of the FTB's intrusion upon Hyatt's seclusion.

1. **Elements of claim:** (1) an intentional intrusion (physical or otherwise); (2) on the solitude or seclusion of another; and (3) that would be highly offensive to a reasonable person."
2. **Supporting evidence:**

In addition to the evidence summarized in the Petition, affidavits and depositions have established the following facts, which give rise to the inference that the FTB unreasonably intruded upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with whom Hyatt either in the past or in the future has had or might reasonably expect to have social or business interactions, and she either disclosed or implied to them that Hyatt was under investigation in California.[33] On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas home[34] — after the audit was over[35] — and took a trophy photograph of Les standing on Hyatt's property in front of Hyatt's residence.[36] This corroborates Les' testimony that Cox was obsessive in her zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found

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[31] Nev. R. Civ. P. Rule 8(a).
[32] Petition, at 1-5.
[33] Cox Depo., pp. 426-27, 957, 1329-30, 1873 *[Appdx., Exh. 16]*; Hyatt Affid., ¶ 129 *[Appdx., Exh. 7]*.
[34] Les Depo., p. 42 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].
[35] Les Depo., pp. 54 - 55 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].
[36] Les Depo., pp. 264, 402 - 03 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

tortious. Because the audit was closed, FTB policies forbade this curiosity-driven visit as unauthorized stalking.[37] Because the visit was for a nontax purpose, the surveillance was forbidden by the Taxpayers' Bill of Rights.[38] Because the visits were forbidden by FTB policies, Cox's surveying of Hyatt's former apartment and his Las Vegas home violated California's privacy act and published FTB procedures.[39] Cox also made three or more trips to the neighborhood of Hyatt's prior residence in La Palma, which trips included unannounced visits with residents of Hyatt's former neighborhood and questions about private details of Hyatt's life.[40] All of these facts and circumstances, taken together, support Hyatt's claims that he was singled out, by FTB actions which should be found tortious, for unlawful purposes, to further ambitions of FTB auditors and the revenue-enhancing goals of the FTB.

The FTB contacted over one hundred sources, including three newspapers, a dozen neighbors, the Licensing Executive Society, and Hyatt's Japanese licensees, causing the inference that Hyatt was under a cloud of suspicion.[41] The FTB, through its investigative actions, and in particular the manner in which they were carried out in California, Nevada and Japan, intruded into Hyatt's solitude and seclusion. The intrusions by the FTB support the inference that any reasonable person, including Hyatt, would find them to be highly offensive.[42] Even if these intrusions were part of a "standard" FTB investigation, this is not a defense to this tort, which only requires that the intrusions be intentional, affect the seclusion of another, and be highly offensive to a reasonable person. Clearly, the intrusions were intentional; they affected Hyatt's seclusion; and would be highly offensive to a reasonable person under the circumstances.

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[37] Les Depo., pp. 54 - 55 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

[38] California Revenue & Taxation Code § 21014, *forbidding* any FTB employee from conducting an 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."

[39] California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 *[Appedx., Exh. 3]* ("employees *shall not access or use* personal or confidential information about individuals maintained by the department without a legal right to such information as provided by law and a 'need to know' to perform his/her official duties.") (Emphasis added.)

[40] Cox Depo., pp. 1158, 1161, 1165, 1176 *[Appdx., Exh. 16]*; Les Depo., pp. 24-25, 385-86 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

[41] Cox Narrative Report *[Appdx., Exh. 13]*.

[42] *See, e.g.*, Hyatt Affid., ¶ 129-138 *[Appdx., Exh. 7]*.

C. **Substantial evidence of the FTB's casting Hyatt in a false light.**

1. **Elements of claim:** (1) giving publicity to a matter concerning another; (2) that places the person in a false light; (3) that would be highly offensive to a reasonable person; and (4) that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[43]

2. **Supporting evidence:**

The evidence summarized above and in the Petition is fully applicable to this claim as well. Moreover, the California Revenue and Taxation Code, and the laws and regulations compiled in the FTB disclosure education materials, forbid disclosure of personal information about a taxpayer to anyone, even to other auditors, who have *no* need to know. But Cox told Les about the murder of Hyatt's son — and called him a "freak" because of it. She disclosed to Les her unsuccessful attempts to start special investigations to investigate Hyatt for fraud, showed Les the narrative report, audit papers, and position letters that lay out extensive detail about Hyatt's personal life and finances, disclosed to Les alternative theories to tax Hyatt, told Les of her meetings with higher-ups on the Hyatt case, and talked about Hyatt incessantly.[44] Cox talked about the case "constantly," "year after year." She talked about the Hyatt case so much and was so unwilling to let it go — even after it was closed — that Les concluded she was so "fixated" and "obsessed" with it that she was beginning to create a fiction in her own head about it.[45]

She told Les about Hyatt's Las Vegas apartment, and his Las Vegas home and his former California house — referring to his old house as a "dump," falsely stating it contained a "dungeon," and calling Hyatt "a bad man." She falsely alleged to Les that he had several Californians on the lookout for the FTB: a "secret" Chinese "gook" girlfriend named Grace Jeng, a "one-armed man," and other "ghouls."[46] She disclosed facts to her friend about his family members, his colon cancer, his patent business, the amount of taxes at issue, her first trip to Las Vegas, her several trips to La Palma, her interviews with Hyatt's Nevada landlord, the tenor of her dealings with Hyatt's tax representatives, and

[43] *See Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of the publication need not necessarily be false. *See, e.g., Douglass v. Hustler Magazine*,769 F.2d 1128 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986) (reasoning that use of a photograph out of context was grounds for recovery on false light theory even though photograph was not "false.")

[44] *See* Les Depo., pp. 10-11, 24-26, 42, 49-51, 94-95, 103 - 104 - 105, 113-114 , 125-126, 140-141, 141-142, 143-144, 167-168 171-172, 176; 181-82, 245-246; 253-255, 263, 268-269; 275, 345-56, 357-358, 371, 375-376, 385-389, 391 respectively [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

[45] *See* Les Depo., pp. 59 - 60, 61 -63, 167 - 168 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

[46] Les Depo., pp. 10, 25, 172, 176 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

that the Hyatt audit was one of the largest, if not the largest, in history.[47] Cox obtained written statements only from Hyatt's estranged relatives and not from his friends, associates and other family members.[48]

During the FTB's contacts with Hyatt's neighbors, trade association, licensees, employees of patronized businesses, and governmental officials in Nevada, the FTB disclosed that Hyatt was under investigation in California,[49] and engaged in other conduct that would reasonably cause these persons to have doubts as to Hyatt's moral character and his integrity.[50] In short, the FTB's actions in conducting interviews and interrogations of Hyatt's neighbors, business associates, and other Nevada residents, and its conduct in issuing deceitful, unauthorized "Demands to Furnish Information" gave the false, yet distinct, appearance that Hyatt was a fugitive from California being investigated as a tax cheater.[51]

In so doing, the FTB: (1) gave publicity to a matter concerning Hyatt; (2) placed Hyatt in a false light; (3) which was highly offensive to Hyatt, as it would be to any reasonable person; and (4) which the FTB had knowledge of or acted in reckless disregard the false light in which it would place Hyatt.

III. Substantial evidence supporting Hyatt's abuse of process claim.

A. **Elements of claim:** Government agencies commit abuse of process when their demands for information are motivated by an improper purpose, such as to harass the taxpayer or put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.[52] An agency that acquires information in an investigation by fraud, deceit, or trickery commits an abuse of process.[53]

B. **Supporting evidence:**

The FTB sent numerous Nevada business and professional entities and individual residents "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority *under California law* to issue subpoenas and demanded that the recipients thereof produce the information concerning Hyatt.[54] Moreover, these Demands were captioned on behalf of the "People of the State of California" and were prominently identified as relating to "In the Matter of: Gilbert P. Hyatt", thus

[47] Ford Depo., pp. 148-55 *[Supp. Appdx., Exh. 43]*.
[48] *Hyatt Affid.*, ¶¶ 117, 118, 174, 175 *[Appdx., Exh. 6]*.
[49] Appdx., Exhs. 9-10.
[50] *E.g.*, Chang Depo, pp. 32-33 *[Supp. Appdx., Exh. 32]*.
[51] *See, e.g.*, Hyatt Affid.¶¶ 129, 143-44 *[Appdx., Exh. 6]*.
[52] *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977).
[53] *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 317 (5th Cir. 1981).
[54] FTB 01882, 01888, 01890, 01892, 01894, 01896, 01897, 01908, 01910, 01912, 01914, 01938, 01940, 01964, 01992, 02043, 02054, 02069, 02081, 02083, 02085, 02087, 02098, 02100, 02294, 02296 [Hyatt Appendix, Vol. VII, Exh. 11 (Exh. 13 attached thereto)].

creating a reasonable inference that a tax, criminal or punitive investigation of Hyatt had been instituted. The FTB has never claimed that it sought or received permission from any Nevada court or any Nevada government agency to send such "quasi-subpoenas" into Nevada. Many Nevada residents and business entities responded with answers and information concerning Hyatt. These "quasi-subpoena" Demands on their face support the inference that they were calculated to coerce Nevada residents into responding through deception, fear and intimidation. In contrast, more polite correspondence requesting, rather than demanding, information, was sent to Nevada officials such as Governor Bob Miller, Senator Richard Bryan and others who were not sent the illicit "Demands". The inference can be drawn that these individuals would have recognized the absence of any authority for a California tax agency to "Demand" information from a Nevada resident and would have taken offense at such a "Demand."[55]

The Demands wrongfully disclosed Hyatt's social security number and in some instances his private address. Contrary to the requirements of the California privacy act, the FTB did not first go to Hyatt; instead, the Demands were sent without his knowledge. Contrary to the same act, the Demands did not disclose to the Nevada recipients that they were voluntary, since California has no power to subpoena information directly from Nevadans. Contrary to the same act, the Demands did not require the recipients to agree to keep Hyatt's personal information confidential. Contrary to the California Financial Privacy Act and the Discovery Statute in California, Cox questioned Hyatt's lawyers, accountants, and financial institutions without Hyatt's knowledge or consent and without first sending Hyatt the required Notice to Consumer. And Cox wrote to two of Mr. Hyatt's most sensitive Japanese customers, enclosing portions of sensitive, confidential multi-million dollar patent licensing agreements, showing that he may have violated the confidentiality clause of the agreements. A reasonable inference is that these actions were intended to damage Hyatt's business relationships.

Moreover, after consulting with Anna Jovanovich,[56] Cox began sending out the Demands For Information. She sent out more Demands to third parties on the Hyatt audits than some auditors sent out in their entire careers.[57] She did so without first ascertaining that the third party was uncooperative,

[55] H 01715, 01716 *[Supp. Appdx., Exh. 33]*.
[56] 1991-tax-year audit workpapers, FTB 100139 *[Supp. Appdx., Exh. 34]*.
[57] Ford Depo., pp. 91-92 *[Supp. Appdx., Exh.43]*; Shigemitsu Depo., p. 187 *[Supp. Appdx., Exh. 41]*; Alvarado Depo., p. 44, *[Supp. Appdx. Exh. 35]*, S. Semana Depo., pp. 82-83 *[Supp. Appdx., Exh. 36]*, B. Gilbert Depo., pp. 35-36 *[Supp. Appdx. Exh.*

as required by the FTB's Residency Manual.[58] She did so without first seeking the information from the taxpayer, as required by law.[59] This invasion of Hyatt's privacy has been condemned by the auditors who have been asked about it.[60] A reasonable inference can be drawn that these actions were undertaken with an illegitimate purpose, to further personal and institutional goals at Hyatt's expense, rather than for legitimate, residency audit purposes.

IV. The Court has overlooked or misapprehended the law in considering an issue never raised in the FTB's petition for extraordinary relief.

Since *State v. Thompson*[61] was decided in 1983, Hyatt has not found any instance like this one, where the Court granted a petition for extraordinary relief, on the ground that the district court erred in denying summary judgment because the plaintiff did not establish sufficient probative evidence. Here, the Court specifically stated that "[b]ecause this case implicates the principles of Full Faith and Credit and comity, which are of great importance with respect to interpreting each state's sovereign responsibilities and rights, we elect to exercise our extraordinary writ powers."[62] Despite the Court's stated ground for entertaining the FTB's petition, the Court has granted the FTB relief on grounds never raised in its petition.[63] Hyatt is similarly unaware of any opinion in which this Court granted extraordinary relief on a ground which was never raised by the petitioner. Such a notion is contrary to established precedent holding that "the burden on the party seeking extraordinary relief is a heavy one."[64] By granting the FTB's petition on grounds never raised in the petition, the Court has disregarded its own precedent and completely relieved the FTB from its heavy burden.

If, in fact, the Court intended to establish new policy related to writ practice and return to pre-1983 authority under which the Court reviewed denials of summary judgment motions based on

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37], Illia Depo., pp. 178-179 *[Supp. Appdx. Exh. 42]*.

[58] FTB 00844 *[Supp. Appdx., Exh. 38]* (To obtain information from *uncooperative* third parties, the auditor should use the Demand for Information Form (FTB Form 4973).) (Emphasis added.)

[59] Information Practices Act of 1977, California Civil Code § 1798.15 ("Each agency shall collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source.")

[60] Illia Depo., p. 248 *[Appdx., Exh. 42]*; Bauche Depo. p. 439 *[Supp. Appdx., Exh. 40]*.

[61] 99 Nev. 358, 662 P.2d 1338 (1983).

[62] Order, June 13, 2001, at 3.

[63] *Id.*, at 3 (The Court specifically recognized that neither party addressed the sufficiency of Hyatt's evidence.).

[64] *Poulos v. District Court*, 98 Nev. 453, 652 P.2d 1177 (1982). In *Poulos*, although the plaintiff failed to support his opposition to summary judgment with *any* affidavits or other evidence as required, the district court did not grant the defendant's motion for summary judgment. This Court denied the defendant's petition for a writ of mandamus concluding that extraordinary relief was unwarranted because there was "no substantial issue of public policy or precedential value in this case, and . . . no compelling reason why [the Court's] intervention by way of extraordinary writ is warranted." *Id.* at 455-56, 652 P.2d at 1178.

sufficiency of the evidence, it should simply deny the FTB writs on the grounds advanced by the FTB, then remand this matter to the district court for further proceedings. Then, an appeal can be taken with an appropriate lower court record, appellate court briefing and argument, and ultimate decision by this Court. This process would avoid what happened here: this Court essentially acting as a super trier-of-fact through its independent review of a record, which, although large, was not complete (the parties had not completed discovery, which was stayed by this Court). Moreover, the court's duty regarding appeals from summary judgment has always been to scour the record to see *if there are material issues of fact in dispute that would entitle the non-moving party to a trial on the merits, which is always favored.* And it is well-established that an appellate tribunal may not weigh the facts, as the court has done here.

V. The Court has overlooked or misapprehended its own standards regarding review of denials of summary judgment motions.

The essential test for this Court in reviewing Hyatt's Petition for Rehearing is whether the evidence presented on the FTB's summary judgment motion *and reasonable inferences from that evidence, which must be drawn favorably to Hyatt,*[65] meet all the elements of one or more of the claims in Hyatt's First Amended Complaint.[66] Hyatt's facts and the reasonable inferences drawn therefrom entitle him to his day in court to argue that the FTB, in and after 1993, undertook a concerted effort to illicitly exact funds from him through fraud and the commission of the other torts that were all utilized to achieve its ultimate, unlawful objectives. As part of the FTB's outrageous attempt to develop a colorable claim against Hyatt, the FTB implemented a strategy which resulted in all Hyatt-adverse facts accepted as true, and the disregard of all Hyatt-supportive facts. The results of this strategy were two FTB audit assessments of enormous amounts. Hyatt is entitled to show that the FTB audits were

[65] *NGA #2 Limited Liability Co. v. Rains*, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought; the factual allegations, evidence, and all reasonable inferences in favor of that party must be presumed correct. . . . A litigant has a right to trial when there remains the slightest doubt as to remaining issues of fact.").

[66] As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she granted that aspect of the FTB's Motion for Judgment on the Pleadings. In that count, Hyatt had sought a declaration as to when he became a Nevada resident in September, 1991 (per Hyatt) or April 1992 (per the FTB). Therefore, the FTB's references to facts in Hyatt's First Amended Complaint and its assertions as to "undisputed" facts which pertain to Hyatt's residency in 1991 and 1992 are no longer part of Hyatt's claims for relief, the district court having properly exercised her function as a gate-keeper to make sure that sufficient evidence was presented on the claims which she allowed to proceed (no formal amended complaint was filed, or needed to be filed, by Hyatt after Judge Saitta dismissed the declaratory judgment claim as to residency on the FTB Motion for Judgment on the Pleadings).

invasions of his privacy, violations of the FTB's express promises and commitments to him, abuses of process, and fraud. Even the U.S. Congress has criticized the FTB in the Congressional Record for the types of acts complained of by Hyatt.[67] All Hyatt wanted was a fair audit, and the FTB promised that to him. Hyatt is entitled to present to a jury his evidence and theories of the case, that the FTB's promises were never intended to be kept and that Hyatt was singled out for extraordinarily unfair and damaging treatment because of the FTB's institutional needs to justify its audit (and the auditors' personal goals of advancement) by assessing large taxes, interest, and fraud penalties.

The FTB has repeatedly accused Hyatt of placing his own "spin" on the facts, and Hyatt fully expects the FTB's answer to Hyatt's petition for rehearing to again attack the facts which support each element of Hyatt's claims. Of course, "spin" is just a derogatory expression for a party arguing its version of the facts and the inferences which those facts support, an essential part of our adversary system. If what the FTB derisively calls "spin" is, in fact, a reasonable inference which a fact-finder can draw from the evidence, then this Court's June 13 Order adopts a new standard under which inferences will no longer be permitted to satisfy the elements of a party's claim. In essence, any civil case will require "smoking gun" direct evidence of each element of each claim, and circumstantial evidence and reasonable inferences will not be available to establish such elements for the fact-finder. Clearly, such a drastic change in civil practice should come only after an appropriate district court proceeding and appellate record made with an understanding that those are the rules which now govern civil practice. Hyatt should not be the one to suffer when his case is used as the vehicle for implementing, in an unpublished order, such major changes in civil practice.

Of course, the FTB has and will undoubtedly put forth its own version of the facts, based on its own inferences which it wants this Court to draw (i.e., that it conducted a "standard", fair investigation perfectly within the bounds of its authority). But our adversarial system has always relied on the fact-finder to resolve those issues: does the fact-finder accept Hyatt's evidence that the FTB was motivated to and did conduct a biased, unlawful and tortious investigation resulting in great personal and professional benefits to the FTB and its auditors, all at Hyatt's expense? Or does the fact-finder accept the FTB's contention that its auditors merely followed their procedures in conducting a standard

[67] Vol. 145 No. 114 - Part III Congressional Record (pp. E1773-75) *[Supp. Appdx. Exh.46].*

investigation? This Court stepped into that fact-finder role, as if it were a panel of jurists, and decided to accept the FTB's version of the facts over Hyatt's.[68] Again, such a change in this Court's appellate role should be pronounced in a published opinion, followed by a remand to let the district court review the evidence under this new standard governing the relationship between the district courts and the Supreme Court.

VI. The Court has overlooked or misapprehended the law regarding the FTB's immunity in California for the conduct at issue.

In footnote 7 of its June 13, 2001 order, the Court cites to Section 860.2 of the California Government Code and *Mitchell v. Franchise Tax Board*[69] for the proposition that California accords its government agency immunity for intentional torts. But the statute's plain language provides immunity in California to the FTB and its employees in regard to "instituting" a tax proceeding. It does not apply in this tort case because Hyatt's claims are not based on the FTB *instituting* a procedure or action to collect taxes. Moreover, *Mitchell* held that the plaintiff's claims were all *directly* based on the FTB's institution of an action or proceeding to collect taxes against the taxpayer and placement of a tax lien on that individual's property. While the very fact that the FTB initiated an audit against an individual cannot be the basis of a tort claim, this is <u>not</u> the basis of Hyatt's suit.[70] Here, as repeatedly stated throughout this lawsuit, Hyatt is not attempting to nor is interfering with the tax protest proceeding in California.[71] Moreover, California's Constitution and California's privacy laws forbid the FTB from engaging in the conduct now alleged by Hyatt and waive sovereign immunity for such conduct.[72]

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[68]The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the FTB's conduct in performing its audit. This Court's June 13 Order reaches the merits by deciding that the FTB's conduct was not so bad that it gives rise to a tort claim, which is the traditional fact-finder role. This Court, then, is signaling its willingness to evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

[69]183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

[70]*Martinez v. City of Los Angeles,* 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff]s' allegations, go beyond the contention that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the investigation . . . , and they caused his arrest and imprisonment in Mexico."); *see also Bell v. State*, 63 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."

[71]The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp. 55-56 [Supp. Hyatt Appendix, Vol. VII, Exh. 11] and Cowan affid., ¶¶ 43, 44 *[Appdx. Exh. 6]*.

[72]California Constitution., Art. I, Sec. 1 (providing that dissemination of data gathered on or about an individual by state agencies is illegal and actionable as invasion of privacy). The California Supreme Court has held that the primary purpose of the Constitutional amendment was to provide protection against the encroachment on personal freedom caused by increased surveillance and data collection. *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975). The legislative history of the amendment demonstrates that it was intended to prevent the improper use of information properly obtained for a specific purpose, for

California cannot therefore object if held liable in Nevada for conduct not protected by its own immunity statute and for which its own laws provide relief to an aggrieved party.

Hyatt's invasion of privacy claims are interrelated and stem from the FTB's iron-clad, Constitutionally-mandated requirement that it respect and not invade Hyatt's privacy. The Court's order of June 13, 2001 properly cited to Nevada law relating to invasion of privacy,[73] but the analysis does not stop there. When "auditing" Nevada residents, the FTB as a public agency of the State of California must comply with its internal, statutory and Constitutional privacy obligations — obligations entirely consistent with Nevada law on invasion of privacy.[74] Otherwise, Nevada residents targeted for audit by the FTB have fewer rights and less privacy than their counterparts in California: a result that neither the Court nor the citizens of Nevada would find palatable.

VII. Conclusion.

For the aforementioned reasons, rehearing and remand should be granted in order to afford Hyatt the opportunity to be heard on what this Court found, *sua sponte*, to be the determinative issue.[75] *Before* the court *rules* in a writ petition on an issue which it declares as determinative of Hyatt's entire case, and which he was not *allowed* to address (because under N.R.A.P. 21, Hyatt was ordered to file an answer "directed solely to the issues of arguable cause against issuance of an alternative or peremptory writ...") he should be given the right to be heard on the issue. Where this court thinks a writ may appropriately issue on a ground not even raised, requested or addressed by the party requesting the writ (the FTB), the appropriate remedy is *not* to grant the writ where the prevailing party in the lower court (Hyatt) has been precluded from refuting that ground.

The effect of the Court's broad, sweeping Order is to close the doors of Nevada's courts and prevent any Nevada resident from bringing an action in Nevada for torts committed by a sister state agency. The facts discussed above show clearly that this is not a case built "on gossamer threads of

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example, the use of it for another purpose or the disclosure of it to some third party. *Id. at* 234 n.11. California Information Practices Act (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").

[73] Order, June 13, 2001, n. 13.

[74] *See* Hyatt Opp. to FTB Mot. for Sum. Judg., pp. 21-26 *[Appdx., Exh. 27].*

[75] At a subsequent hearing before Judge Saitta on July 10, 2001, she commented, with a smile, "I got reversed in the supreme court on an issue that wasn't even raised in the appellate briefs." (Unofficial Transcript page 4, lines 21-23, attached hereto as *Supp. Appdx. Exh. 47*, but this was not a formal part of the record, since this hearing took place after this Court's June 13 Order.)

speculation and surmise."[76] *None* of the tortious acts committed against Hyatt, now a 10-year Nevada resident, are triable in a Nevada court under this Court's June 13 Order, even torts committed *entirely in Nevada*, because that Order takes over the role traditionally (and appropriately) entrusted to the fact-finder.

Finally, this is an extremely high profile matter,[77] and a decision like the June 13 Order which appears to depart from established procedures and precedents of this Court on writ practice and summary judgment standards should be fully argued and briefed before being resolved, before trial, by this Court. As this Court recognizes, "the law favors trial on the merits."[78] If Hyatt is to be denied a trial on the merits, then at a *minimum* he should be allowed to fully argue and brief the issue under any new summary judgment standards which this Court seems to enunciate and find determinative in its June 13 Order.

Accordingly, Hyatt respectfully requests that this Court vacate its June 13 Order, issue an order denying the FTB writ petition as to the grounds for relief asserted therein by the FTB, order the recall of any summary judgment entered pursuant to the June 13 Order, and remand this matter for trial on the merits. The Court should also review the extensive record of the Discovery Commissioner and the district court on the second writ (Docket No. 35549, which would no longer be moot, as it was under the Court's June 13 Order) and deny that FTB writ petition as well, ordering the FTB to provide the ordered discovery. Alternatively, Hyatt respectfully requests that this Court remand this matter to the district court to evaluate Hyatt's evidence in light of the standards for writ practice and summary judgment review which the Court establishes in its order following rehearing.

DATED this _____ day of July, 2001

HUTCHISON & STEFFEN

BERNHARD & LESLIE, CHTD.

By: _____
Peter C. Bernhard, Esq.

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[76] *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992).

[77] For example, immediately after this Court's order, the FTB was publicly touting it before its Franchise Tax Board Advisory Board. "FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in the high-profile *Hyatt* residency case. The taxpayer had asked the court to halt the FTB audit as 'too intrusive.' In a non-written opinion on June 13, the Nevada Supreme Court held that a Nevada trial court should have granted the FTB's request for summary judgment. Mr. Miller, who has been with the FTB for 31 years, expressed extreme satisfaction with the outcome." (California Taxpayer's Association, *Caltaxletter*, Vol. XIV, No. 26, July 3, 2001, p. 3, *[Supp. Appdx., Exh. 48]*.

[78] *Home Sav. Ass'n Nev. Sav. & Loan Ass'n et al v. Aetna Casualty & Surety Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993).

EXHIBIT 37

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,	Case No. 36390 Consolidated with Case No. 35549
Petitioner,	
vs.	**RESPONSE TO ERRATA**
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.	

Petitioner, Franchise Tax Board of the State of California ("FTB") hereby responds to the Errata filed by Real Party in Interest Gilbert P. Hyatt ("Hyatt") on August 10, 2001 to his Supplemental Petition for Rehearing in the above-referenced case.

None of the Errata by Hyatt satisfy the requirement that he produce sufficient facts

indicating a genuine dispute that the acts of the FTB during its investigation constituted intentional torts. See, June 13th Order at Footnote 12.

ERRATA NO. 1:

At page 12, line 23 - page 13, line 3 of FTB's Answer to Hyatt's rehearing request, FTB said:

> Hyatt argues that Candace Les claimed the "audit narrative report re Hyatt was 'fiction,'" and cites to Candace Les' deposition as support. Supplement at page 1, line 19 and n.7. However, the cited pages 10 and 25 of that deposition do not discuss Les' opinion of the audit, and pages 172 and 176 of the deposition are not attached as exhibits. In short, there is no evidence of Les' opinion of the audit in the portions of the record cited by Hyatt, and nowhere does Les state that the report was "fiction.

In response, Hyatt has now submitted his Errata No. 1 to footnote 7 of his Supplemental Petition:

> Errata No. 1: Footnote 7: "[Appedx., Exh. 17]" should be "[Supp. Hyatt Appendix, Vol XIV, Exh. 49]" (change citation to official record, rather than to Rehearing Appendix).

By doing so, Hyatt now cites the Court to where pages 172 and 176 of the Les Deposition can be found. The impression Hyatt attempts to convey is that he now has produced sufficient facts to support rehearing. See footnote 1 to Hyatt's Errata.

To the contrary, upon examination, pages 172 and 176 of the Les Deposition do not "produce sufficient facts, indicating a genuine dispute," that FTB's acts constituted intentional torts. See, June 13th Order at Footnote 12. Those pages of the Les Deposition consist of nothing more than the personal ramblings and opinion of a terminated employee of the FTB. The cited testimony bears no relevance to the substantive work of the audit; that is, verifying Hyatt's claim of Nevada residency. The work of the audit addressed: where did Hyatt live in Nevada between September 24 and October 20; whether he was physically present in Nevada during that time; whether he actually lived in the apartment before the commencement of the lease on November 1st (which was after receipt of the first Japanese payment of $15 million); whether he actually resided in the apartment thereafter; and what are the physical evidence of presence in Nevada

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through the end of 1991 and the first three months of 1992.

ERRATA NO. 2:

This Errata is to Hyatt's footnote 10 citing the "affidavit" of one of his lawyers, Thomas Bourke, who provides a lawyer's argument, but not evidence of facts as required by the Court's June 13th Order at Footnote 12. FTB renews its objections to the Bourke affidavit. See FTB App. Ex. 19 filed August 7th in support of FTB's Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing.

ERRATA NO. 3:

This Errata is to Hyatt's footnote 22, changing the cite to page "268" of the Jovanovich Deposition to page "168."

Footnote 22 purports to support Hyatt's claim of an "extortion" threat to go public if he did not settle.

Page 168 of the Jovanovich deposition, however, has nothing to do with that subject.

ERRATA NO. 4:

This Errata is to Hyatt's Footnote 27 which Hyatt uses to support his argument that taking a photograph from the street of his Las Vegas home was tortious because it was more than a "mere visit" to his house. The photograph was taken in 1995 and showed circumstantial indicia that the house may have been occupied for some time after Hyatt closed escrow on it April 2, 1992. That helped the auditor give Hyatt the benefit of the doubt that he had terminated his California residency upon his close of escrow. Taking the photograph is not evidence of sufficient facts constituting any intentional tort.

ERRATA NOS. 5, 6, 7 and 8:

These Errata are to Hyatt's footnote nos. 34, 35, 36 and 37, all of which are cited by Hyatt to support his argument that the 1995 drive-by and photograph of his Las Vegas house were improper. In point of fact, the audit was still open at that time. Rather than evidence of intentional tort, the drive by and photograph taken from the street reflected indicia of residence

which the auditor used to Hyatt's benefit to conclude that he had resided in the house after close of escrow on April 2, 1992, thereby terminating his California residency.

ERRATA NO. 9:

In this Errata, Hyatt has only cited the Court to a new location for his exhibits. These citations were included in his original Supplemental Petition for Rehearing, and, nothing in the cited pages changes FTB's analysis presented in its Opposition.

ERRATA NOS. 10, 11 and 12:

These Errata are to Hyatt's footnotes 44, 45 and 46, all of which are cited by Hyatt to support his false light claim. The appendix in support of Hyatt's Supplemental Petition for Rehearing had included only three separate pages of the Les Deposition cited in footnotes 44, 45 and 46. FTB argued, in pertinent part in its Answer at page 11, lines 25-26:

> Additionally, Hyatt repeatedly misstates what is in the record by including quotes that do not exist in the record and by citing to testimony that most times does not support the allegations.

Errata Nos. 10, 11 and 12 now cite the Court to 64 separate pages of the Les Deposition that were not in Hyatt's appendix in support of his Supplemental Petition for Rehearing. Hyatt used these same citations in his Supplemental Petition for Rehearing, and has done nothing more than provide this Court with an alternative location to find the Les Deposition. However, nothing in that deposition constitutes sufficient facts, indicating a genuine dispute that FTB placed Hyatt in false light or publicized its investigation outside the scope of the investigation.

ERRATA NO. 13:

This Errata is to Hyatt's footnote 50 and adds page 33 of the Chang Deposition which had not been included in Hyatt's appendix in support of his rehearing petition. Page 33 of the Chang Deposition contains the following testimony:

Q. Did they tell you that they wanted to look into the Youngmart record relating to the travel schedule of Mr. Hyatt?

A. They didn't say that but they said they wanted to look into some

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information regarding Hyatt.

Q. Did they imply that they were investigating whether or not Youngmart was cheating on its taxes respecting Mr. Hyatt?

A. No. Well, I figured that they were there looking for information relating to Hyatt and something was wrong with his records. (Emphasis added).

Hyatt cites that testimony in footnote 50 as support for his argument that the FTB ". . . engaged in other conduct that would reasonably cause these persons to have doubts as to Hyatt's moral character and his integrity." Supplemental Petition at page 8, lines 6-7. The argument is based upon the leading questions, not the actual testimony given by Mr. Chang. Such a distortion of the actual testimony does not constitute evidence of sufficient facts indicating a genuine dispute that the acts of the FTB during its investigation constituted intentional torts.

Not only has Hyatt distorted the Chang testimony, but also Hyatt has deliberately mislead the Court by implying the Chang interview was part of the audit. Hyatt cites the Chang deposition as an example of how the audit caused third parties "to have doubts as to Hyatt's moral character and integrity." Id. But Mr. Chang was interviewed by an investigator from the California Attorney General's office as part of FTB's trial preparation in defense of this case. It was not done as part of the audit as Hyatt falsely portrays it.

ERRATA NO. 14 and 15:

Footnote 54 and 55 provide this Court with nothing more than a new location for copies of FTB's Demands for Information. This change does not alter FTB's analysis presented in its Opposition, and does not constitute sufficient facts, indicating a genuine dispute which would merit this Court granting Hyatt's Petition for Rehearing.

ERRATA NO. 16:

This Errata is to Hyatt's footnote 71, which concerns the on-going administrative proceedings Hyatt is pursuing in California. The Errata provides the Court with nothing more than a new location in the record where Hyatt's opposition to the summary judgment motion can

be located.

Dated this 22nd day of August, 2001.

By _____
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CERTIFICATE OF MAILING

I hereby certify that I am an employee of McDonald Carano Wilson McCune Bergin Frankovich & Hicks LLP, and that I caused to be served a true and correct copy of the foregoing **RESPONSE TO ERRATA** on this 22nd day of August, 2001, by depositing same in the United States Mail, postage prepaid thereon to the addresses noted below, upon the following:

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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 Consolidated with Case No. 35549 **RESPONSE TO ERRATA** ***CONFIDENTIAL INFORMATION FILED UNDER SEAL***

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The envelope attached to this document contains the Franchise Tax Board of the State of California's Response to Errata in the above-referenced matter. The Response to Errata 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 Discovery Writ Petition before this Court.

Dated this 22nd day of August, 2001.

McDONALD CARANO WILSON McCUNE
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Dated this 22nd day of August, 2001.

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EXHIBIT 38

Franchise Tax Bd. v. Eighth Judicial Dist. Court

Supreme Court of Nevada

April 4, 2002, Filed

No. 35549, No. 36390

Reporter
2002 Nev. LEXIS 57 *

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY M. SAITTA, DISTRICT JUDGE, Respondents, and GILBERT P. HYATT, Real Party in Interest.

Subsequent History: [*1] Writ of certiorari granted: *Cal. Franchise Tax Bd. v. Hyatt, 2002 U.S. LEXIS 7586 (U.S. Oct. 15, 2002)*.

Writ of certiorari granted *Franchise Tax Bd. v. Hyatt, 537 U.S. 946, 123 S. Ct. 409, 154 L. Ed. 2d 289, 2002 U.S. LEXIS 7586 (2002)*

Motion denied by *Franchise Tax Bd. v. Hyatt, 537 U.S. 1169, 123 S. Ct. 1012, 154 L. Ed. 2d 911, 2003 U.S. LEXIS 909 (2003)*

Affirmed by *Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 123 S. Ct. 1683, 155 L. Ed. 2d 702, 2003 U.S. LEXIS 3244 (2003)*

Prior History: *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court of Nev., 2001 Nev. LEXIS 55 (Nev., June 13, 2001)*

Disposition: Previous opinion of June 13, 2001 vacated on rehearing. In Docket No. 35549, writ of mandamus granted in part. In Docket No. 35549, writ of prohibition granted in part. Stay of district court proceedings vacated.

LexisNexis® Headnotes

Civil Procedure > Remedies > Writs > General Overview

HN1[] **Remedies, Writs**

Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery.

Civil Procedure > Remedies > Writs > General Overview

HN2[] **Remedies, Writs**

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

Civil Procedure > ... > Discovery > Privileged

Communications > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > ... > Writs > Common Law Writs > Prohibition

HN3[] **Discovery, Privileged Communications**

A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information. A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, the appellate court generally declines to consider such petitions because so few of them warrant extraordinary relief. The appellate court may nevertheless choose to exercise its discretion and intervene, as to clarify an important issue of law and promote the interests of judicial economy.

Administrative Law > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > General Overview

HN4[] **Administrative Law, Sovereign Immunity**

Nevada has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment. California has expressly provided its state taxation agency with complete immunity.

Governments > State & Territorial Governments > Claims By & Against

Torts > Procedural Matters > Conflict of Law > Place of Injury

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Torts > Procedural Matters > Commencement & Prosecution > Subject Matter Jurisdiction

Torts > Procedural Matters > Conflict of Law > General Overview

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN5[] **State & Territorial Governments, Claims By & Against**

The Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy. The doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction, while Nevada law is presumed to govern with respect to the underlying torts.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Courts > Judicial Comity

HN6[] **Jurisdiction, Jurisdictional Sources**

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

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity
Liability > Immunities > Sovereign Immunity

Torts > Public Entity
Liability > Immunities > General Overview

HN7[] **State & Territorial Governments, Claims By & Against**

An investigation is generally considered to be a discretionary function, and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused.

Tax Law > State & Local
Taxes > Administration & Procedure > Audits & Investigations

Torts > Intentional Torts > General Overview

Torts > Business Torts > Bad Faith Breach of Contract > General Overview

Torts > Public Entity
Liability > Immunities > General Overview

HN8[] **Administration & Procedure, Audits & Investigations**

Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment.

Administrative Law > Judicial Review > Administrative Record > Disclosure & Discovery

Civil Procedure > Remedies > Writs > General Overview

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN9[] **Administrative Record, Disclosure & Discovery**

Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders.

Judges: Maupin, C.J. Young, J., Agosti, J., Shearing, J., Leavitt, J. ROSE, J., concuring in part and dissenting in part.

Opinion

ORDER GRANTING PETITION FOR REHEARING, VACATING PREVIOUS ORDER, GRANTING PETITION FOR A WRIT OF

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

In Docket No. 35549, Franchise Tax Board petitioned this court for a writ of mandamus or prohibition, challenging the district court's determination that certain documents were not protected by attorney-client, work product or deliberative process privileges, and its order directing Franchise Tax Board to release the documents to Gilbert Hyatt. In Docket No. 36390, Franchise Tax Board separately petitioned this court for a writ of mandamus, challenging the district court's denial of its motions for summary judgment or dismissal, and contending that the district court lacks subject matter jurisdiction over the underlying tort claims because Franchise Tax Board **[*2]** is immune from liability under California law. Alternatively, Franchise Tax Board sought a writ of prohibition or mandamus limiting the scope of the underlying case to its Nevada-related conduct.

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

We conclude that the district court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles. Therefore, we grant the petition in Docket No. 36390 with respect to the negligence claim, and deny it with respect to the intentional tort claims. We also deny the alternative petition to limit the scope of trial. **[*3]** We further conclude that, except for document FTB No. 07381, which is protected by the attorney work-product privilege, the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents at issue because Franchise Tax Board has not demonstrated that they were privileged. Therefore, we grant the petition for a writ of prohibition [1] in Docket No. 35549 with respect to FTB No. 07381, and deny the petition with respect to all the other documents.

Background

The underlying tort action arises out of Franchise Tax Board's audit of Hyatt--a long-time California resident who moved to Clark County, Nevada--to determine whether Hyatt underpaid California state income taxes for 1991 and 1992. After the audit, Franchise Tax Board assessed substantial additional taxes and penalties **[*4]** against Hyatt. Hyatt formally protested the assessments in California through the state's administrative process, and sued Franchise Tax Board in Clark County District Court for several intentional torts and one negligent act allegedly committed during the audit.

During discovery in the district court case, Hyatt sought the release of all the documents Franchise Tax Board had used in the audit, but subsequently redacted or withheld. Franchise Tax Board opposed Hyatt's motion to compel on the basis that many of the documents were privileged. The district court, acting on a discovery commissioner's recommendation, concluded that most of the documents were not privileged and ordered Franchise Tax Board to release those documents. The district court also entered a protective order governing the parties' disclosure of confidential information. The writ petition in Docket No. 35549 challenges those decisions.

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[1] *HN1*[↑] Prohibition is a more appropriate remedy than mandamus for the prevention of improper discovery. *Wardleigh v. District Court, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995)*.

Franchise Tax Board then moved for summary judgment, or dismissal under NRCP 12(h)(3), arguing that the district court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity and administrative exhaustion all required **[*5]** the application of California law, and under California law Franchise Tax Board is immune from all tort liability. The district court denied the motion. The writ petition in Docket No. 36390 challenges that decision. The Multistate Tax Commission has filed an amicus curiae brief in support of Franchise Tax Board's comity argument.

Propriety of Writ Relief

HN2[↑] We may issue an extraordinary writ at our discretion to compel the district court to perform a required act, [2] or to control discretion exercised arbitrarily or capriciously, [3] or to arrest proceedings that exceed the court's jurisdiction. [4] An extraordinary writ is not available if petitioner has a plain, speedy and adequate remedy in the ordinary course of law. [5]

[*6] HN3[↑] A petition for a writ of prohibition may be used to challenge a discovery order requiring the disclosure of privileged information. [6] A petition for a writ of mandamus may be used to challenge an order denying summary judgment or dismissal; however, we generally decline to consider such petitions because so few of them warrant extraordinary relief. [7] We may nevertheless choose to exercise our discretion and intervene, as we do here, to clarify an important issue of law and promote the interests of judicial economy. [8]

Docket No. 36390

Nevada and California have both generally waived their sovereign immunity from suit, but not their Eleventh Amendment immunity from suit in federal court, and have extended the waivers to their state agencies or public employees, except when state statutes expressly provide immunity. [9] HN4[↑] Nevada **[*7]** has expressly provided its state agencies with immunity for discretionary acts, unless the acts are taken in bad faith, but not for operational or ministerial acts, or for intentional torts committed within the course and scope of employment. [10] California has expressly provided its state taxation agency, Franchise Tax Board, with complete immunity. [11] The fundamental question presented is which state's law applies, or should apply.

[*8] *Jurisdiction*

Preliminarily, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or administrative exhaustion deprive the district court of subject matter jurisdiction over Hyatt's tort claims. First, although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts. [12] **[*9]** Second, HN5[↑] the Full Faith and Credit

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[2] NRS 34.160 (mandamus).

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

[4] NRS 34.320 (prohibition).

[5] NRS 34.170; NRS 34.330.

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

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

[8] Id.

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

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

[11] See Cal. Gov't Code § 860.2; Mitchell v. Franchise Tax Board, 183 Cal. App. 3d 1133, 228 Cal.Rptr. 750 (Ct. App. 1986).

[12] Nevada v. Hall, 440 U.S. 410, 414-21, 59 L. Ed. 2d 416, 99 S. Ct.

Clause does not require Nevada to apply California's law in violation of its own legitimate public policy. [13] Third, the doctrines of sovereign immunity and full faith and credit determine the choice of law with respect to the district court's jurisdiction, [14] while Nevada law is presumed to govern with respect to the underlying torts. [15] Fourth, Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply. The district court has jurisdiction; however, we must decide whether it should decline to exercise its jurisdiction under the doctrine of comity.

Comity

HN6[↑] The doctrine of comity is an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations. [16] **[*10]** In deciding whether to respect California's grant of immunity to a California state agency, a Nevada court should give due regard to the duties, obligations, rights and convenience of Nevada's citizens and persons within the court's protections and consider whether granting California's law comity would contravene Nevada's policies or interests. [17] Here, we conclude that the district court should have refrained from exercising its jurisdiction over the negligence claim under the comity doctrine, but that it properly exercised its jurisdiction over the intentional tort claims.

Negligent Acts

Although Nevada has not expressly granted its state agencies immunity for all negligent acts, California has granted the Franchise Tax Board such immunity. [18] We conclude that affording Franchise Tax Board statutory immunity for negligent acts does not contravene any Nevada interest in this case. ***HN7***[↑] An investigation is generally considered to be a discretionary function, [19] and Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused. [20] Thus, Nevada's and California's interests are similar with respect to Hyatt's negligence claim.

[*11] *Intentional Torts*

In contrast, we conclude that affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case. As previously stated, ***HN8***[↑] Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment. Hyatt's complaint alleges that Franchise Tax Board employees conducted the audit in bad faith, and committed intentional torts during their investigation. We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency. [21] Because we conclude that the district court properly exercised its jurisdiction over the intentional tort claims, we must decide whether our

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1182 (1979).

[13] *Id. at 421-24*.

[14] *Id. at 414-21*.

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

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

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

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

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

[20] *NRS 41.032(2)*.

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

intervention is warranted to prevent the release of documents that Franchise Tax Board asserts are privileged.

[*12] *Docket No. 35549*

Franchise Tax Board invoked the deliberative process, attorney-client and work-product privileges as barriers to the discovery of various documents used or produced during its audit. The district court decided that most of the documents were not protected by these privileges, and ordered Franchise Tax Board to release them. With one exception, we conclude that the district court did not exceed its jurisdiction by ordering Franchise Tax Board to release the documents.

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

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

The work-product privilege does apply, however, to document FTB No. 07381. This memorandum documenting a telephone conversation between Franchise Tax Board attorneys Jovanovich and Gould **[*14]** should be protected from disclosure. When the memorandum was generated, Jovanovich was acting in her role as an attorney representing Franchise Tax Board, as was Gould. The memorandum expresses these attorneys' mental impressions and opinions regarding the possibility of legal action being taken by Franchise Tax Board or Hyatt. Thus, this one document is protected by the attorney work-product privilege. [26]

Finally, although Franchise Tax Board also challenges the district court's protective order, we decline to review the propriety of that discovery order in this writ proceeding. ***HN9***[↑] Although an extraordinary writ may be warranted to avoid the irreparable injury that would result from a discovery order requiring disclosure of privileged information, extraordinary writs are not generally available to review discovery orders. [27] Franchise Tax Board has a plain, speedy and adequate remedy; it may challenge the order on appeal if it is aggrieved **[*15]** by the district court's final judgment.

Conclusion

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

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[22] See *Coastal States Gas Corp. v. Department of Energy, 199 U.S. App. D.C. 272, 617 F.2d 854, 866-68 (D.C. Cir. 1980)*.

[23] See ***In re Sealed Case, 326 U.S. App. D.C. 276, 121 F.3d 729, 737-38 (D.C. Cir. 1997)***.

[24] See *Upjohn Co. v. United States, 449 U.S. 383, 389-97, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)*; *United States v. Chen, 99 F.3d 1495, 1501-02 (9th Cir. 1996)*; *United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996)*; *Texaco Puerto Rico v. Department of Consumer Aff., 60 F.3d 867, 884 (1st Cir. 1995)*.

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

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

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

negligence claim. We deny the petition in Docket No. 36390 with respect to the intentional tort claims, and we deny the alternative petition to limit the scope of trial.

We conclude that the district court exceeded its jurisdiction by ordering the release of one privileged document, but that Franchise Tax Board has not demonstrated that the district court exceeded its jurisdiction by ordering it to release any of the other discovery documents at issue. Accordingly, we grant the petition in Docket No. 35549 in part; **[*16]** the clerk of this court shall issue a writ of prohibition prohibiting the district court from requiring Franchise Tax Board to release document FTB No. 07381. We deny the writ petition in Docket No. 35549 with respect to all other documents.

We vacate our stay of the district court proceedings.

It is so ORDERED. [28]

Maupin, C.J.

Young, J.

Agosti, J.

Shearing, J.

Leavitt, J.

Dissent by: ROSE

Dissent

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

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

In *Mianecki v. District Court*, [1] we were faced with a similar issue when the State of Wisconsin requested comity be granted by Nevada courts in order to recognize Wisconsin's sovereign immunity. In refusing to grant comity and recognize Wisconsin's sovereign **[*17]** immunity, we stated:

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

Based on this **[*18]** very similar case, I would not grant comity to California, and I would extend immunity to the agents of California only to the extent that such immunity is given them by Nevada law. Denying a grant of comity is not uncommon, as California has denied comity to the state of Nevada in years past. [2]

Rose, J.

End of Document

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

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

[2] *Nevada v. Hall, 440 U.S. 410, 418, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979)*.

EXHIBIT 39

No. _____

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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0723

QUESTION PRESENTED

A long-time resident of California sued that State in a Nevada state court, alleging that California committed the torts of invasion of privacy, outrage, abuse of process, and fraud in the course of a personal income tax investigation concerning the timing of the individual's change of residence from California to Nevada. California Government Code section 860.2 reads: "Neither a public entity nor a public employee is liable for an injury caused by . . . (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax."

In *Nevada v. Hall*, 440 U.S. 410 (1979) this Court ruled that, in a tort action against Nevada arising out of a traffic accident occurring in California, California need not give full faith and credit to Nevada's statutory limitation on liability for injuries caused by Nevada state employees. However, the Court also noted that its ruling was fact-based: "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. The question presented is:

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

LIST OF PARTIES

Petitioner Franchise Tax Board of the State of California

Respondent Gilbert P. Hyatt

Respondent Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

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The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated April 4, 2002 (Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for a Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549), is printed in the Appendix, *infra*, at pp. 5-18. The written decision of the Nevada Supreme Court in Case Numbers 35549 and 36390, dated June 13, 2001 (Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549)) is printed in the Appendix, *infra*, at pp. 38-44. The written decision of the Nevada Supreme Court in Case Numbers 39274 and 39312, dated April 4, 2002 (Order Denying Petition for a Writ of Mandamus or Prohibition and Dismissing Appeal), pertaining to the protective order, is printed in the Appendix, *infra*, at pp. 19-21. The Protective Order of the Eighth District Court of the State of Nevada Protective Order is printed in the Appendix, *infra*, at pp. 22-35.

JURISDICTION

On April 4, 2002, the Nevada Supreme Court issued its orders (1) denying and granting in part Petitioner's Petitions For Writ of Mandamus and Writ of Prohibition, and (2) denying Petitioner's Petition For Writ of Mandamus and Writ of Prohibition pertaining to the protective order. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a) because the Nevada Supreme Court rejected

California's claim of right under Article IV, Section 1, of the Constitution, the "Full Faith and Credit Clause."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth verbatim in Appendix, *infra*, pp. 45-48.)

United States Constitution, Art. IV, § 1, The Full Faith and Credit Clause.

California Government Code § 860.2

California Government Code § 905.2

California Government Code § 911.2

California Government Code § 945.4

California Revenue and Taxation Code § 19041

California Revenue and Taxation Code § 21021

STATEMENT OF THE CASE

Pursuant to its inherent sovereign powers, the State of California imposes a personal income tax upon the income of its residents. The Petitioner is the Franchise Tax Board of the State of California (hereinafter referred to as "FTB"). The FTB is the California state agency charged with the public duty of implementing and enforcing the California state personal income tax.

Respondent Gilbert P. Hyatt is a former long-time resident of the State of California who filed a return for 1991 with FTB asserting that he had terminated his California residency and moved to Nevada on September

26, 1991 just before certain companies paid him $40 million cash in "patent licensing fees" for a patent he had obtained while a resident of California. Hyatt did not report the $40 million as California income subject to the state personal income tax. The FTB conducted an audit investigation of his filing status and issued Notices of Proposed Assessment for the years 1991 and 1992 based upon its determination that Hyatt remained a California resident until April of 1992. In these Notices of Proposed Assessment the FTB also asserted a civil fraud penalty. Hyatt filed a protest[1] of these Notices of Proposed Assessment. That protest is still pending in California. After filing his protest, Hyatt filed a lawsuit for monetary damages against FTB in Respondent Nevada state court alleging the commission of fraud, abuse of process, invasion of privacy, outrage and negligence by the FTB in both California and Nevada. (Amended Complaint for Declaratory Relief and Tort Damages is printed in the Appendix, *infra*, at pp. 49-90)

The amended complaint sought declaratory relief that Hyatt was a Nevada resident and not subject to California personal income tax. In his action, Hyatt is seeking hundreds of millions of dollars in damages based upon allegations of the common law torts of: 1) unreasonable intrusion upon the seclusion of another; 2) unreasonable publicity given to private facts; 3) casting plaintiff in a false light; 4) outrage; 5) abuse of process; 6) fraud; and 7) negligent misrepresentation.

[1] A "protest" triggers an internal administrative review of the proposed assessments conducted by a hearing officer who is an employee of the FTB. Cal. Rev. & Tax Code § 19041. The hearing officer on the Hyatt protest is an attorney.

The request for declaratory relief was dismissed by Nevada state court on FTB's motion for judgment on the pleadings for lack of subject matter jurisdiction. But Hyatt was allowed to proceed with his tort claims. The Nevada courts also imposed a Protective Order that directs the FTB not to share information it acquired during the course of the lawsuit with the FTB employees conducting the ongoing administrative proceeding involving Hyatt's personal income tax obligations without first requesting Hyatt's permission to make the documents available. If Hyatt refuses permission, the Protective Order directs the FTB to attempt to obtain the documents through the administrative process. (Protective Order is printed in the Appendix, *infra*, at pp. 22-35) In addition, the Nevada district court ordered the FTB to produce certain documents that, under California evidentiary and administrative law, would be barred or precluded from disclosure. FTB filed its first writ petition with the Nevada Supreme Court in Case Number 35549 contesting these discovery orders.

While that first writ was pending before the Nevada Supreme Court, FTB filed a motion in the trial court seeking summary judgment on the remaining tort claims and dismissal for lack of jurisdiction. That motion was denied by the trial court, and FTB filed a second writ petition in the Nevada Supreme Court, Case Number 36390. On June 13, 2001, the Nevada Supreme Court granted that second writ petition, finding that Hyatt "failed to show any evidence of tortious conduct on the part of the Franchise Tax Board." The Nevada Supreme Court ordered the trial court to enter summary judgment in favor of FTB and dismissed the first writ petition as being moot.

After the Nevada Supreme Court entered its order granting the second writ petition, the FTB filed a motion with the trial court to vacate the Protective Order. That Protective Order had effectively served to prevent the FTB from sharing information it had acquired during the lawsuit with the administrative audit review that California was still conducting to determine whether Hyatt owed additional taxes and should be subjected to a civil fraud penalty for 1991 and 1992. This motion to vacate was denied, and another petition for writ and appeal was filed by the FTB with the Nevada Supreme Court on March 4, 2002.

On April 4, 2002, pursuant to Hyatt's petition for reconsideration, the Nevada Supreme Court issued two separate orders in this case. First, with certain exceptions, the court denied FTB's petitions for writ of mandamus and prohibition. With respect to the mandamus petition, the court refused to grant full faith and credit to California's immunity laws as barring Hyatt's Nevada suits based on the common-law intentional torts; however, the court did make allowance for California's statutory immunity for *negligent* acts, on the ground that such an allowance would not contravene any Nevada interests. With respect to the prohibition petition, the court generally ordered the disclosure and release of documents that are considered confidential and not subject to disclosure under California law; however, the court did bar the district court from requiring the FTB to release one particular document. (Appendix, *infra*, at pp. 3-4) Second, the court denied the FTB's petition for writ of mandamus or prohibition challenging the

district court's denial of the FTB's motion to vacate a protective discovery order.[2] (Appendix, *infra*, at pp. 19-21.)

REASONS FOR GRANTING THE WRIT

I. NEVADA'S REFUSAL TO EXTEND FULL FAITH AND CREDIT TO CALIFORNIA'S TAX IMMUNITY LAW CRIPPLES CALIFORNIA'S ABILITY TO PERFORM ONE OF ITS CORE SOVEREIGN FUNCTIONS, IN THIS CASE ENFORCEMENT OF CALIFORNIA'S PERSONAL INCOME TAX LAW.

California taxes all of the income of its residents, whether earned within or outside California. In addition, it taxes the income received from California sources of non-residents. As part of its tax-enforcement procedures, a core sovereign function, FTB conducts "residency audits" of former California residents now living in other States, for the purpose of determining the existence and extent of any tax obligation owing for the period of California residency and to determine whether they had California source income. Residency audits necessarily involve official tax enforcement activities both within California and in other States.

Under California law, there are multiple jurisdictional bars to bringing a lawsuit based on an ongoing administrative tax investigation, such as a residency tax audit, yet the Nevada Supreme Court refused to extend full faith and credit to California's immunity laws. It is important

[2] The order also dismissed the FTB's appeal from the same order.

that this Court grant the writ in this case to protect California's – or indeed any State's – ability to undertake the exercise of a core sovereign function without exposing it to potentially *unlimited* tort liability to *private parties* in the courts of *sister States*. California has found it necessary to enact a broad immunity scheme, with no geographical restriction on its application, to protect its sovereign tax administration activities. In order to protect the balance inherent in our Constitution's federal system, it is important that this Court protect California's efforts by affirming that full faith and credit applies in such circumstances.

In *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), this Court anticipated that there could be circumstances where even differing state policies would not justify denying full faith and credit to a sister State's body of law. It was suggested that such circumstances might arise where the refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism[,]" such as where it interferes with a State's "capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. This Court explained that *Nevada v. Hall* was not such a case. The FTB believes, however, that this case is precisely what was anticipated by footnote 24.

Because the FTB's alleged torts in this case arose within the context of an administrative tax investigation, California Government Code § 860.2 specifically immunizes the FTB from Hyatt's claims:

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

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

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

California case law dealing with § 860.2 has given it a broad interpretation. For example, *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750, 753 (1986), dismissed negligence, slander of title, interference with credit relations, and due process claims against the FTB based on § 860.2.[3]

As footnote 24 of *Nevada v. Hall* contemplated, it is vital to protect the States' ability to carry out their core sovereign functions, protected by their immunity laws, without the risk of having to defend themselves in the courts of sister States. Full faith and credit must require the Nevada courts to apply California's governmental immunity laws regarding tax administration to the entirety of FTB's conduct, including its conduct in Nevada. Here, Hyatt, a long-time California resident now allegedly living in Nevada, was the subject of a California residency audit. He has sued California in a Nevada state court under Nevada law alleging invasion of privacy, fraud, and

[3] However, section 860.2 does not exist in a vacuum, but is part of a larger statutory scheme for dealing with claims that misconduct of some variety occurred during a tax investigation or proceeding. For example, California Revenue and Taxation Code § 21021 provides taxpayers with a cause of action whenever the tax agency fails to follow board published procedures. On the other hand, California's Tort Claims Act, Gov't Code §§ 911.2, 905.2, and 945.4, bars lawsuits for monetary damages against California or a state employee without first complying with the claims presentation requirements.

abuse of process during the residency audit. However, rather than applying California law, the Nevada Supreme Court has ruled that Hyatt may prosecute his claims against California in Nevada state courts for alleged tortious conduct that comprises the FTB's administrative audit activities notwithstanding California's immunity provisions against suit for tax enforcement activities. Thus, California was deprived in this case of reasonable reliance on an immunity statute that was specifically enacted to protect the core sovereign function of state tax enforcement. Refusal to apply California law here severely hampers California's ability to undertake this core sovereign function. More importantly, the widespread application of the rule set down by the Nevada Supreme Court could cripple the States' ability to conduct vital state programs and protect vital state interests that are necessary to enable them to carry out core state functions.

There should be no doubt in this case that FTB was carrying out core sovereign functions. "'[T]axes are the life-blood of government. . . .'" *Franchise Tax Board of California v. USPS*, 467 U.S. 512, 523 (1984), quoting *Bull v. United States*, 295 U.S. 247, 259 (1935). In another context, involving congressional limitation of federal court jurisdiction, this Court has recognized "'the imperative need of a State to administer its own fiscal operations'" and the congressional intent to limit interference with "'so important a local concern as the collection of taxes.'" *Franchise Tax Board of Cal. v. Alcan Aluminium*, 493 U.S. 331, 338 (1990). The determination of residency is a foundational step in the collection of state personal income taxes. The FTB's acts were all performed as a part of the determination of residency, and thus were undertaken as

part of the State of California's inherent sovereign power to assess and collect taxes.

Allowing Hyatt to proceed notwithstanding the existence of California laws barring his action would seriously interfere with California's capacity to fulfill its sovereign responsibilities. California has the sovereign responsibility to administer California's tax laws. Hyatt's case seeks to punish the FTB for making minimal disclosure to others of identifying information about Hyatt for the purpose of determining his residency under these laws. Allowing Hyatt to litigate these acts further without applying California law would impede the FTB's entire residency audit program, as making even minimal inquiries and information disclosures out of state would expose the FTB to the threat of protracted, out-of-state tort litigation about its residency audit processes. This would necessarily interfere with the FTB's ability to administer California's tax laws, since consulting third party sources and making minimal information disclosures out of state are often required to investigate change of residency claims.

In addition, allowing Hyatt's case to proceed also exposes California to additional legal expenses and the threat of punishment for trying to obtain relevant information during residency audits. The FTB has incurred substantial additional litigation expenses before it has even finalized its proposed tax assessment against Hyatt. The FTB's administrative process could result in modification or withdrawal of the FTB's proposed assessments, yet the FTB already has been called to justify in Nevada courts virtually all of its audit actions and conclusions as if the final administrative result were set in stone. This is a subversion of California's tax administrative process.

Nevada's refusal to apply California's governmental immunity laws to Hyatt' s case, which arises entirely from acts incident to California tax administration, violates the Full Faith and Credit Clause of the United States Constitution.

II. AS SHOWN BY THE ORDER OF THE NEVADA SUPREME COURT IN THIS CASE, AND CONTRASTING RESULTS IN OTHER STATES, THE STATES REQUIRE GUIDANCE IN THE INTERPRETATION AND APPLICATION OF THE FULL FAITH AND CREDIT ANALYSIS OF *NEVADA V. HALL*.

In *Nevada v. Hall*, a University of Nevada employee driving a State of Nevada car in California negligently caused an accident resulting in severe physical injury to California residents. At the time, Nevada law limited tort recoveries against the State of Nevada to $25,000. The California courts declined to apply this limitation on Nevada's statutory waiver of its immunity from suit. *Nevada v. Hall*, 440 U.S. at 412-413. This Court affirmed, holding that the Full Faith and Credit Clause did not require California to apply Nevada's immunity laws to the California car accident. *Nevada v. Hall*, 440 U.S. at 424. The Court noted that California had an interest in providing full protection to those injured on its highways, and that requiring California to limit recovery based on Nevada law would have been obnoxious to California's policy of full recovery. *Ibid.* As noted above, however, the Court also stated that a different analysis might apply where one State's exercise of jurisdiction over a sister State could "interfere with [the sister State's] capacity to fulfill its own sovereign responsibilities":

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could 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.

Numerous courts have recognized the *Nevada v. Hall* exception suggested in footnote 24, which the FTB asserts applies in this case. In fact, several state courts have applied it, and have dismissed lawsuits against sister States as a result. But in this case the Nevada courts did not believe that this suit was precluded by the exception anticipated in *Nevada v. Hall*.

For example, in *Guarini v. State of N.Y.*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the State of New York in a New Jersey Court, but the New Jersey court dismissed the case under the exception to *Nevada v. Hall*. *Id.* at 1366-67. The *Guarini* court held that the "ruling [in *Nevada v. Hall*] did not mean that a State could be sued in another as a matter of course," *id.* at 1366, and dismissed the action based on its threat to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one State's citizens against neighboring States:

> The present case requires a 'different analysis' and a 'different result.'. . . Plaintiff, if successful, would clearly interfere with New York's capacity 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.*

Xiomara Mejia-Cabral v. Eagleton School, 97-2715 (1999 Mass. Super. Lexis 353, September 15, 1999), involved another application of the *Nevada v. Hall* footnote 24 exception. The plaintiff sued a Massachusetts school in a Massachusetts state court for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was also joined as a third-party defendant under allegations that it was negligent in placing the juvenile at the school. The Massachusetts court contrasted *Nevada v. Hall* and dismissed the State of Connecticut as a defendant, noting that:

> The prospect of one state's court deciding whether another state was negligent in selecting 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.)

The analyses, and indeed the results, in *Guarini* and *Xiomara Mejia-Cabral* are contrary to that of the Nevada Supreme Court in the present case. These contrasting views underscore the need to clarify the footnote 24 exception of *Nevada v. Hall*. In the final analysis, the Nevada Supreme Court's decision in this case is inconsistent with the interpretation and application of that decision by other States. Only this Court can speak authoritatively to the reach of its decision in *Nevada v. Hall*. Only this Court can fully resolve the proper application of the Full Faith and Credit Clause of the United States Constitution in the protection of the core sovereign functions of the several States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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EXHIBIT 40

No. 02-42

IN THE

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FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
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On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

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Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT GILBERT P. HYATT

STATEMENT

This case arises out of a tort suit brought by respondent Hyatt, a Nevada citizen, in Nevada state court against petitioner Franchise Tax Board of the State of California (the "Board"). Among various defenses, the Board asserted that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, compelled the Nevada courts to apply California law to the claims, in particular California law that purportedly shields the Board from liability for both negligent and intentional torts. The state district court elected to apply Nevada law. On appeal, the Nevada Supreme Court decided, on grounds of comity, to apply California law to the negligence claim, Pet. App. 11-12, but declined to apply California law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not shield Nevada officials from liability for intentional torts, the court

concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

The evidence introduced at the summary judgment stage showed that Board officials went well beyond typical investigative measures in an effort to extract additional tax revenues from respondent. The underlying tax dispute—which is still proceeding in California (Pet. 3)—turns on the date that respondent, a former California resident, became a permanent resident of Nevada. Seeking to establish a later date than respondent had submitted (and thus to extend the period during which respondent would have been a California citizen subject to California tax liability),[1] Board officials engaged in numerous tortious acts, including disclosures of private information about respondent to third parties, despite prior written and oral assurances that they would not do so. *See, e.g.*, Cowan Affidavit at 3-11 (Hyatt Appendix, Vol. VIII, Exh. 15); Depo. Exh. 101 (Franchise Tax Board audit file) at H01473, H01505, H01637 (Supp. Hyatt Appendix, Vol. X, Exh. 28). Furthermore, they carried out direct invasions of respondent's personal privacy, including efforts to look through mail and trash at his Nevada home. *See* Deposition of Candace Les at 269, 405 (Hyatt Appendix, Vol. VII, Exh. 11) (Les Deposition).

The conduct of one Board auditor, in particular, was extraordinary. This auditor, referring to respondent, declared that she was going to "get that Jew bastard." Les deposition at 10 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). According to

[1] In its petition, the Board seeks to give the impression that the 1991 income in dispute amounts to "$40 million." Pet. 3. In fact, the figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment).

"Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus. "Supp. Hyatt Appendix" refers to the additional appendices submitted in connection with the second petition.

evidence from a former Board employee, the auditor freely discussed information about respondent—much of it false—including, among other things, details about members of his family, his battle with colon cancer, his girlfriend, and the murder of his son. *See, e.g.*, Les Deposition at 176, 255, 389, 391 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). At one point, she took the employee to respondent's Nevada home and photographed her standing in front of it. *See* Les Deposition at 42, 264, 402-03 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49). Her incessant discussion of the investigation eventually led the employee to conclude that she had "created a fiction" about respondent and was "obsessed" with the case. *See* Les Deposition at 59-60, 61-63, 167-68 (Supp. Hyatt Appendix, Vol. XIV, Exh. 49).

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. The Board then sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause required the Nevada courts to apply California law and that, as a result, the Board was immune from liability for all claims. The Nevada district court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Nevada Supreme Court affirmed in part and reversed in part.[2] With respect to the one negligence claim, the court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court said that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies

[2] The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding that respondent had not presented sufficient evidence to support his claims. Upon rehearing, the court vacated that order, Pet. App. 7, and entered the judgment now being challenged by the Board in its petition.

with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to the intentional tort claims. With respect to the Full Faith and Credit Clause argument, the court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Pet. App. 12. Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

ARGUMENT

There is no need for further review in this case. The Nevada Supreme Court, in rejecting the Full Faith and Credit Clause argument made by the Board, did nothing more than correctly apply a well-established constitutional standard to a particular set of facts. The petition should be denied.

A. The sole argument advanced by the Board is that the Full Faith and Credit Clause compels Nevada courts to apply California law—in particular, its law of sovereign immunity—to the intentional tort claims brought by respondent.[3] But this

[3] The Board has not made, and the Question Presented does not encompass, any sovereign immunity argument separate and apart from its

Court has repeatedly made clear that a forum State, having sufficient contacts with the lawsuit, need not apply the law of another State when to do so would offend its own public policy. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Carroll v. Lanza*, 349 U.S. 408, 412 (1955); *Pacific Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-05 (1939).[4] The general rule is straightforward: "[t]he Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker by Thomas*, 522 U.S. at 232 (quoting *Pacific Employers*, 306 U.S. at 501). More particularly, "the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. at 412. Although a stricter rule applies with respect to *judgments*, *see Baker by Thomas*, 522 U.S. at 232-34, the Court has stressed that the Full Faith and Credit Clause applies with significantly less force to state *laws*, *id.*, stating flatly that the Clause does not "enable one state to legislate for

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argument that the Full Faith and Credit Clause required Nevada courts to apply California immunity law. In particular, the Board does not contend that it is shielded by inherent sovereign immunity, a defense that, in any event, this Court has declined to recognize as binding on the courts of a sister State. *See Nevada v. Hall*, 440 U.S. 410, 416 (1979); *see also Alden v. Maine*, 527 U.S. 706, 738-39 (1999).

[4] A State must demonstrate that its contacts with the litigation are sufficiently extensive that "'choice of its law is neither arbitrary nor fundamentally unfair.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion)). Given that respondent is a Nevada resident, and that the acts at issue occurred in (or caused harm in) Nevada, that standard is easily satisfied here.

the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers*, 306 U.S. at 504-05.

The Court has applied this principle, without variation, even when the law at issue would provide sovereign immunity to a defendant State. *See Nevada v. Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* went on to emphasize that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld that decision, noting that California had a "substantial" interest in granting relief to injured persons. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").

The Nevada Supreme Court simply applied these familiar principles to this case. It first recognized that, under the recognized standard, "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. Then, having invoked the doctrine of comity to order summary judgment for the Board on the negligence claim, Pet. App. 11-12, it declined to order summary judgment on the intentional tort claims, stating that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. More particularly, it concluded that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts

committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.

There is no serious question that the Nevada policy—redressing injury from intentional torts—is both genuine and significant. *See Nevada v. Hall*, 440 U.S. at 424. Indeed, like California in *Hall* (*id.*), Nevada has even chosen to subject its own officials to suit for comparable malfeasance. *See* Pet. App. 12 ("Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment"). In short, therefore, Nevada has made a deliberate policy choice that it will open its courts to persons injured as a result of intentional torts, even when the injury results from the acts of state employees. Nothing in the Full Faith and Credit Clause requires the State to subordinate that policy to the contrary policy of another State.

B. The Board does not address—indeed, does not even mention—this body of established law under the Full Faith and Credit Clause. Instead, its entire argument is that a footnote in *Nevada v. Hall*, 440 U.S. at 424 n.24, calls for a different analysis and that state courts are thus in need of guidance about the proper standard. Neither part of this argument is correct.

To begin with, the Board is making too much of footnote 24. In that footnote the Court merely noted that the action of the forum State (California) in applying its own law "pose[d] no substantial threat to our constitutional federalism" and "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities," *id.*, adding that it "ha[d] no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Id.* Although the Court did not elaborate, this language seems to do nothing more than leave open the future possibility of applying a balancing test, as the Court had done in a few prior Full Faith and Credit Clause

cases, pursuant to which the Court might weigh the respective State interests. *See Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 547 (1935) (conflict to be resolved "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight"); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 73 (1954). That *dictum*, however, is of little use to the Board at this point. It is clear by now, if it was not when *Nevada v. Hall* was decided, that the Court no longer employs a balancing test as part of its Full Faith and Credit Clause analysis. Five Justices of this Court expressly said so in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), decided just two years after *Nevada v. Hall*, with the plurality of four Justices observing: "Although at one time the Court required a more exacting standard under the Full Faith and Credit Clause than under the Due Process Clause for evaluating the constitutionality of choice-of-law decisions, . . . the Court has since abandoned the weighing-of-interests requirement." 449 U.S. at 308 n.10 (plurality opinion), citing *Carroll v. Lanza, supra*; *Nevada v. Hall, supra; see also id.* at 322 n.6 (Stevens, J., concurring in the judgment) ("as noted in the plurality opinion . . . the Court has since abandoned the full faith and credit standard represented by *Alaska Packers*"). And, in the years since, the Court has adhered to the standard applied in the text of *Nevada v. Hall*—*i.e.*, that a forum State need not apply foreign law in derogation of its own legitimate public policy—without requiring the State to demonstrate that its policy interest predominates over the conflicting policy of another State. *See, e.g., Sun Oil Co. v. Wortman, supra.*

The Board certainly offers no reason to resurrect the abandoned "balancing" approach. In the first place, any attempt to weigh State interests, by its very nature, puts state and federal courts in the uncomfortable position of having to assess and value different competing public policies whenever multiple States claim to have an interest in a particular lawsuit.

Moreover, as the final authority with respect to applications of the Full Faith and Credit Clause, it would ultimately fall to this Court to pick and choose among those various interests, without the benefit of any reliable means for determining which State interest is, in fact, more important. This case provides a ready example: one State (Nevada) has decided that recovery for injuries should prevail over defenses of sovereign immunity, while another State (California) has ostensibly made the opposite choice. On what ground can it be said that, in Nevada courts, California law must be paramount?

Although the Board plainly believes that the Court should modify its Full Faith and Credit Clause standard in order to protect state sovereignty, that argument ignores several important factors. Most obviously, it gives no regard to the fact that a more intrusive Full Faith and Credit Clause doctrine would diminish the sovereignty of the *forum State*, denying it the right to establish the governing law for "persons and events within it." *Carroll v. Lanza*, 349 U.S. at 412. Furthermore, it fails to recognize that forum States, applying the existing standard, are highly unlikely to allow prosecution of suits that would seriously impede necessary governmental activity. Even a State that allows some suits against its own officials will typically provide sovereign immunity for actions integral to proper government operations. *See* Pet. App. 11-12 (discussing immunity of Nevada officials for discretionary acts). Thus, as in the case of the negligence claim here, *id.*, it may be expected that courts of that State will seek to accommodate officials of a sister State claiming similar protection under their own state law.

It is also doubtful that liability for intentional torts, especially torts committed against the small minority of audited non-resident taxpayers, will impede any legitimate efforts to enforce state tax laws. To state the obvious, proper tax collection does not require the sort of conduct engaged in by the Board here. While the Board refers to the "core sovereign function of state

tax enforcement," Pet. 9, it does not explain why this "core sovereign function" calls for actions that (in the case of one official, at least) amounted to something akin to a personal vendetta.[5] And, to the extent that the Board is concerned about potential liability for mere mistakes or misjudgments, it has already been accorded protection for those actions under the doctrine of comity. *See* Pet. App. 12. The policy concerns expressed by the Board are thus considerably overblown.

Finally, the two state court cases cited by the Board fall far short of demonstrating confusion with regard to the governing standard under the Full Faith and Credit Clause. *See Guarini v. State*, 521 A.2d 1362 (N.J. Super. 1986), *aff'd*, 521 A.2d 1294, *cert. denied*, 484 U.S. 817 (1987); *Xiomora Mejia-Cabral v. Eagleton School*, 1999 WL 791957 (Sept. 16, 1999) (Mass. Super). Although both courts read footnote 24 in *Nevada v. Hall* quite broadly, the fact is that neither case ultimately turned on that reading. In *Xiomora Mejia-Cabral*, the Massachusetts court recognized sovereign immunity for Connecticut as a matter of comity. *See* 1999 WL 791957 at *3-*4. Noting that Massachusetts had retained its own sovereign immunity against similar lawsuits, *id.* at *3, the court concluded that there was "no policy of this state that would be undermined by respecting the terms and conditions on which Connecticut has waived its sovereign immunity." *Id.* at *4. In *Guarini*, the New Jersey court dismissed various claims against New York on four separate grounds—exclusive jurisdiction, sovereign immunity, comity, and lack of standing—without even referring to the Full Faith and Credit Clause, much less indicating a need for further guidance about how to proceed under its provisions. *See* 521 A.2d at 1364-71. These cases thus demonstrate that forum

[5] The Board appears to acknowledge that, even under California law, state officials may be held responsible for some unlawful actions with respect to tax enforcement. *See* Pet. 7-8 and note 3.

States are fully able to identify cases in which recognition of sovereign immunity, or other like defenses, for a sister State is appropriate.

What the Board ultimately refuses to accept in this case is that Nevada, the forum State, is acting as a co-equal sovereign. As such, it has its own sovereign interests in assuring redress for persons within its jurisdiction. *See Nevada v. Hall*, 440 U.S. at 426. As a sovereign itself, of course, the State of California may seek to find common ground with the State of Nevada regarding issues of liability and reciprocity. *Id.* It may not, however, simply elevate its own law over the law of its sister State by means of a flawed interpretation of the Full Faith and Credit Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Brief in Opposition for Respondent Gilbert P. Hyatt in Franchise Tax Board of the State of Nevada v. Gilbert P. Hyatt, were served, by first-class mail, postage prepaid, this 6th day of September, 2002, to the following:

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EXHIBIT 41

No. 02-42

In The Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its Petition for Writ of Certiorari, the California Franchise Tax Board (Board) sought review of the order of the Nevada Supreme Court that refused to extend full faith and credit to California's statutory scheme that provides broad sovereign immunity to state agencies, officials and employees administering California's tax laws. The Board argued that *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), suggested that in cases such as this case – where the order of the Nevada Supreme Court crippled California's capacity and ability to perform one of its core, critical sovereign functions, the enforcement of California's personal income tax law – even differing state policies would not justify denying full faith and credit to a sister State's body of law. The Board also argued that the States need guidance in the interpretation and application of the full faith and credit analysis in *Nevada v. Hall*.

In response, respondent Hyatt argued that the writ should be denied because a forum State need not extend full faith and credit where it has sufficient contacts with the lawsuit. Hyatt also argued that the Court has completely abandoned the use of a balancing test as part of its full faith and credit analysis. Finally, Hyatt argued that the States need no guidance from the Court on this issue. Hyatt is wrong on all counts.

ARGUMENT

I. Contrary to respondent's claim, the Full Faith and Credit Clause affords protection to non-forum sister States in resolving choice of law questions involving critical, core governmental functions.

Respondent's brief argues that the Full Faith and Credit Clause does not afford protection to non-forum sister States in resolving choice of law questions involving critical, core governmental functions. California and at least 37 other States and Territories have explicitly disagreed.

Respondent claims that a forum State, having sufficient contacts with the lawsuit, need not apply the law of another State when to do so would offend its own public policy without regard to the relative importance of the non-forum State's governmental function involved or the extensiveness of the contact between the forum and non-forum States.

Respondent also contends that the Court has abandoned any consideration of the relative importance of the governmental function and contact with the forum State in resolving these critical choice of law questions.

A. Despite the fact that a forum State has sufficient contacts with a lawsuit, it still must extend full faith and credit to the laws of a sister State engaged in core, critical sovereign functions.

Respondent's arguments are in part based on his interpretation of *Nevada v. Hall*, 440 U.S. 410 (1979), and in part by his reliance on a series of cases involving

actions between private parties. These cases between private parties are inapplicable because they do not involve the constitutional issue framed by footnote 24 in *Nevada v. Hall*. *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-38 (1998), involved a personal injury lawsuit between private parties. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 (1988), and *Phillips Petroluem Co. v. Shutts*, 477 U.S. 797, 818-19 (1985), concerned private class actions over oil royalties. *Carroll v. Lanza*, 349 U.S. 408, 412 (1955), and *Pacific-Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-505 (1939), considered the issue of workmen's compensation amongst private parties. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 (1981), involved a wrongful death dispute between private parties.

Although *Nevada v. Hall* was a suit against a State, rather than exclusively between private parties, its result is also inapplicable here because it did not involve a State's exercise of a core, critical sovereign function. *Nevada v. Hall* revolved around a traffic accident by a Nevada state employee involving serious and substantial personal injuries that occurred on a public highway in California rather than the performance of a governmental function as this case does, a difference *Nevada v. Hall* recognized as potentially implicating different questions. In the case presently before the court, the auditor was the sole official of the Board charged with confirming respondent's claim of California non-residency status for California personal income tax purposes, a core, critical state function.[1]

[redacted]

[1] Respondent seeks to influence and prejudice the Court against granting the Board's petition for certiorari by quoting and relying on

(Continued on following page)

not implicate the same constitutional concerns that are present here. Therefore, to the extent that *Allstate* establishes a rule disapproving use of a balancing test, the rule does not apply here. More importantly, however, Justice Stevens explicitly recognized in his concurring opinion in *Allstate* that the competing interests of the forum and non-forum States must be balanced to avoid infringement upon a State's sovereignty. "The Full Faith and Credit Clause implements this design by directing that a State, when acting as a forum for litigation having multistate aspects or implications, *respect the legitimate interests of other States* and avoid infringement upon their sovereignty." *Allstate Insurance Co. v. Hague*, 449 U.S. at 322 (Stevens, J., concurring). Justice Stevens amplified on this in *Allstate* when he explained that full faith and credit must be extended to prevent one State from imposing a policy that is hostile to another State's public acts:

> The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll v. Lanza*, 349 U.S. 408, 413 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevada v. Hall*, *supra*, at 424, n.24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Allstate Insurance Co. v. Hague, *supra*, 449 U.S. at 323, n.10 (Stevens, J., concurring). Certainly the language that Justice Stevens used, "restrain 'any policy of hostility to

the public Acts' of another State," and the prevention of "parochial entrenchment on the interests of other States," makes it clear that a balancing test is still appropriately used in some cases, and the Board believes that such a test must be used in this case.

Respondent's brief dramatically underscores the constitutional confrontation presented by this case which goes to the very core of cooperative federalism, an issue not present at all in *Allstate*. The issue presented to the Court in this case raises numerous important constitutional questions. Is the Full Faith and Credit Clause of the United States Constitution the appropriate vehicle for resolving confrontations between and among the States over the application of choice of law questions? May a forum State extend its judicial authority beyond its geographic borders to affect the governmental policies and actions of another State thereby exposing the public officials of the non-forum State, who have little or no contact with the forum State, to its judicial scrutiny and authority? Do cooperative federalism and the need to prevent conflicts between the States require that the judicial authority of one State with respect to the governmental actions of another State be tempered by the Full Faith and Credit Clause? Are the limitations on choice of law questions especially and uniquely important to our constitutional structure in situations where the forum State, as it does here, admits that substantially all the conduct of another State that gives rise to the conflict occurred in the non-forum State? None of these questions were answered in *Allstate*; they are questions that under our constitution only this Court can answer and the answer is needed now.

Moreover, footnote 10 in *Allstate* [449 U.S. at 323], upon which respondent relies, itself cites *Nevada v. Hall*. Thus, as this Court did in *Nevada v. Hall*, the Court in *Allstate* implicitly left open the same question of revisiting the Full Faith and Credit Clause analysis when choice of law questions involving core sovereign functions are at issue.

In addition, applying respondent's view of full faith and credit to the present situation is at odds with the generally accepted view that the purpose of the Full Faith and Credit Clause was to alter the States' status as completely independent sovereigns.

Justice Scalia explained the role of the Full Faith and Credit Clause in *Sun Oil Co. v. Wortman*, where he explained the statement in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-277 (1935) regarding choice of law jurisprudence: "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties." Thus:

> This statement is true, as the context of the statement in Milwaukee County makes clear, not because the clause itself radically changed the principle of conflicts law but because it made conflicts principles enforceable as a matter of constitutional command rather than leaving the enforcement to the vagaries of the forum's view of comity. See *Estin v. Estin*, 334 U.S. 541, 546 (1948) (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns"). . . .

Sun Oil Co. v. Wortman, 486 U.S. at 723-24, n.1; emphasis and parentheses in original.

Justice Stevens in *Allstate* also explained that:

> The Full Faith and Credit Clause is one of several provisions in the United States Constitution designed to transform the several States from independent sovereigns into a single, unified Nation.

Allstate Insurance Co. v. Hague, 449 U.S. at 322 (Stevens, J., concurring).

II. The States do need guidance in applying *Nevada v. Hall*.

Respondent contends that "forum states, applying the existing standard, are highly unlikely to allow prosecution of suits that would seriously impede necessary government activity." RB 9. Respondent also claims "that forum states are fully able to identify cases in which recognition of sovereign, or other like defenses, for a sister state is appropriate." RB 11. However, the problem here is that a forum State *has* failed to recognize an appropriate defense; thus, precisely that which respondent claims is unlikely to occur has, in fact, occurred. Respondent admits that he is challenging official conduct by Board officials *administering California's tax laws*, conduct that occurred almost exclusively in California. The Nevada Supreme Court originally found that "the myriad of depositions and documents submitted to the court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard to determine residency status for taxation pursuant to its statutory authority." Pet. App. 42-43. The Nevada district court observed that ninety-five percent of the conduct complained about occurred outside the forum State of Nevada. Pet. App. Ex. 17. Yet, despite

these uncontradicted facts, the Nevada Supreme Court has allow respondent to proceed under Nevada law when existing California law would provide the Board with broad immunities.[1] In this case the unexpected has occurred and only this Court can respond to it.

[redacted]

[1] The Nevada district court has also allowed respondent unfettered freedom in discovery, allowing almost unlimited and draconian discovery measures affecting administrative tax and governmental records and public employees, often in contravention of existing California law. This includes sealing the court file and the imposing of an oppressive protective order designed to keep the proceeding behind a wall of secrecy. See Board Response To Errata at 2.

[redacted]

CONCLUSION

Based on the foregoing reasons, petitioner respectfully requests this Court to grant the Board's petition.

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EXHIBIT 42

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Re: Franchise Tax Board of California
v. Gilbert P. Hyatt, et al.
No. 02-42

Dear Mr. Kula:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

William K. Suter

William K. Suter, Clerk

EXHIBIT 43

2002 WL 31827845 (U.S.) (Appellate Brief)
United States Supreme Court Petitioner's Brief.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner,
v.
Gilbert P. HYATT and EIGHT JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, Respondents.

No. 02-42.
December 9, 2002.

On Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF OF PETITIONER

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***i** QUESTION PRESENTED

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of Article IV, Section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

***ii** LIST OF PARTIES

Petitioner Franchise Tax Board of the State of California

Respondent Gilbert P. Hyatt

Respondent Eighth Judicial District Court of the State of Nevada, in and for the County of Clark

West Headnotes (1)

States Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states
(Formerly 360k0(2))

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of the Full Faith and Credit Clause, by refusing to give full faith and credit to the California statute that precludes liability of a public entity or public employee with respect to assessing or collecting taxes, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax? U.S.C.A. Const. Art. 4, § 1; West's Ann.Cal.Gov.Code §§ 818.8, 860.2.

Cases that cite this headnote

***iii** TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

Cases:

*1 OPINIONS BELOW

The written decision of the Nevada Supreme Court in Docket Numbers 35549 and 36390, dated April 4, 2002 (Order Granting Petition for Rehearing, Vacating Previous Order, Granting Petition for a Writ of Mandamus in Part in Docket No. 36390, and Granting Petition for Writ of Prohibition in Part in Docket No. 35549). Pet.App. at pp. 5-18.

The written decision of the Nevada Supreme Court in Docket Numbers 35549 and 36390, dated June 13, 2001, (Order Granting Petition (Docket No. 36390) and Dismissing Petition (Docket No. 35549)). Pet.App. at pp. 38-44.

The written decision of the Nevada Supreme Court in Docket Numbers 39274 and 39312, dated April 4, 2002 (Order Denying Petition for a Writ of Mandamus or Prohibition and Dismissing Appeal), pertaining to the Protective Order. Pet.App. at pp. 19-21.

The Protective Order of the Eighth District Court of the State of Nevada. Pet.App. at pp. 22-35.

JURISDICTION

On April 4, 2002, the Nevada Supreme Court issued its orders (1) denying and granting in part Petitioner's Petitions for Writ of Mandamus and Writ of Prohibition, and (2) denying Petitioner's Petition for Writ of Mandamus and Writ of Prohibition pertaining to the protective order. On July 2, 2002, Petitioner filed a petition for a writ of certiorari. Certiorari was granted on October 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

*2 CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Set forth verbatim in Appendix, *infra*, App. 1)

United States Constitution, Article IV, § 1

California Code of Civil Procedure § 1060.5

California Government Code § 860.2

California Government Code § 905.2

California Government Code § 911.2

California Government Code § 945.4

California Revenue & Taxation Code § 17001

California Revenue & Taxation Code § 17014

California Revenue & Taxation Code § 17015

California Revenue & Taxation Code § 17016

California Revenue & Taxation Code§ 19041

California Revenue & Taxation Code § 19044

California Revenue & Taxation Code § 19045

California Revenue & Taxation Code § 19046

California Revenue & Taxation Code § 19047

California Revenue & Taxation Code § 19381

California Revenue & Taxation Code § 19501

California Revenue & Taxation Code § 19504

***3** California Revenue & Taxation Code § 21021

Title 18, California Code of Regulations § 17014

STATEMENT OF THE CASE

1. Summary of the Background

Pursuant to its inherent sovereign power, the State of California imposes a personal income tax upon the income of its residents. The Petitioner is the Franchise Tax Board of the State of California (hereinafter referred to as the "FTB"). The FTB is the California state agency charged with the public duty of implementing and enforcing California's Personal Income Tax Law. Cal. Rev. & Tax. Code §§ 17001 and 19501. Respondent Gilbert P. Hyatt is a former long-time resident of the State of California who filed a return for 1991 with the FTB asserting that he terminated his California residency and moved to Nevada on October 1, 1991, just before certain companies paid him $40 million cash in "patent licensing fees" for patents he obtained while a resident of California. Record of Proceedings at Volume 1, Item 1, p. 3 and Gilbert Hyatt's First Amended Complaint, Pet. App. at p. 78, ¶60.

Hyatt did not report the $40 million as California income subject to the state personal income tax. Record of Proceedings at Volume 3, Item 2, pp. 12-33. The FTB conducted an audit investigation of Hyatt's filing status and issued Notices of Proposed Assessment for the years 1991 and 1992 based upon its determination that Hyatt remained a California resident until April 3, 1992. Record of Proceedings at Volume 3, Item 2, pp. 412-416. In these Notices of Proposed Assessment the FTB also asserted a ***4** civil fraud penalty. Hyatt filed a protest [1] of these Notices of Proposed Assessment. That protest is still pending in California. Record of Proceedings at Volume 3, Item 2, pp. 410-411. After filing his protest, Hyatt filed a suit against the FTB in Nevada seeking a declaration that he was a Nevada resident, a non-resident of California, and is, therefore, not subject to California personal income tax. In the Nevada suit, Hyatt also seeks monetary damages

against the FTB for alleged fraud, abuse of process, invasion of privacy, outrage and negligence by the FTB and its agents both in California and Nevada. Complaint JA at pp. 45-70, and Amended Complaint Pet.App. at pp. 49-90.

1 A "protest" triggers an internal administrative review of the proposed assessments conducted by a hearing officer who is an employee of the FTB. Cal. Rev. & Tax Code § 19041.

Hyatt's declaratory relief action was dismissed on the FTB's motion for judgment on the pleadings for lack of subject matter jurisdiction. Order Granting Partial Motion for Judgment on the Pleadings, JA at pp. 93-95. But the trial court refused to dismiss the remaining damage claims. Instead, the Nevada District Court sealed the courtroom from public access. JA at pp. 87-92. The Nevada District Court also imposed a Protective Order upon the FTB preventing it from providing most — if not all — of the information it had obtained in the lawsuit to the FTB officials who were conducting the ongoing administrative tax protest. The order barred the FTB from providing any such documents that Hyatt had designated as confidential, without his permission. The Protective Order requires that, if Hyatt refuses permission, the FTB protest officials must attempt to obtain the documents through California ***5** judicial processes. Pet.App. at pp. 22-35. In addition, the Nevada District Court ordered the FTB to produce certain documents that, under California evidentiary and administrative laws, would not be required to be disclosed. JA at pp. 135-146.

On December 27, 1999, the Nevada District Court adopted its Discovery Commissioner's Report and Recommendation, which expanded the scope of Hyatt's lawsuit beyond torts that were allegedly committed in Nevada by California government officials into a general inquiry of every aspect of the California tax process as it applied to Hyatt:
4. [T]hat the entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in this case and a proper subject of discovery.… Hyatt's claim of fraud against the FTB entities him to discovery on the entire audit and assessment process performed by the FTB that was and is directed at him as part of the FTB's attempt to collect taxes from Hyatt.

5. [T]he process of the FTB audits directed at Hyatt is squarely at issue in this case.

JA at pp. 137-138.

In explanation of his findings, the Discovery Commissioner explained:
COMMISSIONER BIGGAR: "… but the process I think is still fair game, and if you think otherwise you will have to have the judge say that because obviously in my view if we are only concerned with acts that took place in the state ***6** of Nevada, then we would have a very small range of discovery in this case because I think everybody is in agreement there were only some few certain acts done in Nevada, investigation by the FTB on premises, so to speak, here as well as inquiring with various Nevada companies and other things, but in my view is only a part of the process of collecting the tax from Mr. Hyatt, and *the process is what is under attack here*, and I think in my view, particularly a state agency should feel that its process should be open to exploration in a case such as this so that we have an open form of government."

JA at p. 133. Emphasis added.

Findings 4 and 5 of the Nevada Court made the entire audit in California, Nevada, or elsewhere the subject of litigation to determine if government power was improperly used to assess taxes and a fraud penalty. The scope of discovery allowed permits Hyatt to discover and litigate in the Nevada courts every aspect of the governmental functions of California's tax audit. This includes reviewing all decisions made to determine if California's administration of its taxing powers was improper and whether its assessment of a fraud penalty was made for the purpose of allegedly "extorting" a settlement.

The FTB filed its first petition with the Nevada Supreme Court in Docket Number 35549, contesting these discovery orders and the protective order. Record of Proceedings at Volume 1, Item 1.

While that first writ was pending before the Nevada Supreme Court, the FTB filed a motion in the trial court seeking summary judgment on the remaining tort claims and dismissal of the action for lack of jurisdiction. Franchise ***7** Tax Board of the State of California's Motion for Summary Judgment Under Nevada Rules of Civil Procedure, Section 56(b) Or Alternatively For Dismissal Under Nevada Rules of Civil Procedure, Section 12(h)(3). Record of Proceedings at Volume 2, Item 11, Exhibit 7. That motion was denied by the district court, and the FTB filed a second petition in the Nevada Supreme Court, Docket Number 36390. Record of Proceedings at Volume 2, Item 10.

On June 13, 2001, the Nevada Supreme Court granted the FTB's second petition, finding that Hyatt had failed to show any evidence of tortious conduct on the part of the Franchise Tax Board:

> There is no evidence, aside from Hyatt's own conclusory allegations, that the Franchise Tax Board's investigation unreasonably intruded into his private life or seclusion, published false information about him, or published information to third parties that was not of a legitimate public concern. The myriad depositions and documents submitted to this court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority.

Pet.App. at pp. 42-43. The Court ordered the trial court to enter summary judgment in favor of the FTB and dismissed the FTB's first petition as being moot. Pet.App. at pp. 43-44.

On July 5, 2001, Hyatt filed a petition for rehearing. Real Party in Interest Gilbert P. Hyatt's Petition for Rehearing re the Court's June 13, 2001 order. JA at pp. 246-297.

***8** On April 4, 2002, the Nevada Supreme Court, without setting forth any new evidence, vacated its earlier decision and issued a new one denying the FTB's petitions. Pet.App. at p. 5. Returning the matter to the trial court, the Nevada Supreme Court refused to apply California law immunizing the FTB from liability for the alleged common-law intentional torts, stating its justification as follows:

> We believe that greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency.

Pet.App. at pp. 12-13. (Footnote omitted.)

Except for one document, the court also ordered the disclosure and release of the FTB's privileged documents. And the court refused to disturb the "protective order." [2] Pet.App. at p. 22.

[2] The order also dismissed the the FTB's appeal from the same order.

2. The Underlying FTB Audit Investigation

The State of California imposes a personal income tax upon the income of its residents. California residents include: (1) every individual who is in California for other than a temporary or transitory purpose; and (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. ***9** Cal. Rev. & Tax. Code §§ 17014, 17015, 17016. The purpose of these statutes is to ensure that all those who are in California for other than a temporary

or transitory purpose, and enjoying the benefits and protection of the State, should in return contribute to the support of the State. [3] When a California taxpayer claims to have changed his or her state of residence, the FTB sometimes performs a residency audit to determine whether the individual did, in fact, become a non-resident of California on or near the asserted change of residency date shown on the taxpayer's California tax return. The residency audit attempts to verify when the taxpayer established significant permanent ties with the new State of claimed residency, and whether the taxpayer severed significant permanent ties with California on or near the asserted change of residency date.

3 Cal. Code Regs. tit. 18, § 17014 (1988); *Whittel v. Franchise Tax Board,* 231 Cal.App.2d 278, 285, 41 Cal.Rptr. 673 (1964).

In 1990, Hyatt obtained a patent on certain computer technologies, resulting in over one hundred million dollars of income in late 1991 and 1992. Substantial publicity surrounded Hyatt's patent, including a newspaper article that attracted an FTB auditor's attention in 1993. The 1992 article reported that Hyatt lived in Las Vegas, but was involved in a California legal dispute with his ex-wife about earnings from recent patent awards. Record of Proceedings at Volume 3, Item 11, pp. 53-91.

The FTB initiated an audit of Hyatt's 1991 tax return Record of Proceedings at Volume 3, Item 11, Exhibit 7, p. 53. In accordance with the provisions of California's ***10** Personal Income Tax Law, FTB auditors attempted to obtain information and records verifying Hyatt's claim of California non-residency. JA at pp. 181-191. The FTB talked by phone to third parties with potentially relevant information, such as the Clark County Assessor's Office, and kept records reflecting the nature of each inquiry. Record of Proceedings at Volume 3, Item 11, Exhibit 2. The FTB interviewed third parties in California and Nevada, such as Hyatt's neighbors and relatives, and in some instances obtained statements from them about Hyatt's change of residency claim. Record of Proceedings at Volume 3, Item 11, Exhibit 2. The FTB also corresponded by mail with third parties either by letter alone, or by a letter accompanied by a "Demand to Furnish Information," a standard FTB form reflecting the statutory authority to obtain information in a tax audit. Cal. Rev. & Tax. Code § 19504; JA at pp. 185-188. FTB auditors also traveled to Las Vegas in March 1995, and spent partial days on each of three consecutive days visiting businesses, talking to neighbors and neighborhood workers, and observing Hyatt's alleged Nevada residence. JA at pp. 187-188.

During late November 1995, the FTB lead auditor, Sheila Cox, also accompanied another FTB auditor to Las Vegas to assist on the other auditor's cases, and made a brief observation of Hyatt's alleged residence during the trip. Hyatt claims that during this latter trip, Ms. Cox went through Hyatt's garbage, rifled through Hyatt's mail, and trespassed on Hyatt's property. JA at p. 189. The FTB disputes Hyatt's version of events on this trip. JA at pp. 181-191.

***11 3. California's Immunity Statutes**

California law provides immunity for the State, its taxing agencies, officials, and employees for injuries caused by instituting an administrative tax proceeding and for acts incidental to the assessment or collection of a tax. The immunity statute, which has no geographical restriction on its application, provides:
Neither a public entity nor a public employee is liable for an injury caused by:

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

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

California Government Code § 860.2. [4]

[4] This statute has been broadly construed by California courts. *Mitchell v. Franchise Tax Board,* 183 Cal.App.3d 1133, 1136, 228 Cal. Rptr. 750 (1986). California Government Code § 860.2 is not the only immunity statute applicable in this case: California Government Code §§ 911.2, 905.2, and 945.4 also bar money damage suits against state agencies. California statutes do not, however, provide the State with absolute immunity: for example, California Revenue and Taxation Code § 21021 establishes a cause of action in California's own courts for a tax agency's failure to follow published procedures.

SUMMARY OF ARGUMENT

California's broad statutory scheme of immunities protects its ability to carry out its core sovereign responsibilities both within and outside of its own territorial ***12** borders; however, Nevada courts refused to recognize California's immunities in this lawsuit. California contends that full faith and credit requires Nevada courts to recognize California's immunities. [5]

[5] Immunity statutes reflect a State's sovereign choice to define the limits of its exposure to liability for the action of its governmental officials, balancing principles of fairness against the legitimate needs of government. The immunities provided by California are commonly provided to tax administrators throughout the country, for example: Hawaii HAW. REV. STAT. ANN. § 662-15(2) (Michie 2002); Idaho (IDAHO CODE § 6-904A(1) (Michie 1998)); Massachusetts (MASS. GEN. LAWS ANN. ch. 258, § 10(d) (West 1988 & Supp. 2002)); Minnesota (MINN. STAT. ANN. § 3, 736, subd. (3)(C) 1998 & Supp. 2002), *but see, e.g.*, MINN. STAT. §§ 270.275-276 (1998 & Supp. 2002) (limitations on immunity)); Mississippi (MISS. CODE ANN. § 11-46-9(1)(I) (2002)); Nebraska (NEB. REV. STAT. § 81-8, 219(2) (1996)); Oklahoma (OKLA. STAT. ANN. tit. 51, § 155(11) (West 2000 & Supp. 2002)); South Dakota (S.D. CONST. art. III, § 27; S.D. CODIFIED LAWS §§ 21-32-16 to -18 (Michie 1987) §§ 3-22-10, - 17) (Michie 1994)); Utah (UTAH CODE ANN. §§ 63-30-10(8), 59-1-704 (1997 & Supp. 2002)); Vermont (V.T. STAT. ANN. tit. 12, § 5601(e)(2) (1973 & Supp. 2001)).

In *Nevada v. Hall,* 440 U.S. 410, *reh'g denied*, 441 U.S. 917 (1979), addressing the facts presented by that case, this Court adhered to a generally recognized exception arising in choice-of-law cases that full faith and credit need not be extended to laws of a sister State where those laws conflict with the forum State's own policies. This exception has arisen in cases involving suits between private parties involving the question of whether the forum State or a different State's laws should apply. In footnote 24 of *Nevada v. Hall,* the Court anticipated a case such as the present one and explained that where the refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism" ***13** (440 U.S. at 424 n.24), such as where it interferes with a State "capacity to fulfill its own sovereign responsibilities" (*ibid.*), a "different analysis or a different result" (*ibid.*) might be required. In this case a different analysis is required because the analysis under existing full faith and credit cases is inadequate to deal with the facts of this case.

California believes that this different analysis requires a different rule of law, one that is both simple and straightforward, and one which takes into consideration the concerns identified by the Court in footnote 24. California submits that:

A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

This rule is designed to eliminate the threat to cooperative federalism by mandating full faith and credit in those circumstances where refusal to extend full faith and credit to a State's legislatively immunized acts would interfere with a State's ability to carry out its core sovereign responsibilities. This rule is supported by (1) the history of the Full Faith and Credit Clause, (2) this Court's own jurisprudence, and (3) the jurisprudence of other States interpreting and applying *Nevada v. Hall.*

In addition, when the present case is examined under the rule suggested above, it is clear that the rule applies and that Nevada courts must extend full faith and credit to California's immunity laws because (1) California's, conduct of the

Hyatt residency tax audit is a core sovereign responsibility, and (2) Nevada's refusal to extend full ***14** faith and credit to California's immunity statutes *interferes* with California's capacity to conduct the Hyatt residency tax audit. When these two requirements of the rule are met, Nevada must extend full faith and credit because its refusal to do so poses a "substantial threat to our constitutional system of cooperative federalism." *Ibid.*

ARGUMENT

I. THE NEVADA SUPREME COURT VIOLATED ARTICLE IV, SECTION 1 OF THE CONSTITUTION BY REFUSING TO RECOGNIZE CALIFORNIA'S IMMUNITY STATUTES IN A LAWSUIT AGAINST THE STATE OF CALIFORNIA BY A PRIVATE CITIZEN THAT AROSE OUT OF ACTIVITIES INCIDENTAL TO THE ASSESSMENT AND COLLECTION OF CALIFORNIA STATE TAXES

A. The Current Choice-of-Law Analysis Does Not Adequately Resolve the Constitutional Issues in the Present Case; a New Rule is Needed

California's dispute with Nevada's courts presents a constitutional confrontation that goes to the very core of cooperative federalism and raises important constitutional questions that existing cases do not adequately answer. California believes that these unanswered questions require this court to adopt a new rule, a rule that California submits is necessary to resolve the "substantial threat to our constitutional system of cooperative federalism" (*Nevada v. Hall,* 440 U.S. at 424 n.24) that is presented by this case. The new rule is, in fact, suggested by the ***15** language in footnote 24 of this Court's opinion in *Nevada v. Hall.*

Under this new rule, Nevada (or any forum State) may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities. This rule necessarily limits the ability of a forum State to use its own law to extend its judicial authority beyond its own geographic borders to interfere with the governmental policies and actions of a sister State.

The existing choice-of-law rules are inadequate to address a case such as this where the subject of the litigation is the manner in which a sister State is conducting a core government function. In general, this Court has explained that as long as a forum State has sufficient contacts with a lawsuit, it is not required to use the law of a sister State when to do so would offend its own public policy. *See Baker v. General Motors Corp.,* 522 U.S. 222, 232-33 (1998); *Sun Oil Co. v. Wortman,* 486 U.S. 717, 733 (1988); *Phillips Petroluem Co. v. Shutts,* 472 U.S. 797, 818-19 (1985); *Carroll v. Lanza,* 349 U.S. 408, 412 (1955); *Pacific-Employers Insurance Co. v. Industrial Accident Comm'n of Cal.*, 306 U.S. 493, 501-505 (1939) (hereinafter referred to as *Pacific Insurance*); *Allstate Insurance Co. v. Hague,* 449 U.S. 302, 308 (1981).

However, these cases are inadequate to address the constitutional issue framed by footnote 24 in *Nevada v. Hall* because they do not involve the exercise of core government activities. They fail to address the constitutional issues because they focus on the forum State's interest as a forum and the interest of the party filing suit, ***16** rather than on the effect the choice of law will have on the non-forum party State's ability to carry out its core functions. *Baker v. General Motors Corp.,* 522 U.S. 222, 232-33 (1998), involved a personal injury lawsuit between private parties. *Sun Oil Co. v. Wortman,* 486 U.S. 717, 733 (1988), and *Phillips Petroluem Co. v. Shutts,* 472 U.S. 797, 818-19 (1985), concerned private class actions over oil royalties. *Carroll v. Lanza,* 349 U.S. 408, 412 (1955), and *Pacific-Employers Insurance Co. v. Industrial Accident Commission of California,* 306 U.S. 493, 501-505 (1939), considered the issue of workmen's compensation. *Allstate Insurance Co. v. Hague,* 449 U.S. 302, 308 (1981), involved a wrongful death dispute between private parties.

In *Pacific Insurance*, the question was whether full faith and credit required California to apply Massachusetts' workers' compensation law in a case where a Massachusetts employee of a Massachusetts employer was injured in California while acting in the scope of his employment. This Court held that California was *not* required by full faith and credit to apply Massachusetts law because it contravened the policy of California's more liberal workmen's compensation Act. 306

U.S. at 502-503. *Pacific Insurance* acknowledged that Massachusetts "ha[d] an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment," (*ibid.*) but explained that California had a more significant interest in being able to exercise its own "constitutional authority … to legislate for the bodily safety and economic protection of employees injured within it." *Ibid.* In fact, this Court explained that "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Ibid.* In contrast to the analysis of the ***17** respective interests of the States, the case did not analyze the effect the choice of law would have on the non-forum State's ability to carry out its core government functions.

Nevada v. Hall posed a question similar to that in *Pacific Insurance*: does full faith and credit require California to apply Nevada law in a case which arose out of a traffic accident caused by a Nevada state employee driving in California while on Nevada state business? This Court held that California was *not* required by full faith and credit to apply Nevada's damage limitation because it contravened the policy of California's more liberal damages law. This Court examined California's interest and compared it to California's interest in *Pacific Insurance*, noting that "[a] similar conclusion is appropriate in this case." 440 U.S. at 424.
The interest of California afforded such respect in the *Pacific Insurance* case was in providing for "the bodily safety and economic protection of employees injured within it." In this case, California's interest is the closely related and equally substantial one of providing "full protection to those who are injured on its highways through the negligence of both residents and nonresidents." To effectuate this interest, California has provided by statute for jurisdiction in its courts over residents and nonresidents alike to allow those injured on its highways through the negligence of others to secure full compensation for their injuries in the California courts.

Ibid. (citations omitted). Just as with *Pacific Insurance, Nevada v. Hall* analyzed the respective States' interests, but failed to analyze the effect the choice of law would have on the non-forum State's ability to carry out its core government functions.

***18** Indeed, anticipation of this very failing appears to have prompted the concerns that were expressed in footnote 24 of *Nevada v. Hall.* Footnote 24 explained that a different analysis and different result may be necessary where a forum State's refusal to extend full faith and credit poses a substantial threat to our constitutional system of cooperative federalism.

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could 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 a different analysis or a different result.

Id. at 424 n.24. This text illustrates that in some situations it may be necessary to develop a rule based upon effect, rather than interest. This is shown by the language "interfere with Nevada's capacity to fulfill its own sovereign responsibilities," (*ibid.*) which focuses on the effect, rather than the interest. The key is that effect must be factored in whenever the choice-of-law decision " interferes" with a State's ability to carry out its core government functions.

Both *Nevada v. Hall* and *Pacific Insurance* support our constitutional system of cooperative federalism because they allow a State to apply its own law in cases where full faith and credit would otherwise force application of a foreign law contrary to its own policy. Both are "interest" based cases that focus primarily on the forum States' *interest* in applying their own taw: in *Pacific Insurance*, California's interest in applying its own workmen's ***19** compensation law to an employee injured while on the job in California; and in *Nevada v. Hall,* California's interest in applying its own more liberal damages law. In these cases, cooperative federalism was served by an interest-based analysis, but application of only the interest-based analysis in this case actually *thwarts* cooperative federalism because it fails to consider the effect

the choice of law would have on the non-forum State's ability to carry out its core government functions. This failure to factor in the effect on core government functions is why a new rule or test must be developed.

When the *subject* of the litigation is the State's *activities* in carrying out its critical or core governmental functions, the ordinary rules are inadequate because they do not provide any consideration for effect on the State's *ability* to carry out its essential functions. Under the interest test, any law reflecting conflicting policy of the forum State, no matter how insignificant, will trump the non-forum State's law, no matter how adversely it affects its ability to carry out vital governmental functions.

In some cases, such as this one, it is the use of the interest-based test, alone, that creates a threat to cooperative federalism because it completely fails to examine whether the choice-of-law decision has the effect of interfering with the non-forum State's ability to carry out its core sovereign functions. In order to remedy this threat to cooperative federalism, California has developed what it believes is the best test that can be used where the litigation involves legislatively immunized activities undertaken in carrying out the State's core government functions, a test that looks to the *effect* of the choice-of-law decision, *i.e.*, whether there is interference. Specifically, the California rule provides that:

> ***20** A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

In addition to resolving the threat to cooperative federalism posed by using only the interest-based test, California's proffered rule should be adopted because it is supported by the history of the Full Faith and Credit Clause, this Court's own jurisprudence, and the jurisprudence of various other States in interpreting and applying *Nevada v. Hall.*

1. The History of the Full Faith and Credit Clause Supports California's Suggested Rule

Prior to the adoption of the Articles of Confederation and the Constitution, each state (or colony) was a sovereign and independent government. As independent governments they had the power to enact laws governing local matters, wage war, levy taxes and engage in any number of acts of sovereign responsibility. As independent nations they were free to accept or reject the laws or acts of other nations subject only to treaties or principles of comity. Prior to the Articles of Confederation, the colonies had to a large extent ignored the rulings of other colonies and even some of the rulings of England. Litigants could re-litigate their cases in different jurisdictions without much concern for rulings in other colonies. However, more enlightened principles of comity (at least regarding judgments) took ***21** hold before the enactment of the Articles of Confederation.[6] These principles of comity, which were based upon enlightened self-interest, and which meant that most colonies granted full credit to other State's judgments and court rulings, were then incorporated into the Articles of Confederation.[7]

6 James D. Sumner, Jr., *The Full-Faith-And-Credit Clause — It's History And Purpose*, 34 Or. L. Rev. 224, 228-229 (1955).

7 *Ibid.*

At the Constitutional Convention of 1787, these principles were explicitly included in Article IV, Section 1 of the United States Constitution; indeed, they were expanded to include in addition each State's public acts and records. The Full Faith and Credit Clause of the United States Constitution specifically provides that:

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

U.S. Const., art. IV, § 1.

The Full Faith and Credit Clause was placed in Article IV along with other provisions designed to establish a single republic with equal privileges being accorded the several States, [8] and the citizens of each state throughout the rest of ***22** the United States. [9] It establishes the importance of single nationhood, with the promise that the obligations and privileges of the States and their citizens would not end at one State's border.

8 Article IV, § 3, Clauses 1 and 2 deal with new States, while Article IV, § 4 guarantees every State a republican form of government and protects each State from invasion and domestic violence.

9 Article IV, § 2, Clause 1 provides that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states[;]" and § 2, Clause 2 provides that fugitives from justice from one state shall "be removed [back] to the state having jurisdiction of the crime."

Despite the dearth of legislative history, there is little doubt that the Full Faith and Credit Clause was intended to ensure harmony and peaceful intercourse among the states without relying on the uncertainties of comity. [10] It was, in effect, an internal treaty among the States. As such, although the several States maintained all the sovereignty not ceded to the nation, they also collectively forged a single integrated union where, unlike foreign nations, the States were not free to ignore the laws and acts of the nation or their sister States, even when those laws might conflict with their own:

10 Robert H. Jackson, *Full Faith And Credit — The Lawyer's Clause Of The Constitution*, 45 Colum. L. Rev. 1, 5 n.17 (1945); Benjamin Cardoza, *The Growth Of The Law* 136 (1924).

[T]he very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereigns, each free to ignore obligations created under the laws or by judicial proceedings of the others, and to make them integral parts of a single nation….

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935).

***23** The purpose of full faith and credit was, then, to alter the status of the States, which it did by abandoning reliance on comity and making conflict of law principles constitutionally mandated. The Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns." *Estin v. Estin,* 334 U.S. 541, 546 (1948) (emphasis added). Indeed, "the clause … made conflicts principles enforceable as a matter of constitutional command rather than leaving the enforcement to the vagaries of the forum's view of comity." *Sun Oil Co. v. Wortman,* 486 U.S. at 723, n.1.

Years ago this Court recognized that the Clause would be properly invoked to restrain "any policy of hostility to the public Acts [of another state]." *Carroll v. Lanza,* 349 U.S. 408, 413 (1955). In this case, Nevada's refusal to extend full faith and credit to California's immunity laws results in a "policy of hostility" to California's tax acts, a policy that the Full Faith and Credit Clause was intended to restrain. This restraint against hostility can be accomplished by this Court adopting California's suggested rule.

While there may be little legislative history on the Full Faith and Credit Clause, [11] this Court's historical analysis supports California's interpretation that full faith and credit provides a virtual absolute barrier to one State allowing its processes — including its courts — to impinge upon the constitutionally valid exercise of a sister State's sovereign responsibilities. This interpretation is based on ***24** the principles of cooperative federalism and reciprocal respect, which are at the

heart of the Full Faith and Credit Clause. It is likely that Nevada's refusal to extend full faith and credit in this case is just what the Full Faith and Credit Clause was designed to thwart. [12]

11 *See Nevada v. Hall,* 440 U.S. 410; Jackson, *supra* note 10, at 5 n.17.

12 In The Federalist, No. 42, James Madison noted that the clause was "an evident and valuable improvement on the clause relating to this subject in the articles of Confederation" and that the power "may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process, within a foreign jurisdiction." The Federalist No. 42 (James Madison).

2 The Fact That This Court's Own Jurisprudence Recognizes the Limitations of an Interest-Based Test Supports the Rule California Suggests

The rule that California advances here — that a forum state may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities — is grounded in the concerns expressed by the Court in footnote 24 of *Nevada v. Hall*, 440 U.S. 410. *Nevada v. Hall* was a tort action against the State of Nevada in a California state court, which arose out of a traffic accident caused by a Nevada state employee driving in California while on Nevada state business. This Court held that a court need not give full faith and credit to another State's laws if those laws conflicted with the *policy* of the forum State; thus, California need not give full faith and credit to Nevada's statutory ***25** limitation on liability for injuries caused by a Nevada state employee since it was in conflict with California's policy against any such limitation. This holding was tied to the Court's own interest-based choice-of-laws analysis adopted in cases involving lawsuits between two private litigants. However, footnote 24 in *Nevada v. Hall* makes it clear that ruling itself was fact-based and limited; it acknowledges that a different analysis and different result may be necessary where a forum State's refusal to extend full faith and credit poses a "substantial threat to our constitutional system of cooperative federalism." *Id.* at 424 n.24.

The thrust of footnote 24 is that this different analysis and result is necessary to protect "our constitutional system of cooperative federalism." *Ibid.* Nevada's refusal to extend full faith and credit to California's immunity laws in this case poses the very threat to the constitutional system of cooperative federalism that footnote 24 cautions against. Footnote 24 suggests that it is improper to deny full faith and credit where to do so "interfere[s] with [the sister State's] capacity to fulfill its own sovereign responsibilities." *Ibid.* While a suit involving a traffic accident occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities, a suit against California based on activities such as the Hyatt residency audit, which is incident to the assessment or collection of a California state tax, clearly "interferes" with California's "capacity to fulfill its own sovereign responsibilities." *Ibid.* California submits that the concerns articulated in footnote 24 can best be addressed by California's effects-based test: a forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a ***26** refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

Footnote 24 does not exist in a vacuum; Justice Blackmun's dissent in *Nevada v. Hall* places it in perspective. Justice Blackmun warns against almost precisely what has occurred in this situation. ("States probably will decide to modify their tax-collection and revenue systems in order to avoid the collection of judgments." *Id.* at 429.) Footnote 24's cautionary instructions have appeared in other decisions of this Court, as well. For example: Justice Stevens, the author of the majority opinion in *Nevada v. Hall,* authored a concurring opinion in *Allstate Insurance Co. v. Hague,* 449 U.S. 302(1980), [13] that is consistent with California's suggested rule. Justice Stevens recognized ***27** that full faith and credit mandates that States not infringe on other State's sovereignty:

13 In *Allstate*, a Wisconsin resident employed in Minnesota died on his way to work in Minnesota when the motorcycle he was on was struck from behind by an automobile while he was still in Wisconsin. The operators of both vehicles were Wisconsin

> residents, neither of who had valid insurance. The decedent had a policy covering three vehicles he owned with uninsured motorist coverage for $15,000 for each vehicle. *Id.* at 305. The widow moved to Minnesota for reasons unrelated to the litigation and filed suit in Minnesota, where she sought declaratory relief under Minnesota law that the three policies could be "stacked." The defendant claimed that Wisconsin law, which precluded such "stacking," should apply. *Ibid.* The plurality opinion of this Court concluded that full faith and credit did not require Minnesota to apply Wisconsin law because, even though application of Minnesota law may have been unsound as a matter of conflict of laws, there was no threat to Wisconsin's sovereignty by allowing the use of Minnesota's substantive law. *Id.* at 313. The plurality opinion further concluded that due process did not prevent Minnesota from applying its own law since neither the "stacking" rule itself nor Minnesota's application of it to the private litigants raised any serious question of fairness. *Id.* at 320.

The Full Faith and Credit Clause implements this design by directing that a State, when acting as a forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty.

Id. at 322 (Stevens, J., concurring). While "respect [for] the legitimate interests of other States" (*ibid.*) acknowledges the need for an interest-based test in some circumstances Justice Stevens' recognition that States must "avoid infringement upon [other State's] sovereignty," (*ibid.*) suggests the need for an effect-based test that focuses on interference or "infringement upon … sovereignty." *Ibid.* Justice Stevens also explained that:

The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll v. Lanza,* 349 U.S. 408, 413 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevada v. Hall, supra,* at 424, n. 24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas v. Washington Gas Light Co.,* U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Id. at 323 n.10 (Stevens, J., concurring). These concerns are addressed in the present case by an effect-based rule. For example: his statement that *Nevada v. Hall* posed "no ***28** substantial threat to our constitutional system of cooperative federalism," *ibid.* is especially significant because it suggests that in a proper case — such as this case — where there is such a threat, the Full Faith and Credit Clause would bar the forum State from using its own law when doing so would create — as here — a "substantial threat to our constitutional system of cooperative federalism." *Ibid.* California's effect-based test accomplishes this. In addition, California's suggested rule is the very least that is necessary to guard against the evils Justice Stevens identified in *Allstate*, and specifically to "restrain 'any policy of hostility to the public Acts' of another State," and to prevent the "parochial entrenchment on the interests of other States." *Ibid.*

3. The Jurisprudence of Other State's Interpreting And Applying *Nevada v. Hall* Supports California's Suggested Rule

The courts of other States have also recognized (as footnote 24 suggests) that *Nevada v. Hall's* interest-based test is inadequate and does not apply where the case deals with a forum State's interference with a sister State's ability to carry out its core sovereign responsibilities. These cases fully support the rule California advances: that a forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities. These cases recognize that the failure to extend full faith and credit under such circumstances has an adverse effect on principles of cooperative federalism.

In *Guarini v. New York,* 521 A.2d 1362 (N.J. Super. Ct.), *aff'd*, ***29** 521 A.2d 1294, 1366-67 (N.J. Super. Ct. App. Div. 1986), *cert. denied*, 484 U.S. 817 (1987), New Jersey claimed that the Statue of Liberty and the island on which it is located were under its jurisdiction and sovereignty. New York had exercised jurisdiction over the statue and the island for at least 150 years. New Jersey sued the State of New York in a New Jersey court, but the New Jersey court dismissed the case in reliance on footnote 24 of *Nevada v. Hall. Guarini* held that the "ruling [in *Nevada v. Hall*] did not mean that a state could be sued in another state as a matter of course." *Id.* at 1366. The court dismissed the action based on the

threat it posed to the constitutional system of cooperative federalism, including a potential "cascade of lawsuits" by one State's citizens against neighboring States:

The present case clearly requires a "different analysis" and a "different result." … Plaintiff if successful, would clearly interfere with New York's capacity 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."

Ibid.

In *Mejia-Cabral v. Eagleton School, Inc.,* No. 97-2715, 1999 Mass. Super. LEXIS 353 (Mass. Super. Ct. Sept. 15, 1999), plaintiff sued a Massachusetts school in a Massachusetts state court for wrongful death caused by a juvenile delinquent attendee. The State of Connecticut was joined as a third-party defendant under the theory that it negligently placed the juvenile at the school. The Massachusetts court dismissed the State of Connecticut as a defendant, noting that:

***30** The prospect of one state's court deciding whether another state was negligent in selecting 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. at *6 (citations omitted).

Both *Mejia-Cabral* and *Guarini* acknowledged the lawsuits against Connecticut and New York, respectively, interfered with those States' ability to carry out their sovereign functions. The Massachusetts court in *Mejia-Cabral* acknowledged that allowing the third-party complaint to proceed against the State of Connecticut would "interfere with [Connecticut's] capacity to fulfill its own sovereign obligations." *Ibid.* Similarly, the New Jersey court in *Guarini* acknowledged that if the plaintiff prevailed in the lawsuit, that result "would clearly interfere with New York's capacity to fulfill its own sovereign responsibility." *Guarini*, 521 A.2d at 1366-67.

Both courts also recognized that it was this *interference* with a State's capacity to fulfill its *sovereign responsibilities* that posed the substantial threat to constitutionally-based cooperative federalism. Finally, both courts concluded that these threats to cooperative federalism were unacceptable; they clearly recognized the need to remedy threats to our constitutional system of cooperative federalism. A similar threat to cooperative federalism ***31** exists in the present case; it is this threat that is the justification for the effect-based rule that California asks this Court to adopt.

B. The Nevada State Court Is Required to Extend Fun Faith and Credit to California's Immunity Statutes in This Case Because Its Refusal to Do So Would Interfere with California's Capacity to Fulfill its Own Core Sovereign Responsibilities

California has established above that full faith and credit requires the adoption of the rule that a forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities. When this case is examined under the rule, it is clear that Nevada courts must extend full faith and credit to California's immunity laws because (1) California's conduct of the Hyatt residency tax audit is a *core sovereign responsibility*, and (2) Nevada's refusal to extend full faith and credit to California's immunity statutes *interfered* with California's capacity to fulfill its core sovereign responsibilities.

1. California's Rule Applies in This Case Because the FTB's Conduct of the Hyatt Residency Tax Audit Is a Core Sovereign Responsibility

The power to tax is the most essential sovereign power of a state because it is the means by which government is able to function. Exercise of this power is unquestionably a core sovereign responsibility. " '[T]axes are the life-blood of government.' " ***32** *Franchise Tax Board v. United States Postal Serv.*, 467 U.S. 512, 523 (1984) (quoting *Bull v. United States,* 295 U.S. 247, 259 (1935)). This Court has recognized " 'the imperative need of a State to administer its own fiscal operations' " and that little is " 'so important a local concern as the collection of taxes.' " *Franchise Tax Board v. Alcan Aluminum Ltd.,* 493 U.S. 331, 338 (1990). Although there is no clear definition of what constitutes a core sovereign responsibility, the cases cited above underscore the vital nature of the collection of state taxes, and the administration of state tax laws. Indeed, it is fair to say that California's income tax laws and its laws for the administration of income taxes are fundamental to its fiscal integrity. It is difficult, in fact, to imagine a more core sovereign responsibility than the administration of a tax system and the collection of taxes thereunder.

The notion that state taxes are too important to the States to be interfered with by outside influences is further underscored by the fact that Congress has enacted the Tax Injunction Act (28 U.S.C. § 1341), which recognizes that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts. *Fair Assessment in Real Estate Ass'n v. McNary,* 454 U.S. 100, 102-03 (1981). [14]

14 For example: *California v. Grace Brethren Church,* 457 U.S. 393, 408-11 (1982), recognized the importance of tax administration to local government when it upheld the dismissal of a plaintiff's action pursuant to the Tax Injunction Act on the grounds, *inter alia*, that tax collection constitutes an important local concern of the State.

The determination of residency is a foundational step in the collection of state personal income taxes. Here, all of the FTB's acts were performed as a part of the determination of ***33** residency, and thus were undertaken as part of the State of California's inherent sovereign responsibility and power to assess and collect taxes. The process used by California is typical and reasonable given the nature of Hyatt's residency claims. [15] Any reasonable long-time California resident who claims to move to Nevada at virtually the instant he realizes $40 million in income should expect that California would use the normal procedures at its disposal to ascertain the validity of the alleged change of residence.

15 The Nevada Supreme Court originally found that "the myriad of depositions and documents submitted to the court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard to detarmine residency status for taxation pursuant to its statutory authority." Pet.App. at pp. 42-43.

No State can effectively carry out its tax administration functions without being able to freely review and investigate taxpayer's claims, even when they involve a claimed change of residency. Where the claimed events allegedly take place outside of the State, effectve review and investigation necessarily involves some out-of-state review; however, the out-of-state investigaton and review is also a core sovereign function. Here, California would have neglected its sovereign responsibility had it not undertaken some investigation in Nevada of Hyatt's alleged new residence. Full faith and credit must require the Nevada courts to apply California's governmental immunity laws regarding tax administration and collection to the entirety of the FTB's conduct, including its conduct in Nevada. [16]

16 It is worth repeating that the conduct in Nevada was minimal. The FTB auditor only made two short trips to Nevada and sent correspondence from California to third parties in Nevada in an attempt to verify the truth of Hyatt's claims regarding his alleged relocation to Nevada. This contact in Nevada is insignificant in comparison to the hundreds of hours of audit time expended in California. JA at pp. 236-237. In fact, the Nevada court noted that ninety-seven percent of the conduct complained about occurred *outside* the forum State of Nevada. JA at pp. 236-237.

***34 2. California's Rule Applies in This Case Because Nevada Interfered with California's Capacity to Conduct the Hyatt Residency Tax Audit**

It is clear that Nevada's refusal to extend full faith and credit to California's tax immunity statutes interfered with California's ability to carry out its core sovereign responsibility to assess and collect taxes. California has a comprehensive tax system that balances revenue collection with taxpayer protections: on the one side it protects taxpayers by (1) permitting administrative review of tax assessments [17], (2) establishing a taxpayer's cause of action for a tax agency's failure to follow published procedures [18], and (3) allowing *de novo* judicial review of administrative tax determinations upon payment of the tax. [19] On the other side, however, it provides protection to the State, its agencies, officials and employees by providing specified ***35** immunities in connection with the administration of the tax system and the collection of taxes. This tax system reflects the California legislature's best efforts to achieve the proper balance.

17 Hyatt still has a full slate of administrative remedies available to him including: a complete review of the tax assessment at the protest stage (Cal. Rev. & Tax. Code §§ 19041, 19044); and, an independent administrative review by the five-member State Board of Equalization (Cal. Rev. & Tax. Code §§ 19045-47).

18 Cal. Rev. & Tax. Code § 21021.

19 In fact, when the issue is residency — as it is here — once a taxpayer exhausts his administrative review, he is entitled to file a lawsuit seeking declaratory relief as to his residence *without* the necessity of prepaying the tax. Cal. Rev. & Tax. Code § 19381; Cal. Civ. Proc. Code § 1060.5.

The general effect of Nevada's refusal to give full faith and credit to California's immunities is to skew the tax system; thus, Hyatt retains all the benefits provided under California law, but Nevada has relieved him of the burdens. The effect of this is to *interfere* with California's capacity to assess and collect taxes. In addition, Nevada's refusal to extend full faith and credit has deprived California of reasonable reliance on an immunity statute that specifically protects its ability to enforce state tax laws.

More specifically, Nevada's refusal to give full faith and credit to California's immunities will interfere with the FTB's residency audit program, the conduct of which is a core sovereign responsibility. As part of the residency audit of Hyatt, the FTB disclosed minimal identifying information about him to others in order to determine his residency under California law. J.A. at pp. 181-191. Hyatt claims he was injured by these disclosures; however, California is immune from liability for these injuries under California Government Code § 860.2. By refusing to extend full faith and credit, Nevada has exposed the FTB's residency audit processes to both the additional legal expenses from protracted, out-of-state tort litigation, as well as potentially unlimited damages. This exposure to unlimited liability will necessarily have a chilling effect upon residency audits, which often require consulting third party sources and making minimal information disclosures out of state. Thus, by refusing to extend full faith and credit, the Nevada courts have interfered with the FTB's entire residency audit program.

***36** Furthermore, the Nevada courts have directly, and knowingly, interjected themselves into California's administrative process. The Discovery Commissioner held variously that:
1. "[T]he entire process of the FTB audits of Hyatt, including the FTB assessments of taxes and the protests, is at issue in the case and a proper subject of discovery.…" JA at p. 133.

2. "[T]he process of FTB audits directed at Hyatt is squarely at issue in this case." JA at p. 133.

3. "[T]he process … is fair game … and if you think otherwise you will have to have the judge say that.… [T]he process is what is under attack here.…" JA at p. 133.

The protective order, issued by the trial court, and left in place by the Nevada Supreme Court (Pet.App. at pp. 22-35), blocks normal access to information relevant to the underlying tax assessments by denying material produced in this litigation to the California administrative process. The Nevada court's protective order dictates the mechanics of how California can use its own statutory power to obtain information in a tax audit by requiring a notice and demand procedure not contained in California law. California's normal practice of reviewing tax matters, which requires the exhaustion of administrative remedies, has been effectively bypassed. The ruling of the Nevada Supreme Court rejects California's recognized claims of privilege, including the attorney-client privilege, and ***37** interposes Nevada's interpretation of such privileges. JA at pp. 135-146. And none of these intrusions include the toll on FTB employees and resources. [20]

20 The Nevada District Court allowed the deposition of 24 witnesses, mostly FTB employees who were not involved at all with the Hyatt audit. These depositions totaled 315 hours of testimony and 11,000 pages of transcripts, and included 340 demands for documents made of deposed witnesses, and 5 separate voluminous written document demands which included 329 individual document demands, for which the FTB produced 17,514 pages of documents. Record of Proceedings at Volume 3, Item 11, Exhibit 8, pp. 420-422.

Finally, if extrapolated, it is clear that the widespread application of the rule set down by the Nevada Supreme Court could (and perhaps would) interfere with (and likely cripple) the States' ability to conduct any number of various programs that are vital to state interests, each of which is a core sovereign responsibility. In order to ensure that this does not occur, and to protect the balance inherent in our Constitution's system of cooperative federalism, it is important that this Court affirm that full faith and credit applies in this case.

*38 CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court reverse the April 4, 2002 order of the Nevada Supreme Court and order that this case be dismissed and the protective order vacated.

*1a United States Constitution

Article IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.

California Code of Civil Procedure

§ 1060.5. Action by one claiming to be nonresident for income tax purposes

Any individual claiming to be a nonresident of the State of California for the purposes of the Personal Income Tax Law may commence an action in the Superior Court in the County of Sacramento, or in the County of Los Angeles, or in the City and County of San Francisco, against the Franchise Tax Board to determine the fact of his or her residence in this state under the conditions and circumstances set forth in Section 19381 of the Revenue and Taxation Code.

California Government Code

§ 860.2. Injuries caused by proceedings or application of laws

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

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

***2a** (b) An act or omission in the interpretation or application of any law relating to a tax.

California Government Code

§ 905.2. Claims for money or damages against state

There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the state:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, or (2) for an injury for which the state is liable.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

California Government Code

§ 911.2. Time of presentation of claims; limitation

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter ***3a** not later than one year after the accrual of the cause of action.

California Government Code

§ 945.4. Necessity of written claim acted upon by board or deemed to have been rejected

Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

California Revenue & Taxation Code

§ 17001. Short title

This part is known and may be cited as the "Personal Income Tax Law."

California Revenue & Taxation Code

§ 17014. Resident

(a) "Resident" includes:

(1) Every individual who is in this state for other than a temporary or transitory purpose.

(2) Every individual domiciled in this state who is outside the state for a temporary or transitory purpose.

***4a** (b) Any individual (and spouse) who is domiciled in this state shall be considered outside this state for a temporary or transitory purpose while that individual:

(1) Holds an elective office of the government of the United States, or

(2) Is employed on the staff of an elective officer in the legislative branch of the government of the United States as described in paragraph (1), or

(3) Holds an appointive office in the executive branch of the government of the United States (other than the armed forces of the United States or career appointees in the United States Foreign Service) if the appointment to that office was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States.

(c) Any individual who is a resident of this state continues to be a resident even though temporarily absent from the state.

(d) For any taxable year beginning on or after January 1, 1994, any individual domiciled in this state who is absent from the state for an uninterrupted period of at least 546 consecutive days under an employment-related contract shall be considered outside this state for other than a temporary or transitory purpose.

(1) For purposes of this subdivision, returns to this state, totaling in the aggregate not more than 45 days during a taxable year, shall be disregarded.

(2) This subdivision shall not apply to any individual, including any spouse described in paragraph (3), who ***5a** has income from stocks, bonds, notes, or other intangible personal property in excess of two hundred thousand dollars ($200,000) in any taxable year in which the employment-related contract is in effect. In the case of an individual who is married, this paragraph shall be applied to the income of each spouse separately.

(3) Any spouse who is absent from the state for an uninterrupted period of at least 546 consecutive days to accompany a spouse who, under this subdivision, is considered outside this state for other than a temporary or transitory purpose shall, for purposes of this subdivision, also be considered outside this state for other than a temporary or transitory purpose.

(4) This subdivision shall not apply to any individual if the principal purpose of the individual's absence from this state is to avoid any tax imposed by this part.

California Revenue & Taxation Code

§ 17015. Nonresident

"Nonresident" means every individual other than a resident.

California Revenue & Taxation Code

§ 17016. Presumption of residence; rebuttal

Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose.

***6a California Revenue & Taxation Code**

§ 19041. Protest against proposed deficiency assessment; time; contents

(a) Within 60 days after the mailing of each notice of proposed deficiency assessment the taxpayer may file with the Franchise Tax Board a written protest against the proposed deficiency assessment, specifying in the protest the grounds upon which it is based.

(b) Any protest filed with the Franchise Tax Board on or before the last date specified for filing that protest by the Franchise Tax Board in the notice of proposed deficiency assessment (according to Section 19034) shall be treated as timely filed.

(c) The amendments made by the act adding this subdivision [FN1] shall apply to any notice mailed after December 31, 1999.

California Revenue & Taxation Code

§ 19044. Protest; reconsideration of assessment; hearing

(a) If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this subdivision.

(b) The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the ***7a** protest shall continue to be under protest until the Franchise Tax Board acts on that part.

California Revenue & Taxation Code

§ 19045. Protest; finality of action; time for appeal

(a) The Franchise Tax Board's action upon the protest, whether in whole or in part, is final upon the expiration of 30 days from the date when it mails notice of its action to the taxpayer, unless within that 30-day period the taxpayer appeals in writing from the action of the Franchise Tax Board to the board.

(b)(1) The Franchise Tax Board's notice of action upon protest shall include the date determined by the Franchise Tax Board as the last day on which the taxpayer may file an appeal with the board.

(2) Any appeal to the board filed by the taxpayer on or before the date for filing an appeal specified in the notice (pursuant to paragraph (1)) shall be treated as timely filed.

(c) This section shall apply to any notice mailed after December 31, 1999.

California Revenue & Taxation Code

§ 19046. Appeal to Board of Equalization; addressing and mailing

Two copies of the appeal and two copies of any supporting documents shall be addressed and mailed to the State Board of Equalization at Sacramento, California. Upon receipt of the appeal, the board shall provide one copy of the appeal and one copy of any supporting ***8a** documents to the Franchise Tax Board at Sacramento, California.

California Revenue & Taxation Code

§ 19047. Appeal; hearing and determination; notice

The board shall hear and determine the appeal and thereafter shall forthwith notify the taxpayer and the Franchise Tax Board of its determination and the reasons therefor.

California Revenue & Taxation Code

§ 19381. Equitable process against assessment or collection; action to determine residence; stay of tax based upon residence

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this state or against any officer of this state to prevent or enjoin the assessment or collection of any tax under this part; provided, however, that any individual after protesting a notice or notices of deficiency assessment issued because of his or her alleged residence in this state and after appealing from the action of the Franchise Tax Board to the State Board of Equalization, may within 60 days after the action of the State Board of Equalization becomes final commence an action, on the grounds set forth in his or her protest, in the Superior Court of the County of Sacramento, in the County of Los Angeles or in the City and County of San Francisco against the Franchise Tax Board to determine the fact of his or her residence in this state during the year or years set forth in the notice or notices of deficiency assessment. No tax based solely upon the residence of such ***9a** an individual shall be collected from that individual until 60 days after the action of the State Board of Equalization becomes final and, if he or she commences an action pursuant to this section, during the pendency of the action, other than by way of or under the jeopardy assessment provisions of this part.

California Revenue & Taxation Code

§ 19501. Administration and enforcement; creation of districts; branch offices

The Franchise Tax Board shall administer and enforce Part 10 (commencing with Section 17001), Part 10.7 (commencing with Section 21001), Part 11 (commencing with Section 23001), and this part. For this purpose, it may divide the state into a reasonable number of districts, in each of which a branch office or offices may be maintained during all or part of the time as may be necessary.

California Revenue & Taxation Code

§ 19504. Examination of books and papers; oral examination of taxpayer and witnesses; subpoenas

(a) The Franchise Tax Board, for the purpose of administering its duties under this part, including ascertaining the correctness of any return; making a return where none has been made; determining or collecting the liability of any person in respect of any liability imposed by Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part (or the liability at law or in equity of any transferee in respect of that liability); shall have the power to require by demand, that an entity of any kind including, but not limited to employers, persons, or financial institutions provide ***10a** information or make available for examination or copying at a specified time and place, or both, any book, papers, or other data which may be relevant to that purpose. Any demand to a financial institution shall comply with the California Right to Financial Privacy Act set forth in Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the Government Code. Information which may be required upon demand includes, but is not limited to, any of the following:

(1) Addresses and telephone numbers of persons designated by the Franchise Tax Board.

(2) Information contained on Federal Form W-2 (Wage and Tax Statement), Federal Form W-4 (Employee's Withholding Allowance Certificate), or State Form DE-4 (Employee's Withholding Allowance Certificate).

(b) The Franchise Tax Board may require the attendance of the taxpayer or of any other person having knowledge in the premises and may take testimony and require material proof for its information and administer oaths to carry out this part.

(c) The Franchise Tax Board may issue subpoenas or subpoenas duces tecum, which subpoenas must be signed by any member of the Franchise Tax Board and may be served on any person for any purpose.

(d) Obedience to subpoenas or subpoenas duces tecum issued in accordance with this section may be enforced by application to the superior court as set forth in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code.

(e) When examining a return, the Franchise Tax Board shall not use financial status or economic reality ***11a** examination techniques to determine the existence of unreported income of any taxpayer unless the Franchise Tax Board has a reasonable indication that there is a likelihood of unreported income.

(f) The amendments made by the act adding this subdivision shall apply to any examination beginning on or after the effective date of this act.

California Revenue & Taxation Code

§ 21021. Action by taxpayer aggrieved by action or omission by officer or employee in reckless disregard of published procedures; amount of damages; frivolous position; penalty

(a) If any officer or employee of the board recklessly disregards board published procedures, a taxpayer aggrieved by that action or omission may bring an action for damages against the State of California in superior court.

(b) In any action brought under subdivision (a), upon a finding of liability on the part of the State of California, the state shall be liable to the plaintiff in an amount equal to the sum of all of the following:

(1) Actual and direct monetary damages sustained by the plaintiff as a result of the actions or omissions:

(2) Reasonable litigation costs, as defined for purposes of Sections 19420 and 26491. [FN1]

(c) In the awarding of damages under subdivision (b), the court shall take into consideration the negligence or omissions, if any, on the part of the plaintiff which contributed to the damages.

***12a** (d) Whenever it appears to the court that the taxpayer's position in the proceedings brought under subdivision (a) is frivolous, the court may impose a penalty against the plaintiff in an amount not to exceed ten thousand dollars ($10,000). A penalty so imposed shall be paid upon notice and demand from the board and shall be collected as a tax imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

Title 18 California Code of Regulations § 17014 (1988)

Who Are Residents and Nonresidents.

The term "resident," as defined in the law, includes (1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is outside the State for a temporary or transitory purpose. All other individuals are nonresidents.

Under this definition, an individual may be a resident although not domiciled in this State, and, conversely, may be domiciled in this State without being a resident. The purpose of this definition is to include in the category of individuals who are taxable upon their entire net income, regardless of whether derived from sources within or without the State, all individuals who are physically present in this State enjoying the benefit and protection of its laws and government, except individuals who are here temporarily, and to exclude from this category all individuals who, although domiciled in this State, are outside this State for other than temporary or transitory purposes, and, hence, do not obtain the benefits accorded by the laws and Government of this State.

***13a** If an individual acquires the status of a resident by virtue of being physically present in the State for other than temporary or transitory purposes, he remains a resident even though temporarily absent from the State. If, however, he leaves the State for other than temporary or transitory purposes, he thereupon ceases to be a resident.

If an individual is domiciled in this State, he remains a resident unless he is outside of this State for other than temporary or transitory purposes.

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EXHIBIT 44

No. 02-42

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT and EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

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QUESTION PRESENTED

Whether the Full Faith and Credit Clause requires the Nevada state courts to apply California immunity law, rather than Nevada law, to tort claims alleging intentional misconduct against a Nevada citizen in Nevada, even though Nevada has substantive lawmaking authority over the subject matter of the lawsuit.

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On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

STATEMENT

The issues in this case arise out of a tort suit brought by respondent Hyatt, a Nevada citizen, in Nevada state court against petitioner Franchise Tax Board of the State of California (the "Board" or "FTB"). In a motion for summary judgment seeking dismissal of all claims, the Board asserted, among other defenses, that the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, compelled the Nevada courts to apply California law to the claims, in particular California law that allegedly shields the Board from liability for both negligent and intentional torts. The state district court denied the motion. On a petition for

mandamus filed by the Board, the Nevada Supreme Court decided, on grounds of comity, to apply California immunity law to the negligence claim, Pet. App. 11-12, but declined to apply California immunity law to the intentional tort claims. Pet. App. 12-13. Noting that Nevada law does not immunize Nevada officials from liability for intentional torts, the court concluded that application of California law to deny redress to injured Nevada plaintiffs would "contravene Nevada's policies and interests in this case." Pet. App. 12.

This tort suit is one of two continuing disputes between respondent and the Board. The other dispute involves a residency tax audit initiated by the Board in 1993 with respect to the 1991 and 1992 tax years. The principal issue in that underlying tax matter turns on the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income—on behalf of and under contract to U.S. Philips Corporation—from certain patented inventions.[1] For its part, the Board has concluded that respondent became a resident of Nevada six months later. The administrative proceedings relating to this six month dispute are being conducted in California, and are ongoing. *See* FTB Br. at 4.

This suit, in turn, concerns various tortious acts committed by the Board, including fraud, outrageous conduct, disclosure of confidential information, and invasion of privacy. *See generally* Pet. App. 49-90 (First Amended Complaint); J.A. 246-66 (Petition for Rehearing); J.A. 267-97 (Supplement to Petition

[1] In suggesting (FTB Br. 3) that the 1991 income in dispute amounts to "$40 million," the Board simply disregards the fact that respondent collected licensing income on behalf of U.S. Philips. The correct figure is less than half that ($17,727,743). *See* Cowan Affidavit Exh. 16 (Hyatt Appendix, Vol. VIII, Exh. 15) (Notice of Proposed Assessment). ("Hyatt Appendix" refers to appendices submitted to the Nevada Supreme Court in connection with the first petition for a writ of mandamus.)

for Rehearing). The evidence introduced at the summary judgment stage shows that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extort a tax settlement from Mr. Hyatt. This bad-faith effort relied on two primary courses of action. The first was to create a huge potential tax charge against respondent, largely by making false and unsupported claims and then embellishing them with the threat of large penalties. The second was to put pressure on respondent to settle the inflated claims by, among other things, releasing confidential information, while informing respondent that resistance to settlement would lead to a further loss of privacy and to public exposure.

The Board undertook this campaign against respondent after the State of California urged its tax officials to increase revenues in order to alleviate a pressing financial crisis. *See* J.A. 13 ("the demands for performance and efficiency in revenue production are higher than they have ever been"); *see also id.* 9-13, 15. Auditors knew that prosecution of large tax claims would provide recognition and an opportunity for advancement within the department. *See generally* J.A. 157-58. Indeed, large assessments, in and of themselves, would be advantageous, because the department evaluated its performance by the amount of taxes assessed. Some evidence suggests that California tax officials especially targeted wealthy taxpayers living in Nevada. *See* J.A. 174-75.

The Board also had a policy of using the threat of penalties to coerce settlements. *See* J.A. 164-67, 178-80. A memorandum regarding tax penalties, in fact, placed a picture of a skull and crossbones on its cover. *See* J.A. 16. A former Board employee testified in a deposition that a California tax official showed auditors how to use threatened penalties as "big poker chips" to "close audits" with taxpayers. *See* J.A. 165, 166. The largest, most severe penalty, and thus the biggest chip, was the seldom imposed penalty for fraud. *See* J.A. 158, 177-78.

Against this background Sheila Cox set her sights on Mr. Hyatt. As the evidence shows, her attempts to pursue a tax claim against Mr. Hyatt were, by any measure, extraordinary and offensive. *See* J.A. 161 (auditor Cox "created an entire fiction about [respondent]"). Referring to respondent, the auditor declared that she was going to "get that Jew bastard." J.A. 148, 168. According to evidence from a former Board employee, the auditor freely discussed information about respondent - - much of it false—with persons within and without the office. *See* J.A. 148-52. That information included, among other things, details about members of his family, his battle with colon cancer, a woman that the Board claimed to be his girlfriend, and the murder of his son. *See, e.g.*, J.A. 148, 168, 169, 170, 176; 283. The auditor also committed direct invasions of respondent's privacy. She sought out respondent's Nevada home, *see* J.A. 153, 174, 176, and looked through his mail and his trash. *See* J.A. 172. In addition, she took a picture of one of her colleagues posed in front of the house. *See* J.A. 44, 171. Her incessant discussion of the investigation eventually led the colleague to conclude that she was "obsessed" with the case. *See* J.A. 157.

Within her department Ms. Cox pressed for harsh action, including imposition of the rare fraud penalties. *See* J.A. 161, 162. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See* J.A. 150, 159. Reflecting her obsession, she created a story about being watched by a "one-armed" man and insisted that associates of Mr. Hyatt were mysterious and threatening. *See* J.A. 151, 152, 161-62. She repeatedly spoke disparagingly about respondent and his associates. *See* J.A. 148, 152, 169-70.

The Board also repeatedly violated its promises of confidentiality, both internally and externally. *See, e.g.*, J.A. 149-50. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number

to third parties, *see* J.A. 19-43, including California and Nevada newspapers. *See* J.A. 34-36, 39-40, 40-43. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. *See* J.A. 24-27, 29-30. The Board also disclosed its investigation of respondent to respondent's patent licensees in Japan. *See* J.A. 256-57.

The Board was well aware that respondent, like many private inventors, had highly-developed concerns about privacy and security. *See* J.A. 175, 197-206. Far from giving these concerns careful respect, the Board sought to use them against him. In addition to the numerous information "Demand[s]" sent by the Board to third parties, one Board employee pointedly told Eugene Cowan, an attorney representing respondent, that "most individuals, particularly wealthy or famous individuals, compromise and settle with the FTB to avoid publicity, to avoid the individual's financial information becoming public, and to avoid the very fact of the dispute with the FTB becoming public." J.A. 212. In Mr. Cowan's view, "[t]he clear import of her suggestion was that famous, wealthy individuals settle with the FTB to avoid being, rightly or wrongly, branded a 'tax dodger.'" J.A. 212.

These deliberate acts caused significant damage to respondent's business and reputation. Because of the tortious Board actions, the royalty income received by respondent from new licensees "dropped to zero." J.A. 257.

Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts.[2] The Board sought summary judgment, arguing, *inter alia*, that the Full Faith and Credit Clause, U.S. Const., art IV, § 1, required the Nevada courts to apply California law and that, as a result, the

[2] In addition to his claims for damages, respondent sought a declaratory judgment that he had become a Nevada resident effective as of September 26, 1991. *See* Pet. App. 62-65. The district court dismissed this claim, and it is no longer part of the case.

Board was immune from liability for all claims. The Nevada trial court rejected this defense, as well as defenses of sovereign immunity and comity, without opinion.

The Board then sought a writ of mandamus from the Nevada Supreme Court, asking that the court order dismissal of the action "for lack of subject matter jurisdiction" or, alternatively, that it limit the action to what the Board termed "the FTB's Nevada acts and Nevada contacts concerning Hyatt." FTB Petition for Mandamus at 43. The Nevada Supreme Court initially granted a writ of mandamus directing the district court to enter summary judgment in favor of the Board, Pet. App. 38-44, concluding (on a ground neither asserted by the Board nor briefed by the parties) that respondent had not presented sufficient evidence to support his claims. Respondent sought rehearing, citing extensive evidence from the record that the Board had committed numerous negligent and intentional torts. *See* J.A. 246-97. After reviewing that evidence, the supreme court granted rehearing and vacated its prior order. *See* Pet. App. 6-7.

The Nevada Supreme Court then addressed whether the district court should have applied California law, reaching different conclusions based on the nature of respondent's claims. With respect to the one negligence claim made against the Board, the supreme court decided that "the district court should have refrained from exercising its jurisdiction . . . under the comity doctrine . . . ." Pet. App. 11. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," Pet. App. 12, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Pet. App. 12. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Pet. App. 12.

The Nevada Supreme Court declined, however, to apply California immunity law to respondent's intentional tort claims. With respect to the full faith and credit argument, the court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Pet. App. 10. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Pet. App. 12. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Pet. App. 12. Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Pet. App. 12-13.[3]

SUMMARY OF ARGUMENT

I. This Court has held that "[t]he Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (internal quotation marks omitted). This longstanding respect for the States' traditional lawmaking authority directly reflects the fact that each State retains 'a residuary and inviolable sovereignty," *Printz v. United States*, 521 U.S. 898, 919 (1997) (internal quotation marks omitted), which includes the sovereign power to address harms occurring within its borders. While a State should properly take account of the interests of its sister States, the fact remains that full faith

[3] In its decision the Nevada Supreme Court apparently assumed that California law, if applicable, would provide immunity for the tortious acts committed by the Board. Pet. App. 10-13. *But see* pages 36-37 *infra* (discussing California law).

and credit doctrine does not "enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939). This principle holds even when the law of the sister State would provide immunity for its actions within the forum State. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979).

The State of Nevada plainly was "competent to legislate" with respect to the torts at issue in this case. To meet that standard, a "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Here, Nevada was both the State in which the injuries to respondent took place, *see Carroll v. Lanza*, 349 U.S. 408, 413 (1955), and the State in which respondent was a citizen at the time that the tortious conduct causing his injuries occurred. Moreover, Nevada has significant contacts with the defendant in this case: the Board not only engaged in improper actions that took place directly within Nevada, it conducted a broad tortious scheme that was specifically intended to have its harmful effects there. Nothing in the Full Faith and Credit Clause bars Nevada from applying its own law to that wrongdoing. In doing so, however, the State made a point of treating California as a co-equal sovereign, specifically examining whether Nevada would be liable for similar actions by its own officials and deciding to defer to California law, as a matter of comity, where it would not.

II. The Court should decline to adopt the "new" full faith and credit rule proposed by the Board. This rule—which would bar application of forum law "to the legislatively immunized acts of a sister State" when that law "interferes with the sister State's capacity to fulfill its own core sovereign responsibilities"—would work a wholly unjustified change in the States'

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

The Court has held to these fundamental principles even when the "conflicting and opposed policy" is one that provides sovereign immunity to a defendant State. *See Hall*, 440 U.S. at 421-24. Although acknowledging that "in certain limited situations, the courts of one State must apply the statutory law of another State," *id.* at 421, the Court in *Hall* reiterated that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Id.* at 422. In that case, the California courts had chosen to apply California law, providing full redress for injuries incurred within its borders, despite efforts by Nevada to invoke the defense of partial sovereign immunity under Nevada law. *See id.* at 421-24. This Court upheld the right of California to choose its own law, noting that California had a "substantial" interest in granting relief to persons injured within its borders. *See id.* at 424 (quoting App. to Pet. for Cert. vii) ("California's interest is the . . . substantial one of providing 'full protection to those who are injured on its highways through the negligence of both residents and nonresidents'").[4]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Proposed Rule Is Unnecessary.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We nonetheless will briefly address their arguments, which fall far short of making a case for reconsidering, let alone overruling, *Nevada v. Hall*. "Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Welch v. Texas Dep't of Highways*, 483 U.S. 468, 494 (1987)). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," 502 U.S. at 202, the Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification." *Id.* There is no "compelling justification" here.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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EXHIBIT 45

No. 02-42

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada**

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ARGUMENT

Respondent Hyatt seeks to minimize the extraordinary challenge to cooperative federalism that is presented by this dispute. It bears remembering that this case is about a former California resident who moves to Nevada and then uses the *Nevada* courts to pass judgment on *California's* decision to tax him for his *California* income.[1]

In this Court, petitioner Franchise Tax Board has urged that existing conflicts-of-law methodology is inadequate to address the question of the extent to which the Full Faith and Credit Clause requires Nevada courts to apply California's Government Code section 860.2. The Board argues that existing methodology defers to the *interests* of the forum State over the non-forum State, without regard for the *effects* of the choice of law on the

[1] The BRIEF FOR RESPONDENT GILBERT P. HYATT [Resp. Br.] contains too many factual errors to list; however, some of the more egregious bear mention. For example, Hyatt has alleged that the audit and decisions to issue the NPAs were motivated by the religious prejudice of the third auditor; however, the decision to audit Hyatt was made in 1993, by the first auditor. Record at Vol. 3, # 11, Cox Aff. ¶ 3. Moreover, no auditor made the decision to issue the NPAs; other Board personnel made those decisions after reviewing the final audit report. Record at Vol. 3, # 11, Bauche Aff. ¶¶ 4 and 6. It is also worth noting that in the first proceedings before the Nevada Supreme Court Hyatt accused the Board of "snoop[ing] at mail on the doorstep and record[ing] the timing, description, and quantity of his trash." Record at Vol. 6, # 28, p. 10, lines 10-12. After the Nevada Supreme Court originally granted the Board's writ and found that the Board's "investigative acts were in line with a standard investigation to determine residency status for taxation pursuant to its statutory authority" (Cert. App. 42-43), Hyatt increased the level of accusations, claiming instead that the Board's auditor "looked through his mail and his trash." Resp. Br. at 4. These two examples alone illustrate that Hyatt appears willing to claim (or allege) anything in order to breathe life into his lawsuit.

non-forum State. Such an approach is constitutionally adequate in dealing with suits over traffic accidents caused by agents of the non-forum State while driving in the forum State. *Nevada v. Hall*, 440 U.S. 410 (1979). It is wholly inadequate to deal with suits about official conduct by agents of the non-forum State carried out in the non-forum State and in the forum State in implementation of a core governmental function such as collection of tax debts owed by the plaintiff to the non-forum State.

The Board accordingly urges adoption of a different choice-of-law rule, to apply when suit is brought against the non-forum State or its agents based on activities in implementation of a core governmental function of the non-forum State. Such a rule – based as it is on the potential for interference by the forum State with the non-forum State's capacity to fulfill its own sovereign responsibilities (*see Nevada v. Hall,* 440 U.S. at 424 n.24) – would refer, not to the forum State's *interest* in the choice of law, but rather to the *effects* of the choice on the non-forum State's ability to function as a co-equal sovereign government. It would, in short, require the forum State to give full faith and credit to the non-forum State's own statutes limiting liability for injuries caused by the core sovereign activities that are the subject of the litigation.

A. When the effect of the forum State's policy preference is interference with the defendant State's capacity to function as a co-equal sovereign, a superficial consideration of the forum State's legislative competence will not suffice to dispose of the choice-of-law issue.

Hyatt's argument proceeds from a faulty premise. Hyatt first observes that, in resolving a choice-of-law

question, the Full Faith and Credit Clause allows a State to apply its own law to a subject matter about which it is competent to legislate – a proposition with which the Board generally has no dispute. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 721 (1988), citing *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). Hyatt next asserts that "[t]he central full faith and credit question, then, is whether Nevada was 'competent to legislate' regarding torts that are the subject matter of this lawsuit." Resp. Br. at 16.

But this Court has never suggested that the inquiry over a forum State's prerogative to ignore a defendant-State's statutory liability limits is merely a matter of confirming the forum State's legislative competency over the conduct giving rise to the alleged liability. It is clear, for example, that in *Nevada v. Hall*, this Court accepted California's rejection of Nevada's liability limitations, not only because California's choice of law rested on a legitimate policy preference about matters over which California has undisputed legislative competency, 440 U.S. at 424, but more importantly, because California's choice did not threaten to interfere with Nevada's capacity to fulfill its own sovereign responsibilities. *See* 440 U.S. at 424 n.24. Hyatt's assertion that Nevada enjoys legislative competency to enact and enforce its tort law does not end the inquiry; at best, it would be merely a beginning.

In any event, it is facetious for Hyatt to argue that nothing is at issue here other than Nevada's legislative competence to define the respective rights and liabilities of persons in their interpersonal interactions. The "person" before the Nevada court as a defendant is, after all, a co-equal sovereign State, and the "interaction" at issue is nothing less than the sister-State's effort to investigate a

possibly fraudulent evasion of tax obligations by the plaintiff based on his prior residency in the defendant State. To be sure, Hyatt's allegations may sound in tort, but those vague allegations *patently* concern the conduct of the critical governmental function of investigating, assessing, and collecting taxes from a delinquent taxpayer – hardly the subject of tort jurisprudence.

What is really at issue here is not mere adjudication of alleged torts, but rather Hyatt's effort to have the Nevada courts supervise and pass judgment upon the manner in which California's taxing agency investigates whether Hyatt has evaded his tax obligation to California.

B. Contrary to Hyatt's assertion, the Board does not seek a cession of *Nevada's* legislative jurisdiction over torts. Rather, the Board seeks an end to Nevada's usurpation of *California's* legislative jurisdiction to limit the kinds of remedies that California taxpayers have to challenge a tax investigation and audit.

Hyatt argues at great length that the Board's proposed rule is inconsistent with full faith and credit history and principles, that it "would strip away significant legislative authority from the forum States," Resp. Br. at 21, and that it suggests that, in the Full Faith and Credit Clause, "the States were permanently ceding to each other part of their traditional, jealously guarded legislative authority." Resp. Br. at 26. The argument rests entirely on Hyatt's own baseless contention that the "legislative authority" truly in question is Nevada's authority to legislate *tort laws*.

The Board does not take issue with Hyatt's lengthy argument to the effect that the Full Faith and Credit Clause was never intended to work a cession of legislative jurisdiction by the States *inter se*. But the argument misses the point. This case is not about compelling a *cession* of the forum-State's legislative sovereignty; it is rather about *usurpation* of the defendant-State's legislative sovereignty.

In order effectively to carry out investigation, assessment, and collection of delinquent taxes, California has deliberately immunized its tax officials from liability for alleged injury caused by acts incidental to the assessment or collection of taxes. Specifically, California Government Code § 860.2 provides that "Neither a public entity nor a public employee is liable for an injury caused by: (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax [or] (b) An act or omission in the interpretation or application of any law relating to a tax."[2]

This is not to say that California taxpayers have no means to challenge what they believe to be an unwarranted investigation or assessment. Indeed, a California taxpayer, including Hyatt, has all of the following remedies for challenging an audit investigation: (1) a complete review of the tax assessment at the protest stage,[3] (2) an

[2] The statute has been broadly construed by California courts. *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1136, 228 Cal.Rptr. 750 (1986) (statute bars suit for alleged interference with business and credit, slander to title, denial of due process, and punitive damages based on allegedly willful, wanton and malicious behavior).

[3] Cal. Rev. & Tax Code §§ 19041, 19044.

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independent administrative review by the five-member State Board of Equalization,[4] (3) a taxpayer's cause of action for a tax agency's failure to follow published procedures,[5] and (4) a de novo judicial review of administrative tax determinations of California residency without the necessity of prepaying the tax.[6]

What an individual taxpayer may not do, however, is sue the Board on the ground that the investigation is injurious – at least such a suit may not be brought in California courts. What Hyatt wants is the right to move to Nevada and sue the Board *there*. The net effect of Nevada's willingness to entertain Hyatt's suit against the Board is nothing short of an usurpation by the Nevada courts of *California's* legislative jurisdiction to limit the kinds of remedies that California taxpayers have to challenge a tax investigation and audit.

C. Hyatt's proffered "contacts" purporting to support Nevada's choice of law are manifestly insufficient as a basis for a choice-of-law decision that results in litigation that interferes with California's capacity to carry out an essential governmental function.

Hyatt acknowledges that Nevada's choice of its own immunity policy over California's statutory liability limits must be based on "a significant contact or significant aggregation of contacts, creating state interests, such that

[4] Cal. Rev. & Tax Code §§ 19045-47.

[5] Cal. Rev. & Tax Code § 21021.

[6] Cal. Rev. & Tax Code § 19381; Cal. Civ. Proc. Code § 1060.5.

choice of law is neither arbitrary nor fundamentally unfair." Resp. Br. at 17. Hyatt asserts that such contacts are present here, but the contacts in this case manifestly cannot justify Nevada's intrusion into California's administration of California taxes.

1. **Hyatt's residency in Nevada cannot reasonably justify that State's interference with California's tax collection efforts, because it is precisely Hyatt's move to Nevada that prompted the tax audit in the first instance.**

First, Hyatt erroneously asserts as a sufficient "contact" that "Nevada is the State in which the plaintiff suffered his injuries." *Id.* But, as a threshold matter, a plaintiff's residence and place of filing the action are generally accorded little or no significance in the constitutional analysis because of the danger of forum shopping. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985). Fairness and reasonable expectation of the parties are more important to the analysis. *Id.* at 822. In this case, both fairness and reasonable expectation favor California. Fairness, because only 3% of the activities occurred in Nevada. JA at 237. Reasonable expectation, because: (1) Hyatt was a long-time resident of California, where he worked for many years developing the computer technology that resulted in his receipt of $40 million in income in late 1991 (JA at 48); (2) Hyatt claimed he terminated his California residency just before receipt of that $40 million; and (3) given the suspicious circumstances, Hyatt had every reason to expect that his non-residency claim would be investigated by California agents enforcing California law.

Furthermore, the facts of this case dramatically confirm this Court's concern that reliance on residency as a justification for choice-of-law invites forum shopping. Indeed, it is Hyatt's evident position that this Court's full faith and credit jurisprudence guarantees Nevada's prerogative to serve as a sanctuary for "tax refugees" from California who, solely by virtue of moving (or claiming to have moved) their residence across the state line, may not only avoid the payment of future California income taxes, but may also acquire the standing to sue their former State in Nevada to impede the collection of past taxes due and owing.

2. Even if it existed, Nevada's official hostility to California tax practices would not justify an assertion of the prerogative to supervise the California taxing agency in those practices.

Hyatt asserts as a substantial "contact" the fact that the Board "deliberately took actions that either occurred in Nevada or were specifically intended to have their harmful effects there." Resp. Br. at 19. Hyatt also avers that Nevada may be concerned about "targeting" of Nevada residents by California tax officials. *See* Resp. Br. at 18. In effect, Hyatt suggests that Nevada's hostility to California tax practices would justify Nevada's assertion of judicial supervision over the California taxing agency.

Of course, the State of Nevada is not before the Court. Nor has Nevada itself chosen to appear as amicus curiae to support Hyatt's use of its courts.

In any event, the law is quite contrary to Hyatt's view. Nearly a half-century ago, the Court recognized that full faith and credit would be properly invoked to restrain "any

policy of hostility to the public Acts [of another state]." *Carroll v. Lanza,* 349 U.S. 408, 413 (1955). And, as Justice Stevens noted in his concurring opinion in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 323 n.10 (1981), in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Of course the Board deliberately took actions in Nevada, and of course the Board took actions in California with the intent of effecting a result in Nevada. Hyatt, himself, brought about the tax audit by moving *to Nevada*. If Hyatt fails to cooperate with California tax officials in *California*, then those officials obviously have little alternative but to follow his trail into *Nevada* or forego collection of taxes due and owing. Hyatt's preferences to the contrary notwithstanding, there is no evidence of any official objection by the State of Nevada to California's tax investigations in Nevada, much less of the Board's investigation of Hyatt in particular. And even if there were, such an objection would not be a constitutionally sufficient basis for Nevada's refusal to give full faith and credit to California's statutory structure for its tax collection processes. There are other, more appropriate means for addressing such political issues, e.g., interstate compact negotiations.

D. Hyatt is less than candid in suggesting that California's tax-collection efforts are unaffected by the proceedings in the Nevada courts.

Hyatt makes the misleading assertion that "despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California."

Resp. Br. at 10. While the Board will concede that it is attempting to press forward with its investigation despite Hyatt's effort to hamper and derail that investigation, that is hardly the whole of the picture.

The Nevada litigation interferes with the California tax process, first and foremost, by chilling the activities of the Board's auditors and investigators. Because the Nevada courts have resolved to inquire into the whole of California's tax assessment and auditing process (JA at 137-138), every action taken by every Board employee in furtherance of the investigation against Hyatt threatens to become the subject of additional discovery and additional alleged injury.

The interference is analogous to that described in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), wherein this Court held that taxpayers could not sue for damages under 42 U.S.C. § 1983, based upon a property tax assessment. The Court's explanation that a suit for damages "would 'in every practical sense operate to suspend collection of state taxes,'" *ibid.*, fully recognizes that a suit for money damages amounts to a collateral attack on the taxing process. The Court observed:

> Thus, a judicial determination of official liability for the acts complained of, even though necessarily based upon a finding of bad faith, would have an undeniable chilling effect upon the actions of all County officers governed by the same practicalities or required to implement the same policies. There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, not to mention the assessment of attorney's fees under 42 U.S.C. § 1988, would promptly cease the conduct found to have

> infringed petitioners' constitutional rights, whether or not those officials were acting in good faith. In short, petitioners' action would "in every practical sense operate to suspend collection of the state taxes . . . ," *Great Lakes*, 319 U. S., at 299, a form of federal-court interference previously rejected by this Court on principles of federalism.

454 U.S. at 115. No lesser chilling effect results from Hyatt's sweeping action for damages in the Nevada courts.

Furthermore, the Nevada courts' refusal to dismiss Hyatt's tort action has placed the Board in the untenable position of having to comply with outrageous discovery demands or risk sanction of its attorneys and default judgment against the State. And indeed, discovery has been oppressive. Hyatt's trial attorneys have taken 315 hours of deposition testimony from 24 witnesses, have made 329 separate document demands from the Board (which have produced over 17,000 pages of documents), and have made 340 additional document demands to deposed witnesses. Record at Vol. 3, # 11, Ex. 8, pp. 420-422. It is disingenuous for Hyatt to suggest that the Board's tax proceedings in California have not been adversely affected by having to make employees available for depositions and by having to spend hundreds of hours of employee-time marshaling documents for response to document-production demands in the Nevada courts.

Finally, as a direct result of Hyatt's Nevada litigation, the administrative tax process in California has been effectively placed on hold, despite the Board's efforts to

advance it.[7] Specifically, complying with the protective order of the Nevada court, the Board subpoenaed documents and deposition testimony relevant to Hyatt's claims. App. 8. Then, again complying with the protective order of the Nevada court, the Board attempted to enforce the subpoena duces tecum in Sacramento Superior Court, an attempt which Hyatt has opposed by filing his Opposition to Subpoena. App. 1-27. Remarkably, Hyatt has opposed the Board's subpoena on the grounds that California courts must extend full faith and credit to the Nevada protective order, and must accordingly block the Board's access to the relevant tax information.[8] Hyatt's actions in opposing the Board's subpoenas have impeded the progress of the administrative proceedings and are directly contrary to the statements that he makes in his brief filed in this Court, where he claims that "despite the Nevada litigation, the tax proceeding against respondent is continuing without interruption in California." Resp. Br. at 10. The matter is still under submission before the California courts at this time.

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[7] In order to illustrate that Hyatt – despite his contrary representations to this Court – is using the Nevada lawsuit to interfere with the administrative tax proceedings pending in California, the Board has attached the following document as an appendix to this brief:

App. 1-27: Respondent Gilbert P. Hyatt's Response and Opposition to the OSC re FTB's Petition for Order to Compel Compliance with Administrative Subpoena (hereafter referred to as "Opposition to Subpoena").

[8] Hyatt argued that the court in California must accord the protective order full faith and credit, claiming that: "under the Full Faith and Credit Clause, the Nevada protective order is entitled to all the respect and solemnity of any other judicial ruling from a sister state or another California court[.]" App. 26-27.

E. The rule urged by the Board is reasonable, workable, and limited in scope.

This Court's expression of concern in *Nevada v. Hall* has directly led to the following rule as urged by the Board:

> A forum State may not refuse to extend full faith and credit to the legislatively immunized acts of a sister State when such a refusal interferes with the sister State's capacity to fulfill its own core sovereign responsibilities.

Cf. Nevada v. Hall, 440 U.S. at 424 n.24.

1. If the rule can be said to involve a "balancing of interests," it is a balancing, not of the parochial interests of one State against those of another, but rather a balancing of the parochial interests of one State against a national, constitutional interest in cooperative federalism.

Hyatt complains that the Board's rule is merely a return to a discredited "balancing of interests" methodology for resolving choice-of-law issues. It is not. Whereas the former balancing-of-interests analysis balanced the interests of the forum State against the interest of the non-forum State,[9] the Board's rule reflects a balancing of the interests

[9] *See Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 547 (1935).

of the forum-State against the interest of the Union, reflected in a system of cooperative federalism.[10]

Thus, the Board has repeatedly pointed out that its test looks to the *effect* of the choice-of-law decision on the capacity of the defendant State to carry out core sovereign responsibilities. Where, as was the case in *Nevada v. Hall*, the forum State's policy preference can reasonably be said to work no interference with the defendant State's basic capacity to function as a co-equal sovereign, that preference does not offend the mandate of the Full Faith and Credit Clause. But where, as in the instant case, the forum State's policy preference impedes critical tax collection efforts of a co-equal sovereign State, then the Board's rule would require that the parochial interests of the forum State yield to the constitutionally contemplated system of co-equal sovereign States.

The application of this rule prevents a forum State from assuming through its judicial system what amounts to a supervisory role over a sister State's core governmental functions. The rule requires nothing more than that State courts extend full faith and credit to the scope of scrutiny permitted by the acting State in the conduct of its

[10] However, that balancing occurred in the formulation of the rule, not in the application. No consideration is given the interests of the forum State in the application of the rule because, once the rule's elements have been met, the forum State must give "faith" to its sister State's conduct in carrying out its own core governmental functions; cooperative federalism requires no less. In the last analysis, there are certain state functions whose operation falls entirely within the acting State's responsibility. Legislative acts structuring those core sovereign responsibilities are entitled to truly *full* faith and credit under the Full Faith and Credit Clause.

core governmental functions. If the acting State has constitutionally valid immunity statutes that prevent its own courts from interfering in the governmental process, then the forum State must respect that limitation.

2. The Board's new rule has standards sufficiently well-described to enable courts to apply it.

Hyatt claims that the Board's rule is essentially standardless. While the Board acknowledges that there is no bright-line test for a "core governmental responsibility," it is not standardless because States would be able to identify such a responsibility by reference to their own essential operations. All States, for example, collect revenue by one device or another. The assessment and collection of state personal income taxes are the lifeblood of the California government because it is the means by which government is able to function.

That taxes are clearly a core function is supported by ample authority. For example, the ability of the State to assess and collect taxes is so important that the California Constitution bars "any court" from issuing a "legal or equitable process . . . to prevent or enjoin the collection of any tax." Cal. Const., art. XIII, § 32. Federal law similarly mandates that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. In fact, as pointed out earlier, this Court has held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal court." *Fair Assessment*, *supra*, 454 U.S. at 116. And, in a similar vein, this Court

has recognized "the vital interest of the government in acquiring its lifeblood, revenue" (*Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 21 (2000)) in holding that – despite bankruptcy statutes to the contrary – a debtor bears the burden of proof on a tax claim in bankruptcy court when the substantive law creating the tax obligation puts the burden on the taxpayer.

Although these authorities do not define a "core" sovereign process, they clearly illustrate that tax systems and processes are core. Here, the determination of residency is a foundational step in the collection of state personal income taxes. No State can effectively carry out its tax administration without being able freely to review and investigate a taxpayer's claims, even when they involve a claimed change of residency.

Likewise, all States exercise their law enforcement powers for the preservation of the health, safety, and welfare of their citizens. It is reasonable to characterize tax assessment and collection and law enforcement as core governmental functions, while the same may not be true for recruiting for a state university football team. The difficulty of drawing a bright line is less important than assuring that all processes that clearly are core are protected under the Full Faith and Credit Clause.

In addition, hypothetical difficulties in applying the rule are insignificant when compared to the harm to cooperative federalism – protected by the Full Faith and Credit Clause – that will occur if the Board's rule (or one having the same effect) is not adopted. As explained above, Hyatt's lawsuit is not limited to acts in Nevada, but intrudes into all aspects of California's decisions and actions in auditing Hyatt and assessing taxes against him.

Finally, despite the absence of a bright-line test, this Court has made similar types of determinations in various other settings. For example, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1977), a five-member majority of this Court held that the Coeur d'Alene tribe could not employ the *Ex parte Young*, 209 U.S. 123 (1908) exception to the Eleventh Amendment in a suit against the State of Idaho because the subject matter of the suit (ownership of the submerged lands and beds of Lake Coeur d'Alene) implicated Idaho's "special sovereignty interests," despite the fact that no attempt was made to *define* the term. *Id.* at 281, 287-288. And, in *Maine v. Taylor*, 477 U.S. 131 (1985), the Court held that Maine's statutory ban on the importation of live baitfish did not unconstitutionally burden interstate commerce, in part because the ban "serves *legitimate local purposes*[.]" *Id.* at 151 (emphasis added). In each of these cases, the court employed the test without attempting to define the universe of situations that would come within it. Likewise, here, the core-sovereign-function test is workable without having to describe every circumstance in which it might apply.

3. This Court did not reject the Board's proposed rule in *Bonaparte v. Tax Court*.

Hyatt also claims that the Board's rule has been impliedly rejected by this Court in *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), a case that rejected the argument that full faith and credit barred a State from taxing the obligation of another State. According to Hyatt, *Bonaparte* involved "'interference' with 'core sovereign responsibilities,'" and since full faith and credit did not bar that, it should not bar Nevada's refusal here to apply California law. However, *Bonaparte* did not involve a lawsuit against

a defendant State that had raised the issue of applying its own immunity statute. Moreover, it only resulted in trimming a benefit to the non-forum State, it did not involve the type of interference with the tax *process* that exists in this case.

4. The Board's new rule is necessary.

Hyatt asserts that the Board's rule is unnecessary because of the protection already afforded to sister State defendants through comity, interstate compacts, and Congressional action. Any notion that a new rule is unnecessary because of comity, interstate compacts, and Congressional action is put to rest by the fact that this case is ongoing. Moreover, a new rule is necessary because current choice-of-law methodology does not remotely contemplate the cynical use of a State's judicial processes by a plaintiff against his former State of citizenship, to interfere with an ongoing governmental investigation of the plaintiff by the defendant State – especially when that investigation concerns tax obligations that were incurred during the time of plaintiff's former citizenship. In such a context, it is obviously insufficient simply to look at the face of the complaint and consider whether the forum State is competent to legislate in the general area of law encompassed by the allegations. Such an approach ignores the inescapable fact that plaintiff seeks to elevate the status of the forum court to that of a judge over the governmental investigation that is being conducted against plaintiff by the defendant sister State.

Furthermore, the Board's rule is necessary because this case cries out for full faith and credit protection. There must be a solution other than mere reliance on a

forum State's willingness to grant comity, because – as this case shows – comity is no solution. Both the type and amount of interference that the Board has detailed above illustrate that Nevada's refusal to extend full faith and credit has resulted in exactly the evils that Justice Stevens commented on in his concurring opinion in *Allstate*, where he explained that the Full Faith and Credit Clause "would be invoked to restrain 'any policy of hostility to the public Acts' of another State," and would prevent the "parochial entrenchment on the interests of other States." *Allstate Insurance Co. v. Hague*, *supra*, 449 U.S. at 323 n.10 (Stevens, J., concurring).[11]

[11] This Court held long ago that " . . . no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests that this Court reverse the order of the Nevada Supreme Court.

Respectfully submitted,

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EXHIBIT 46

Supreme Court of the United States
FRANCHISE TAX BOARD OF CALIFORNIA, Petitioner,
v.
Gilbert P. HYATT, et al.
No. 02-42.

Argued Feb. 24, 2003.
Decided April 23, 2003.

Taxpayer, former California resident who had moved to Nevada, brought state-court action in Nevada against California tax collection agency, alleging negligent misrepresentation, invasion of privacy, fraud and other torts in connection with agency's assessments and penalties for tax year for which taxpayer filed as part-year California resident. The Nevada Supreme Court denied in part agency's petition for writ of mandamus, ordering Clark County District Court to dismiss negligence claim for lack of jurisdiction but finding that intentional tort claims could proceed to trial. Certiorari was granted, 537 U.S. 946, 123 S.Ct. 409, 154 L.Ed.2d 289. The United States Supreme Court, Justice O'Connor, held that Nevada court was not required to extend full faith and credit to California statute conferring complete immunity on California agencies.

Affirmed.

West Headnotes

[1] States 360 ⚿5(2)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) k. Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States. Most Cited Cases

Whereas Full Faith and Credit Clause is exacting with respect to final judgment rendered by court with adjudicatory authority over subject matter and persons governed by judgment, it is less demanding with respect to choice of laws; Clause does not compel state to substitute statutes of other states for its own statutes dealing with subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1.

[2] States 360 ⚿5(2)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) k. Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States. Most Cited Cases

Nevada court hearing intentional tort action brought by Nevada resident against California tax collection agency based at least in part on conduct occurring in Nevada was not required to extend full faith and credit to California statute conferring complete immunity on California agencies; Nevada high court's determination that affording immunity to foreign state's agency would contravene Nevada's policy of protecting its citizens from injurious intentional torts committed by sister states' government employees relied on contours of Nevada's own sovereign immunity as benchmark and did not exhibit policy of hostility to public acts of California. U.S.C.A. Const. Art. 4, § 1; West's Ann.Cal. Const. Art. 3, § 5; West's Ann.Cal.Gov.Code §§ 820, 860.2; West's NRSA 41.031.

[3] States 360 ⚿191.1

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 k. In General. Most Cited

Cases
Constitution does not confer sovereign immunity on states in courts of sister states.

[4] States 360 ⚿5(2)

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) k. Full Faith and Credit in Each State to the Public Acts, Records, Etc. of Other States. Most Cited Cases
Full Faith and Credit Clause does not require state to apply second state's sovereign immunity statutes where such application would violate first state's own legitimate public policy. U.S.C.A. Const. Art. 4, § 1.

****1684** Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt's (hereinafter respondent) "part-year" 1991 California income-tax return represented that he had ceased to be a California resident and had become a Nevada resident in October 1991, shortly before he received substantial licensing fees. Petitioner California Franchise Tax Board (CFTB) determined that he was a California resident until April 1992, and accordingly issued notices of proposed assessments for 1991 and 1992 and imposed substantial civil fraud penalties. Respondent filed suit against CFTB in a Nevada state court, alleging that CFTB had directed numerous contacts at Nevada and had committed negligence and intentional torts during the course of its audit of respondent. In its motion for summary judgment or dismissal, CFTB argued that the state court lacked subject matter jurisdiction because full faith and credit and other legal principles required that the court apply California law immunizing CFTB from suit. Upon denial of that motion, CFTB petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal. The latter court ultimately granted the petition in part and denied it in part, holding that the lower court should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles, but that the intentional tort claims could proceed to trial. Among other things, the court noted that Nevada immunizes its state agencies from suits for discretionary acts but not for intentional torts committed within the course and scope of employment and held that affording CFTB statutory immunity with respect to intentional torts would contravene Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister States' government employees.

Held: The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, does not require Nevada to give full faith and credit to California's statutes providing its tax agency with immunity from suit. The full faith and credit command "is exacting" with respect to a final judgment rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580, but is less demanding with respect to choice of laws. The Clause does not compel a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it ***489** is competent to legislate. *E.g.*, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 108 S.Ct. 2117, 100 L.Ed.2d 743. Nevada is undoubtedly competent to legislate with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. CFTB argues unpersuasively that this Court should adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would interfere with the State's capacity to fulfill its

own sovereign responsibilities. The Court has, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve ****1685** conflicts between overlapping laws of coordinate States. See, *e.g.*, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026. However, this balancing-of-interests approach quickly proved unsatisfactory and the Court abandoned it, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, n. 10, 322, n. 6, 339, n. 6, 101 S.Ct. 633, 66 L.Ed.2d 521, recognizing, instead, that it is frequently the case under the Clause that a court can lawfully apply either the law of one State or the contrary law of another, *Sun Oil Co. v. Wortman*, *supra*, at 727, 108 S.Ct. 2117. The Court has already ruled that the Full Faith and Credit Clause does not require a forum State to apply a sister State's sovereign immunity statutes where such application would violate the forum State's own legitimate public policy. *Nevada v. Hall*, 440 U.S. 410, 424, 99 S.Ct. 1182, 59 L.Ed.2d 416. There is no constitutionally significant distinction between the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function. States' sovereignty interests are not foreign to the full faith and credit command, but the Court is not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183. The Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis. Pp. 1687-1690.

Affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Bill Lockyer, Attorney General of the State of California, Manuel M. Medeiros, State Solicitor, David S. Chaney, Senior Assistant Attorney General, Wm. Dean Freeman, Lead Supervising Deputy Attorney General, Felix E. Leatherwood, Deputy Attorney General, Counsel of Record, Los Angeles, CA, for petitioner.

Gilbert P. Hyatt, Mark A. Hutchison, Hutchison & Steffen, Las Vegas, NV, Donald J. Kula, Riordan & McKinzie, Los Angeles, CA, ***490** H. Bartow Farr, III, Counsel of Record, Farr & Taranto, Washington, DC, Peter C. Bernhard, Bernhard, Bradley & Johnson, Las Vegas, NV, for respondents.

For U.S. Supreme Court briefs, see:2002 WL 31827845 (Pet.Brief)2003 WL 181170 (Resp.Brief)2003 WL 469130 (Reply.Brief)

Justice O'CONNOR delivered the opinion of the Court.

We granted certiorari to resolve whether the Nevada Supreme Court's refusal to extend full faith and credit to California's statute immunizing its tax collection agency from suit violates Article IV, § 1, of the Constitution. We conclude it does not, and we therefore affirm the judgment of the Nevada Supreme Court.

I

Respondent Gilbert P. Hyatt (hereinafter respondent) filed a "part-year" resident income tax return in California for 1991. App. to Pet. for Cert. 54. In the return, respondent represented that as of October 1, 1991, he had ceased to be a California resident and had become a resident of Nevada. In 1993, petitioner California Franchise Tax Board (CFTB) commenced an audit to determine whether respondent had underpaid state income taxes. *Ibid.* The audit focused on ***491** respondent's claim that he had changed residency shortly before receiving substantial licensing fees for certain patented inventions related to computer technology.

At the conclusion of its audit, CFTB determined that respondent was a California resident until April 3, 1992, and accordingly issued notices of proposed assessments for income taxes for 1991 and 1992 and imposed substantial civil fraud penalties. *Id.*, at

56-57, 58-59. Respondent ****1686** protested the proposed assessments and penalties in California through CFTB's administrative process. See Cal. Rev. & Tax.Code Ann. §§ 19041, 19044-19046 (West 1994).

On January 6, 1998, with the administrative protest ongoing in California, respondent filed a lawsuit against CFTB in Nevada in Clark County District Court. Respondent alleges that CFTB directed "numerous and continuous contacts ... at Nevada" and committed several torts during the course of the audit, including invasion of privacy, outrageous conduct, abuse of process, fraud, and negligent misrepresentation. App. to Pet. for Cert. 51-52, 54. Respondent seeks punitive and compensatory damages. *Id.*, at 51-52. He also sought a declaratory judgment "confirm[ing][his] status as a Nevada resident effective as of September 26, 1991," *id.*, at 51, but the District Court dismissed the claim for lack of subject matter jurisdiction on April 16, 1999, App. 93-95.

During the discovery phase of the Nevada lawsuit, CFTB filed a petition in the Nevada Supreme Court for a writ of mandamus, or in the alternative, for a writ of prohibition, challenging certain of the District Court's discovery orders. While that petition was pending, CFTB filed a motion in the District Court for summary judgment or, in the alternative, for dismissal for lack of jurisdiction. CFTB argued that the District Court lacked subject matter jurisdiction because principles of sovereign immunity, full faith and credit, choice of law, comity, and administrative exhaustion all required that the District Court apply California law, under which:

> ***492** "Neither a public entity nor a public employee is liable for an injury caused by:
>
> "(a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax [or]
>
> "(b) An act or omission in the interpretation or application of any law relating to a tax." Cal. Govt.Code Ann. § 860.2 (West 1995).

The District Court denied CFTB's motion for summary judgment or dismissal, prompting CFTB to file a second petition in the Nevada Supreme Court. This petition sought a writ of mandamus ordering the dismissal of the case, or in the alternative, a writ of prohibition and mandamus limiting the scope of the suit to claims arising out of conduct that occurred in Nevada.

On June 13, 2001, the Nevada Supreme Court granted CFTB's second petition, dismissed the first petition as moot, and ordered the District Court to enter summary judgment in favor of CFTB.App. to Pet. for Cert. 38-43. On April 4, 2002, however, the court granted respondent's petition for rehearing, vacated its prior ruling, granted CFTB's second petition in part, and denied it in part. *Id.*, at 5-18. The court held that the District Court "should have declined to exercise its jurisdiction over the underlying negligence claim under comity principles" but that the intentional tort claims could proceed to trial. *Id.*, at 7.

The Nevada Supreme Court noted that both Nevada and California have generally waived their sovereign immunity from suit in state court and "have extended the waivers to their state agencies or public employees except when state statutes expressly provide immunity." *Id.*, at 9-10 (citing Nev.Rev.Stat. § 41.031 (1996); Cal. Const., Art. 3, § 5; and Cal. Govt.Code Ann. § 820 (West 1995)). Whereas Nevada has not conferred immunity on its state agencies for intentional torts committed within the course and scope of ***493** employment, the court acknowledged that "California has expressly provided [CFTB] with complete immunity." App. to Pet. for Cert. 10 (citing Cal. Govt.Code Ann. § 860.2 (West 1995) and *Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 228 Cal.Rptr. 750 (1986)). To determine which State's law should apply, the court applied principles of comity.

****1687** Though the Nevada Supreme Court recognized the doctrine of comity as "an accommodation

policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations," the court also recognized its duty to determine whether the application of California law "would contravene Nevada's policies or interests," giving "due regard to the duties, obligations, rights and convenience of Nevada's citizens." App. to Pet. for Cert. 11. "An investigation is generally considered to be a discretionary function," the court observed, "and Nevada provides its [own] agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Id.*, at 12. "[A]ffording [CFTB] statutory immunity for negligent acts," the court therefore concluded, "does not contravene any Nevada interest in this case." *Ibid.* The court accordingly held that "the district court should have declined to exercise its jurisdiction" over respondent's negligence claim under principles of comity. *Id.*, at 7. With respect to the intentional torts, however, the court held that "affording [CFTB] statutory immunity ... does contravene Nevada's policies and interests in this case." *Id.*, at 12. Because Nevada "does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment," the court held that "Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees" should be accorded ***494** greater weight "than California's policy favoring complete immunity for its taxation agency." *Id.*, at 12-13.

We granted certiorari to resolve whether Article IV, § 1, of the Constitution requires Nevada to give full faith and credit to California's statute providing its tax agency with immunity from suit, 537 U.S. 946, 123 S.Ct. 409, 154 L.Ed.2d 289 (2002), and we now affirm.

II

[1] The Constitution's Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1. As we have explained, "[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker v. General Motors Corp.*, 522 U.S. 222, 232, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). Whereas the full faith and credit command "is exacting" with respect to "[a] final judgment ... rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment," *id.*, at 233, 118 S.Ct. 657, it is less demanding with respect to choice of laws. We have held that the Full Faith and Credit Clause does not compel " 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)).

The State of Nevada is undoubtedly "competent to legislate" with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders. " '[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.' ***495** " *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (quoting ****1688***Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (plurality opinion)); see 472 U.S., at 822-823, 101 S.Ct. 633. Such contacts are manifest in this case: the plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada, Brief for Petitioner

33-34, n. 16. See, *e.g.*, *Carroll v. Lanza*, 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955) ("The State where the tort occurs certainly has a concern in the problems following in the wake of the injury"); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, at 503, 59 S.Ct. 629 ("Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power").

[2] CFTB does not contend otherwise. Instead, CFTB urges this Court to adopt a "new rule" mandating that a state court extend full faith and credit to a sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would "interfer[e] with a State's capacity to fulfill its own sovereign responsibilities." Brief for Petitioner 13 (internal quotation marks omitted).

We have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932) (holding that the Constitution required a federal court sitting in New Hampshire to apply a Vermont workers' compensation statute in a tort suit brought by the administrator of a Vermont worker killed in New Hampshire). This balancing approach quickly proved unsatisfactory. Compare *Alaska Packers Assn. v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532, 550, 55 S.Ct. 518, 79 L.Ed. 1044 (1935) (holding that a forum State, which was the place of hiring but not of a claimant's domicile, could apply its own law to compensate for an accident in another State, because "[n]o persuasive reason" was shown for requiring application of the law of the State where the ***496** accident occurred), with *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, at 504-505, 59 S.Ct. 629 (holding that the State where an accident occurred could apply its own workers' compensation law and need not give full faith and credit to that of the State of hiring and domicile of the employer and employee). As Justice Robert H. Jackson, recounting these cases, aptly observed, "it [is] difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution." Full Faith and Credit-The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 16 (1945).

In light of this experience, we abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause. *Allstate Ins. Co. v. Hague*, 449 U.S., at 308, n. 10, 101 S.Ct. 633 (plurality opinion); *id.*, at 322, n. 6, 101 S.Ct. 633 (STEVENS, J., concurring in judgment); *id.*, at 339, n. 6, 101 S.Ct. 633 (Powell, J., dissenting). We have recognized, instead, that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another." *Sun Oil Co. v. Wortman*, *supra*, at 727, 108 S.Ct. 2117. We thus have held that a State need not "substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, at 501, 59 S.Ct. 629; see *Baker v. General Motors Corp.*, *supra*, at 232, 118 S.Ct. 657; *Sun Oil Co. v. Wortman*, *supra*, at 722, 108 S.Ct. 2117; *Phillips Petroleum Co. v. Shutts*, *supra*, at 818-819, 105 S.Ct. 2965. Acknowledging this shift, CFTB contends that this case demonstrates the need for a new rule under the Full Faith and Credit Clause that will protect "core sovereignty" interests as ****1689** expressed in state statutes delineating the contours of the State's immunity from suit. Brief for Petitioner 13.

We disagree. We have confronted the question whether the Full Faith and Credit Clause requires a forum State to ***497** recognize a sister State's legislatively recaptured immunity once before. In *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), an employee of the University of Nevada was involved in an automobile accident with California residents, who filed suit in Califor-

nia and named Nevada as a defendant. The California courts refused to apply a Nevada statute that capped damages in tort suits against the State on the ground that "to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery." *Id.*, at 424, 99 S.Ct. 1182.

[3] We affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. *Id.*, at 414-421, 99 S.Ct. 1182. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of petitioner's *amici* States, see Brief for State of Florida et al. as *Amici Curiae* 2, to do so. See this Court's Rule 14.1(a); *Mazer v. Stein*, 347 U.S. 201, 206, n. 5, 74 S.Ct. 460, 98 L.Ed. 630 (1954) ("We do not reach for constitutional questions not raised by the parties").

[4] The question presented here instead implicates *Hall's* second holding: that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity statutes where such application would violate California's own legitimate public policy. 440 U.S., at 424, 99 S.Ct. 1182. The Court observed in a footnote:

> "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could 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 of Nevada, might require a different analysis or a different result." *Id.*, at 424, n. 24, 99 S.Ct. 1182.

***498** CFTB asserts that an analysis of this lawsuit's effects should lead to a different result: that the Full Faith and Credit Clause requires Nevada to apply California's immunity statute to avoid interference with California's "sovereign responsibility" of enforcing its income tax laws. Brief for Petitioner 13.

Our past experience with appraising and balancing state interests under the Full Faith and Credit Clause counsels against adopting CFTB's proposed new rule. Having recognized, in *Hall*, that a suit against a State in a sister State's court "necessarily implicates the power and authority" of both sovereigns, 440 U.S., at 416, 99 S.Ct. 1182, the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada, were we to deem this lawsuit an interference with California's "core sovereign responsibilities." We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was "integral" or "traditional." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-547, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). CFTB has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.

Even were we inclined to embark on a course of balancing States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause, ****1690** this case would not present the occasion to do so. There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and California's interests in the tort claims here arising out of its tax collection agency's residency audit. To be sure, the power to promulgate and enforce income tax laws is an essential attribute of sovereignty. See *Franchise Tax Bd. of Cal. v. Postal Service*, 467 U.S. 512, 523, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984) ***499** " '[T]axes are the life-blood of government' " (quoting *Bull v. United States*, 295 U.S. 247, 259-260, 55 S.Ct. 695, 79 L.Ed. 1421 (1935))). But the university employee's educational mission in *Hall* might also be so described. Cf. *Brown v.*

Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("[E]ducation is perhaps the most important function of state and local governments").

If we were to compare the degree to which the allegedly tortious acts here and in *Hall* are related to a core sovereign function, we would be left to ponder the relationship between an automobile accident and educating, on one hand, and the intrusions alleged here and collecting taxes, on the other. We discern no constitutionally significant distinction between these relationships. To the extent CFTB complains of the burdens and expense of out-of-state litigation, and the diversion of state resources away from the performance of important state functions, those burdens do not distinguish this case from any other out-of-state lawsuit against California or one of its agencies.

States' sovereignty interests are not foreign to the full faith and credit command. But we are not presented here with a case in which a State has exhibited a "policy of hostility to the public Acts" of a sister State. *Carroll v. Lanza*, 349 U.S., at 413, 75 S.Ct. 804. The Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis. See App. to Pet. for Cert. 10-13.

In short, we heed the lessons learned as a result of *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026 (1932), and its progeny. Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.

The judgment of the Nevada Supreme Court is affirmed.

It is so ordered.

U.S.Nev.,2003.
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538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, 71 USLW 4307, 03 Cal. Daily Op. Serv. 3364, 2003 Daily Journal D.A.R. 4281

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EXHIBIT 47