

IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT,

Appellants,

v.

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA,

Respondents.

Docket No. 84707

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**APPENDIX OF EXHIBITS TO
APPELLANT'S OPENING BRIEF
VOLUME 11 OF 42**

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7	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 2	10/15/2019	2,3	AA000283	AA000535
8	Appendix of Exhibits in Support of FTB's Briefing re the Requirement of Entry of Judgment in FTB's Favor and Determination that FTB is Prevailing Party — Volume 3	10/15/2019	3,4	AA000536	AA000707

9	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, filed October 15, 2019	10/15/2019	4-7	AA000708	AA001592
10	Exhibits 14-34 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, filed October 15, 2019	10/15/2019	7-11	AA001593	AA002438
11	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, filed October 15, 2019	10/15/2019	11-15	AA002439	AA003430
12	Exhibits 67-82 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, filed October 15, 2019	10/15/2019	15-19	AA003431	AA004403

13	Exhibits 83-94 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, filed October 15, 2019	10/15/2019	19-21	AA004404	AA004733
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35	Plaintiff Gilbert P. Hyatt's Motion to Strike, Motion to Retax, and Alternatively, Motion for Extension of Time to Provide Additional Basis to Retax Costs	3/2/2020	37, 38	AA008695	AA008705
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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX OF EXHIBITS TO APPELLANT’S OPENING BRIEF VOLUME 11 OF 42** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.

DATED this 10th day of October, 2022.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

1 Q. Does the Franchise Tax Board have any policy
2 against intruding into a taxpayer's privacy?

3 A. I am not aware of a policy.

4 Q. Does the Franchise Tax Board have any policy
5 about against destruction of documents relating to a
6 taxpayer

7 A. I am not aware of a policy. There could be
8 one.

9 Q. Have you ever sent out a demand for
10 information to a third party?

11 A. Yes, sir.

12 Q. Have you ever sent out a demand for
13 information to a third party across state lines?

14 A. Not that I recall.

15 Q. Would you tell me in your tenure -- is it ten,
16 year career?

17 A. Ten, yes.

18 Q. In your ten year career, how many times have
19 you sent out demands to a third party?

20 A. Oh, my. Maybe 30 maybe.

21 Q. Have you ever sent out demand for information

22 to a rabbi?

23 A. Not that I'm aware of, no.

24 Q. Or a priest?

25 A. Not that I recall.

26 Q. Or a minister?

44

27 A. Not that I recall.

28 Q. How about to a dating service?

1 A. Not that I recall.

2 Q. Have you ever interviewed third parties?

3 A. Yes, sir.

4 Q. When you interview third parties, did you use
5 set questions? Or did you have an outline for areas you
6 wanted to cover?

7 A. I don't recall.

8 Q. Have you ever prepared affidavits?

9 A. Not that I recall.

10 Q. Are you authorized to administer oaths?

11 A. No, sir.

12 Q. Are any of your auditors under your
13 supervision authorized to administer oaths?

14 A. Not that I'm aware of, no.

15 Q. Have you ever asked a taxpayer to provide an
16 affidavit?

17 A. Not that I can recall, no.

18 Q. Is there any program by which the Franchise
19 Tax Board targets high income taxpayers?

20 A. Targets? No, sir.

21 Q. How about selects them for audit?

22 A. Large income taxpayers do come up for audit,

23 yes.

24 Q. Have you ever heard of a program called LIT.

25 LIT?

26 A. Yes.

45

27 Q. Does that refer to the large income taxpayer

28 program?

1 said my name had come up in connection with the case.

2 Q. Now, what about the work you did with Sheila

3 Cox when you went to interview a fellow named Hyatt who is

4 first name was Brian or Michael or both, Michael and

5 Brian. Do you remember knowing the name Hyatt at that time?

6 A. I don't recall knowing the name, no.

7 Q. What do you recall about the work you did on

8 that interview?

9 A. I accompanied Sheila to the gentleman's home,

10 I believe it was. And I think I took a few notes. And

11 that was really about it that I remember.

12 Q. Did you sign and date your notes?

13 A. I don't believe I did.

14 Q. Did you give your notes to Sheila Cox?

15 A. That is my recollection, yes, sir.

16 Q. What is the procedure about what happens to

17 notes after an interview? What is the normal procedure at

18 the Franchise Tax Board?

19 A. I don't know.

20 Q. What do you do with notes after you do an

21 interview?

22 A. In my current position, they go in a working

23 file.

24 Q. How about when you were an auditor?

25 A. They went into the file. Sometimes they were

26 summarized, and the originals were not included.

49

27 Q. So when was the last time you saw your notes?

28 A. It would have been the day of the interview, I

1 Q. Agreeing too much.

2 A. No. I don't think so.

3 Q. Do you know what a no change audit it?

4 A. Yes, sir.

5 Q. What is it?

6 A. It's when you complete an audit and things

7 that were looked at were fine and the return is accepted as

8 filed.

9 Q. Would it be [straining|strange] if an auditor

10 had a grader than normal number of no change audits?

11 A. Strange?

12 Q. Yes. Out of the ordinary.

13 A. If they had a greater than average number,

14 that would be out of the ordinary.

15 Q. Have you ever heard of anyone called the queen

16 of no change audits?

17 A. Me at one point. Not that I can recall, no.

18 Q. Were you regarded as that at one point?

19 A. Oh, I don't know that I was. When I was still

20 in Santa Barbara I turned in five or six cases in a row

21 that were fine, accepted as filed. And I told my boss that

22 that's what I was.

23 Q. The queen of no change audits?

24 A. Yes. Which did not play out to be true.

25 Q. So you've assessed your fair share of high

26 dollar cases, I take it?

101

27 A. Oh, I don't know. I think I've done a good

28 job for the state and for the people that I work for.

1 chips?

2 A. I can't think of anything that was phrased
3 that way.

4 Q. Were you ever encouraged to use bargaining
5 chips?

6 A. No, sir, not that I recall.

7 Q. Did you ever attend any residency training in
8 which bargaining chips were used as a visual aid?

9 A. Residency training?

10 Q. Yes.

11 A. Not that I can remember.

12 Q. Have you ever attended any training by Doug
13 Dick 124?

14 A. Yes, sir, I have.

15 Q. What has he trained you in?

16 A. What was that training. You know, I don't
17 remember the name of his class.

18 Q. Was he teaching about negotiate techniques?

19 A. Yes, he was.

20 Q. Did he use any visual aids of looking like

21 a pock err chip?

22 A. Yes, he had a PowerPoint presentation.

23 Q. What was his PowerPoint presentation

24 illustrating if you recall

25 ((CORRECTION: poker chip)

26 ?

164

27 A. That there are -- or can be legitimate audit

28 issues that are brought up, are discussed with the rep and



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10:54 1 is FTB Form 4973-39, last revised in March of '94.
2 Do you see that?
3 A. Yes.
4 Q. Did you talk to Sheila Cox about
10:54 5 sending demands to furnish information to anybody?
6 A. No.
7 Q. Have you ever sent out demands to
8 furnish information out of state?
9 A. No.
10:54 10 MR. HELLER: Objection, asked and answered.
11 BY MR. BOURKE:
12 Q. No, you haven't?
13 A. No.
14 Q. Do you recall ever putting on a Social
10:54 15 Security number for a taxpayer on a demand for
16 information sent to a third party within the state of
17 California?
18 A. I don't think I've sent out any
19 demands for information.
10:54 20 Q. Is it not standard policy of the FTB
21 to use a demand for information to send to third
22 parties? Is that not normal?
23 A. No. It's just that in my cases the
24 taxpayers provided the information I required or
10:55 25 requested and I did not have to go outside to get

10:55 1 that information.

2 Q. And was it your practice to first ask
3 for information from the taxpayer?

4 A. Yes.

10:55 5 Q. Is it your understanding that that is
6 recommended policy at the FTB to first go to the
7 taxpayer to ask for information before you go to
8 third parties?

9 A. I don't know if that's a recommended
10:55 10 policy. It's practice, although with respect to the
11 DMV information, voter registration information,
12 that's something I would send out in the process of
13 scoping the return prior to contacting.

14 Q. But other than DMV and voter
10:55 15 registration, it would be your practice to first ask
16 the taxpayer for information before going to third
17 parties?

18 A. Yes.

19 Q. Would you look at the questionnaire
10:56 20 that's at H 01688? There is a questionnaire
21 addressed to Keith L. Kalm, K-a-l-m, Jennifer Circle
22 in La Palma. Did you ever discuss with Sheila Cox
23 sending out questionnaires to neighbors of Mr. Hyatt,
24 or former neighbors of Mr. Hyatt?

10:56 25 A. No.

09:46 1 A. Yes.

2 Q. And the demand for information is an
3 FTB form that is printed up and you can type in the
4 variable information on a typewriter?

09:46 5 A. Correct.

6 Q. Now, there is a place in the form that
7 says SSN, I believe.

8 A. Correct.

9 Q. Does that refer to Social Security
09:46 10 number?

11 A. I believe so.

12 Q. And have you used the form to disclose
13 the Social Security number of taxpayers to third
14 parties?

09:47 15 MR. HELLER: Objection to form.

16 THE WITNESS: I can't recall doing that but I
17 may have done that.

18 BY MR. BOURKE:

19 Q. As I understand your testimony, you've
09:47 20 been an auditor for about 20 years?

21 A. Correct.

22 Q. Could you tell me approximately how
23 many demands for information you think you've sent
24 out in your 20 years?

9:47 25 A. A handful.

09:47 1 Q. Less than 10?
2 A. Yes.
3 Q. Have you ever sent a demand for
4 information to an out-of-state recipient?
09:47 5 A. I don't believe so.
6 Q. Does the FTB have any rules or
7 regulations about sending demands for information to
8 out-of-state recipients?
9 A. I would think they have some
09:47 10 guidelines on that.
11 Q. Based on your 20 years of experience,
12 which is considerably more than mine, could you tell
13 me what documents I should ask for in order to find
14 whatever rules and regulations there are about
09:48 15 demands for information?
16 A. I would think they would be in our
17 audit manuals.
18 Q. And to focus in on the relevant audit
19 manuals for a residency audit in 1993 to 1996 time
09:48 20 period, what audit manuals would those be?
21 A. I would say -- in this case?
22 Q. Yes. For Gil Hyatt.
23 A. The Residency Audit Manual.
24 Q. Yes, okay. Now, I have a copy of a
9:48 25 Residency Audit Manual that was modified in October

obtained from the postal employee's supervisor before conducting the interview.

Occasionally, a third party will be apprehensive about furnishing information in writing. The telephone is an effective technique in obtaining preliminary information verbally, then requesting that it be confirmed in writing. If the individual contacted refuses to furnish any written information, documentation of the call using the Public Contact Memo will suffice as support for the information obtained. Also, 'prompting techniques' for purposes of confirming suspicions, work well verbally. As an example, a school official may not be authorized to release the address of a student. The auditor may merely want confirmation of a suspected address. The official is then confronted with the address and just asked to confirm or deny it. More times than not, the auditor will obtain the information necessary to either confirm or deny his suspicions. This technique is used when time constraints are involved, or when the auditor feels he may not otherwise obtain the information.

Section 19504 (formerly Section 19254) authorizes the Department to request and obtain information from third parties. This section may be cited/quoted if the requested information is not provided. It is advisable not to quote the section in the first request because it does not leave much recourse. To obtain information from uncooperative third parties, the auditor should use the Demand For Information form (FTB Form 4973). See Exhibit XXIII. Financial institutions will not release information without authorization from the taxpayer and/or payment of fees. Authorization To Release Financial Information (FTB Form 2590) is used in this instance. Procedures for when FTB incurs the cost are in Exhibit XXII.

If the auditor is still unable to obtain the information a subpoena duces tecum may be required. This may also be used to reduce the fees imposed by certain financial institutions. Instructions and procedures for issuing a subpoena duces tecum are contained in the Subpoena Manual located in each District Office.

See the Information Sources section of this manual for a comprehensive discussion of potential third party sources.



1 Q. That was basically a requirement from Wagon
2 Trails management, you had to prorate it if you wanted
3 to move in any sooner than the first?

4 A. Oh, yes. Even if it's one day.

5 Q. Could you reserve it, say I wanted two weeks
6 from now to start on the first?

7 A. When you rent it there was a two-week if you
8 wanted, if you couldn't come in, we did two weeks from
9 the day of application to move-in.

10 Q. I see. That's the most you would do?

11 A. Right.

12 Q. What was the date of the application here?

13 A. Unless it's military, then we have nothing to
14 tell Uncle Sam.

15 Q. Was the application here on the 8th?

16 A. That was the date that the application
17 probably was filled, and then we start making up the
18 lease. And that was the date that the lease was made
19 up. But then we don't know the day of move-in, and
20 that's when that work is done, when we know the day of
21 move-in.

22 Q. Now, if someone from an out of state agency
23 had come in and asked to look at the rental agreement
24 with Mr. Hyatt, would you have given access to the
25 rental agreement without Mr. Hyatt's consent?

1 A. I can't unless I know who it is. I'd have to
2 go through either the resident or upper management.

3 Q. Do you have any negative feelings about the
4 HUD residents at Wagon Trails?

5 A. No.

6 Q. You don't think any less of them because --

7 A. No.

8 Q. -- they are receiving subsidies?

9 A. Unfortunately, they didn't have the income to
10 pay and they have to live. We had seniors as well as
11 young people.

12 Q. That received the HUD subsidies?

13 A. Oh, yes. The one bedrooms were reserved for
14 the seniors.

15 Q. And are they allowed to have any higher income
16 and still receive a subsidy because they're aged?

17 A. You have to have the requirements to receive
18 it.

19 Q. How many of the, what percentage, how low is
20 the percentage of all of the tenants that are low income
21 at Wagon Trails?

22 A. That was the 45 units.

23 Q. Out of 224?

24 A. Out of 224.

25 Q. So that would be about 20 percent?



40



1 A. This is 1 of 4.

2 Q. Would you turn to the page of the work
3 papers numbered H01199?

4 MR. WILSON: 1199?

5 MR. BOURKE: Yes.

6 Q. This is a portion of the work papers
7 that Sheila Cox prepared and she, in this portion of
8 the work papers, she has done an alphabetical
9 sorting of the demands for information and
10 correspondence, and under S. is the name Shapiro.

11 This is the incident I talked to you
12 about where Sheila Cox did not know Dr. Shapiro's
13 first name so she sent out demands or letters
14 requesting information about Gil Hyatt to all the
15 Shapiros in the phone book.

16 MR. WILSON: We have a lot of them, Eric
17 and Melvin, Richard.

18 THE WITNESS: And some with no name.

19 MR. BOURKE: Q. As I understand your
20 testimony, that is not proper procedure even back
21 before the audit plan, correct?

22 A. No, it would not be proper procedure.

23 Q. Now, with respect to asking about
24 medical information, is it also true when medical
25 information about an individual is sought, the

15:17 1 A. I have no idea.

2 Q. Is this a preprinted form where Jerry
3 Goldberg's signature is affixed to the form?

4 A. I have no idea. I've never used it
15:17 5 myself.

6 Q. Have you ever in your practice sent
7 out demands for information to third parties to
8 out-of-state recipients?

9 A. A demand for information, no.

15:18 10 Q. Have you sent out any demands for
11 information within the state of California to third
12 parties?

13 A. A demand. I don't know if you would
14 call it demand. We've requested information from, as
15:18 15 I say, banks and things like that. I don't know if
16 you call it a demand.

17 Q. Well, there is a specific form I'm
18 referring to at the FTB called a "Demand for
19 Information" that at least in the Hyatt case was used
15:18 20 to communicate with third parties. Are you familiar
21 with that form?

22 A. Not -- I'm not familiar myself.

23 Q. Did you get any training on the use of
24 that form at the FTB?

15:18 25 A. No, I didn't.



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1 A. I was the witness.
2 Q. On all three occasions?
3 A. All three occasions.
4 Q. On any of those three occasions did you
5 bring your spouse? 02:21:50
6 A. No, did not.
7 Q. Did any other auditor bring his or her
8 spouse?
9 A. No, they did not.
10 Q. Would that be unusual at the FTB, to 02:21:58
11 bring spouses along to an out-of-state trip?
12 A. Not necessarily.
13 Q. So it's nothing that you would forbid?
14 A. No.
15 Q. In your residency audits, did you send 02:22:20
16 out demands for information to third parties?
17 A. I personally did not send out demands.
18 Q. In all 100 of your cases?
19 A. I'm sorry. I was referring -- I was in
20 the present. Yes, I've sent out demands. 02:22:34
21 Q. In your 100 cases, do you think you have
22 sent out an average of one per case?
23 A. I have no way of even estimating that.
24 Q. What I'm trying to get at, did you send
25 out a lot of these requests or was it on occasion 02:22:50

1 you would send out a demand to a third party?

2 A. Demands to a third party were a fairly

3 common practice.

4 Q. Once per audit or ten times per audit?

5 A. Some cases dictated more than one, 02:23:06

6 others dictated zero. It depended on the complexity

7 of the case and the cooperation of the rep.

8 Q. Did you ever send out demands to third

9 parties across state lines?

10 A. I don't recall. 02:23:18

11 Q. Do you recall whether the Franchise Tax

12 Board has a practice of sending out demands for

13 information to third parties across state lines?

14 A. Yes, we do send out requests for

15 information across state lines. 02:23:32

16 Q. And those requests for information are

17 entitled demand for information?

18 A. Demand to Furnish Information.

19 Q. And the demands to furnish information

20 sent out by the Franchise Tax Board says that the 02:23:44

21 response to this is mandatory, does it not?

22 A. I don't recall the exact wording on the

23 form.

24 Q. Do you know of any authority that would

25 allow the Franchise Tax Board to force people in 02:23:58

1 understood by the tax rep and the taxpayer so that
2 we could deal with this intrusiveness and burden
3 issue. In other words, they had to explain the why
4 behind why we were asking the information, and they
5 were to look at alternatives that were -- that could 04:36:36
6 possibly reduce the burden and the intrusiveness on
7 both sides.

8 Q. Now, on intrusiveness, for example,
9 would you think it's appropriate, when an
10 investigator is trying to find out how many times a 04:36:58
11 taxpayer visited Dr. Shapiro, to send out demands
12 for information to all the Dr. Shapiros in the phone
13 book, or should you try to find out from the
14 taxpayer the name of the Dr. Shapiro that was
15 consulted? 04:37:12

16 A. Correct, I would -- the latter.

17 Q. Has anyone ever looked at the Gil Hyatt
18 file to see whether or not there was an intrusion
19 into Mr. Hyatt's privacy?

20 A. Not that I'm aware of. 04:37:28

21 Q. Did you tell your auditors at this
22 meeting to stop talking about the Gil Hyatt audit?

23 A. No.

24 Q. Did you tell them to refrain from
25 mentioning taxpayer information unless there was a 04:37:48



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1 A. Yes. 11:43:40

2 Q. And is that a grounds for termination at 11:43:42

3 the FTB? 11:43:45

4 A. I don't know what the grounds are for 11:43:45

5 termination. 11:43:47

6 Q. And did you criticize Candace Les for 11:43:48

7 anything else? 11:43:53

8 A. I don't believe I ever criticized her. 11:43:56

9 I reviewed the work that was done. And I would have 11:43:58

10 testified to work that I saw in the audit file. 11:44:03

11 Q. And did you say that the work you saw 11:44:07

12 was sometimes less -- did not have adequate 11:44:10

13 substantiations for the conclusions reached? 11:44:15

14 A. Yes, I did. 11:44:16

15 Q. And is that something that you as a 11:44:17

16 reviewer are doing in part of your normal course of 11:44:22

17 business? 11:44:24

18 A. My job is to evaluate a case and see if 11:44:26

19 the documentation and the write-up support the 11:44:30

20 auditor's decision. 11:44:34

21 Q. On the Gil Hyatt case, did you read the 11:44:35

22 documentation in the Gil Hyatt record? 11:44:39

23 A. I did not review all the documentation 11:44:40

24 in the file. 11:44:43

25 Q. How many pages did you review? 11:44:43

1 A. My normal process in review is to read 11:44:47
2 the narrative, the progress report and the 11:44:53
3 correspondence. 11:44:59
4 Q. You remember whether or not you did that 11:45:05
5 for Gil Hyatt? 11:45:07
6 A. Yes, I remember doing that. 11:45:09
7 Q. You did that. You read every page of 11:45:10
8 the correspondence section? 11:45:12
9 A. Probably. 11:45:13
10 Q. But you don't remember? 11:45:14
11 A. I do not remember. 11:45:16
12 Q. Do you remember reading every page of 11:45:16
13 the narrative? 11:45:18
14 A. Yes. 11:45:19
15 Q. And of the progress report? 11:45:19
16 A. Probably, but I'm not positive. 11:45:22
17 Q. And does the correspondence include 11:45:26
18 demands for information to third parties? 11:45:32
19 A. It should. 11:45:35
20 Q. Have you ever sent a demand for 11:45:36
21 information to a third party across state lines? 11:45:38
22 A. I don't remember. 11:45:40
23 Q. In your work that you do as an auditor, 11:45:43
24 have you sent out a lot of demands for information 11:45:45
25 to third parties? 11:45:48

1	A. I have sent demands for information.	11:45:49
2	Q. Was the Gil Hyatt case one of the	11:45:53
3	largest cases at the Franchise Tax Board residency	11:45:56
4	section?	11:46:01
5	A. Define largest.	11:46:02
6	Q. In terms of hours. 600 or more hours?	11:46:02
7	A. I have spent that many hours on a case.	11:46:05
8	Q. On a residency case?	11:46:08
9	A. Yes, I have.	11:46:09
10	Q. What year did you do that?	11:46:10
11	A. It could have been through -- I'm	11:46:14
12	guessing, I'm sorry. I do not remember	11:46:18
13	specifically. Probably 19 -- the case probably	11:46:20
14	closed in 1993 or '4.	11:46:24
15	Q. Okay. Without telling me any taxpayer	11:46:28
16	information, did that result in an NPA or was that a	11:46:31
17	no change audit?	11:46:35
18	A. Assessments were issued.	11:46:36
19	MR. BOURKE: I think we better break now for	11:46:38
20	lunch.	11:46:41
21	THE VIDEOGRAPHER: We have to close that tape	11:46:41
22	also.	11:46:42
23	We are going off the record at 11:47.	11:46:44
24	This ends tape one in the deposition of Carol Ford	11:46:49
25	on May the 4th, 1999.	11:46:52

1 Q. So if we deleted the account number too, 14:26:36
2 then -- 14:26:39
3 A. Yes. 14:26:39
4 Q. Then we could have a printout of the 14:26:39
5 number of hours to date, correct? 14:26:42
6 A. I can't answer that, if you just had 14:26:44
7 that, but that information would be available. 14:26:47
8 Q. Now with respect to whether or not 14:26:50
9 there's a big case, are you aware of how much money 14:26:53
10 is being sought from Gil Hyatt as of today by the 14:26:59
11 Franchise Tax Board? 14:27:02
12 A. I have no knowledge. 14:27:03
13 Q. Have you ever heard that there's -- that 14:27:05
14 the Franchise Tax Board is seeking 28.8 millions 14:27:09
15 from him in penalty, taxes and interest? 14:27:12
16 A. I don't know what the dollar amount is. 14:27:14
17 Q. Do you recall what the dollar amount was 14:27:17
18 of the assessments that you worked on, the MPAs that 14:27:19
19 you worked on? 14:27:24
20 A. To be really specific, no. 14:27:25
21 Q. Can you tell me what would be a big case 14:27:28
22 at the FTB in terms of the dollars of an assessment 14:27:30
23 for a residency case? 14:27:39
24 A. I assume -- I don't know what would be a 14:27:42
25 big case. Anything over five million I would say. 14:27:47

1	Q. Five million in taxes plus penalty and	14:27:52
2	interest?	14:27:55
3	A. That would be a large case.	14:27:56
4	Q. Could you tell me in a typical year how	14:27:58
5	much money the residency unit generates for the	14:28:02
6	State of California?	14:28:06
7	A. I don't know.	14:28:06
8	Q. Do you know in a typical year how much	14:28:07
9	money the residency unit assesses?	14:28:10
10	A. I have no idea.	14:28:13
11	Q. Did you attend any presentations by	14:28:15
12	management of the residency unit where they would	14:28:18
13	give results to the residency auditors of how much	14:28:21
14	money was assessed or collected through the	14:28:25
15	residency program for various fiscal years?	14:28:28
16	A. I don't specifically remember anybody	14:28:32
17	mentioning dollar amount.	14:28:35
18	Q. Do you remember Steve Illia or Brad	14:28:37
19	Lacour giving a presentation of how well the	14:28:39
20	residency unit was doing?	14:28:42
21	A. I know that they both presented -- I	14:28:45
22	know that they both presented at 1997 or spoke at	14:28:47
23	the 1997 conference, but I didn't pay attention to	14:28:51
24	dollar amounts.	14:28:55
25	Q. Do you recall them making any	14:28:57

1 comparisons between the moneys generated by the 14:28:59
2 residency unit versus other units or programs at the 14:29:02
3 FTB, such as partnerships, corporations, multistate, 14:29:07
4 RAR? 14:29:15
5 A. I don't have -- I don't remember 14:29:17
6 specifics. They may have done that, but -- 14:29:19
7 Q. Now I wanted to clarify something about 14:29:23
8 as I understand it there's a case that you said you 14:29:27
9 were proud of your issues relating to an 14:29:29
10 out-of-state taxpayer, and that involved more than a 14:29:31
11 million dollars worth of taxes assessed, correct? 14:29:34
12 A. I did not say I was proud of the case. 14:29:38
13 It was a case. It was a good case that I had 14:29:40
14 developed. 14:29:43
15 Q. I just wanted to keep that in mind, 14:29:44
16 whatever that case is. That's different from the 14:29:47
17 James H taxpayer case, correct? 14:29:49
18 MR. LEATHERWOOD: I'm going to move to strike. 14:29:53
19 Can you restate the question? 14:29:56
20 MR. BOURKE: Q. Is that different from the 14:29:56
21 James H. taxpayer case referred to in the residency 14:29:57
22 work papers? 14:30:00
23 MR. WILSON: Excuse me, Counsel. Do you mean 14:30:02
24 different than not the same or different in some 14:30:03
25 respect? 14:30:06

1 MR. BOURKE: Different -- is that case 14:30:06
2 different -- involve a different taxpayer than the 14:30:12
3 case that you did such good work on that related to 14:30:17
4 a one million dollars assessment. 14:30:21
5 MR. LEATHERWOOD: First of all, Counsel, I'm 14:30:23
6 going to direct her not to respond to that, because 14:30:25
7 you obviously don't know the identity of the 14:30:30
8 taxpayer related to James H. taxpayer, and I'm -- 14:30:32
9 and any question that you ask her is going to either 14:30:36
10 confirm or deny information by the taxpayer that you 14:30:39
11 already knew the identity of. How you got the 14:30:41
12 identity of the taxpayer, I don't know. It really 14:30:44
13 is of no concern. It still would be on her part 14:30:47
14 disclosing information I think should be precluded 14:30:51
15 from her disclosure. 14:30:54
16 In other words, you're asking her to 14:30:56
17 affirm or deny information about a particular 14:30:57
18 taxpayer. 14:31:01
19 MR. BOURKE: Q. Is that case that you did 14:31:01
20 good work on that related to the one million dollar 14:31:04
21 assessment, is that a different taxpayer than the 14:31:07
22 one you spent over 600 hours assessing? 14:31:09
23 A. Yes. 14:31:12
24 Q. Do you know how many hours you spent on 14:31:13
25 that case with the most hours? Was it 700 hours? 14:31:15

1	A.	It could have been at the end, yes.	14:31:20
2	Q.	Could it have been 800 hours?	14:31:22
3	A.	I don't recall.	14:31:25
4	Q.	Is there something at the Franchise Tax	14:31:26
5		Board called the CBR or cost benefit ratio?	14:31:28
6	A.	Yes.	14:31:33
7	Q.	Could you tell me what that is?	14:31:34
8	A.	It was a method that was used -- we'll	14:31:37
9		call it the olden days, that how many -- let's see,	14:31:42
10		somehow it was a calculation of how much tax was	14:31:50
11		being generated based upon how many hours were	14:31:53
12		involved in the case.	14:31:59
13	Q.	Okay. And could you tell me how you	14:32:03
14		learned about the CBR or cost benefit ratio?	14:32:06
15	A.	It used to be discussed.	14:32:11
16	Q.	When was it discussed?	14:32:15
17	A.	When I was a new auditor.	14:32:20
18	Q.	And did it stop being discussed at a	14:32:23
19		certain time?	14:32:25
20	A.	Yes. The emphasis went away from that,	14:32:28
21		and I believe it had something to do with the	14:32:33
22		Taxpayer Bill of Rights.	14:32:35
23	Q.	Could you tell me what about the	14:32:45
24		Taxpayer Bill of Rights had anything to do with the	14:32:47
25		cost benefit ratio?	14:32:50

1 A. I can't really tell you the answer to 14:32:51
2 that. 14:32:54
3 Q. What was the cost benefit ratio that 14:32:54
4 auditors were expected to live up to during the time 14:32:57
5 it was discussed in the residency program? 14:33:00
6 A. I'm not -- I'm trying to remember. So 14:33:08
7 just a minute. It could have been like \$350 per 14:33:11
8 hour. But I could be very wrong on that. 14:33:21
9 Q. Could it have been \$1,000 an hour? 14:33:27
10 A. I've never heard that figure. 14:33:29
11 Q. \$600 an hour? 14:33:31
12 A. I don't think I've -- I remember 350 and 14:33:34
13 I remember 500. But I don't remember -- and I don't 14:33:38
14 remember specifically when that was. 14:33:41
15 Q. Were people requested to keep the CBR in 14:33:47
16 other than written form? Were you discouraged from 14:33:52
17 writing down the CBR? 14:33:56
18 A. I don't ever remember seeing the CBR 14:33:57
19 written down. 14:34:00
20 Q. Did you ever hear the managers of the 14:34:03
21 Franchise Tax Board residency program talk about a 14:34:06
22 CBR goal or objective for auditors? 14:34:10
23 A. I don't think so. 14:34:17
24 Q. Do you remember Mr. Illia talking about 14:34:20
25 a CBR at all? 14:34:23

1 A. He could have. 14:34:24
2 Q. Was the CBR supposed to be kind of a 14:34:30
3 minimum figure that you're supposed to drop an audit 14:34:34
4 if it didn't look like you were going to meet the 14:34:36
5 \$350 or \$500 an hour objective? 14:34:39
6 A. I believe we evaluated the case at the 14:34:52
7 beginning and determined how many hours we thought 14:34:57
8 we were going to be devoting to the case prior to 14:35:00
9 opening an examination. 14:35:04
10 Q. Does a typical residency case take about 14:35:07
11 100 hours? 14:35:11
12 A. That's our goal. 14:35:12
13 Q. The goal is to make a residency case 14:35:14
14 complete by the end of 100 hours? 14:35:17
15 A. Yes. 14:35:20
16 Q. Do you know whether or not the residency 14:35:26
17 program has ever had a taxpayer with as large a tax 14:35:29
18 assessment as Gil Hyatt? 14:35:34
19 A. I don't have access to that knowledge. 14:35:36
20 I don't know. 14:35:38
21 Q. You're not aware of any as large as his? 14:35:39
22 A. No. 14:35:42
23 MR. WILSON: Well, I have to object. Did you 14:35:43
24 understand the question? 14:35:50
25 THE WITNESS: Not for sure. 14:35:51

1 MR. WILSON: Do you want to restate it, 14:35:53
2 please? 14:35:54
3 MR. BOURKE: Q. Are you personally aware of 14:35:55
4 any other taxpayer being assessed as much money as 14:35:56
5 Gil Hyatt was assessed? 14:36:00
6 A. Of the cases I have reviewed, I don't 14:36:05
7 think I've ever seen a case with as large an 14:36:10
8 assessment as his. 14:36:13
9 Q. Have you ever seen a penalty assessment 14:36:15
10 relating to fraud as large as the penalty assessment 14:36:17
11 assessed against Gil Hyatt? 14:36:22
12 A. I've seen a fraud penalty assessed, but 14:36:24
13 I don't remember the dollar amount. 14:36:28
14 Q. In your career how many fraud 14:36:31
15 assessments have you seen? 14:36:33
16 A. I have only seen two. 14:36:35
17 Q. And is that other case still pending, 14:36:38
18 the other case with the fraud assessment besides Gil 14:36:41
19 Hyatt's? 14:36:43
20 A. I think it is closed and has been 14:36:48
21 closed. 14:36:50
22 Q. On that other case involving a fraud 14:36:52
23 audit, was Sheila Cox involved? 14:36:54
24 A. I don't think she was involved. 14:36:59
25 Q. Were you the reviewer on the case? 14:37:01

11:23 1 information that she obtained from the bank
2 statement, I will say probably I will not go to the
3 file and locate for that particular bank statement.
4 I assume that she had that document in her file.

11:24 5 Q. So you didn't feel it was necessary
6 because you trusted Sheila Cox?

7 A. Based on my recollection, yes, I do
8 trust her, but I do not remember I did it, whether I
9 located that bank statement or not, but I will say if
11:24 10 I do not trust her work, yes, I will go back to
11 locate that statement.

12 Q. Now, when she said that she had
13 affidavits, you trusted her that she had affidavits,
14 right?

11:24 15 A. Yes, I can make that assumption.

16 Q. And when she wrote down that she had
17 affidavits you trusted her that she had affidavits?

18 A. Yes.

19 Q. And if she wrote down that she had
11:24 20 three affidavits you trusted her that she had three
21 affidavits, right?

22 A. I will say yes, I can trust her.

23 Q. Do you know whether Sheila Cox knows
24 what an affidavit is?

1:25 25 A. I have no knowledge. We have never

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

1 N. GLENOAKS BLVD., SUITE 200
DURBANK, CA 91502-1170



DEMAND TO FURNISH
INFORMATION

Authorized by
California Revenue & Taxation Code
Section 19504 (formerly 19254 (a) and 26423 (a)*)

The People of the State of California to:

Great Expectations
11640 Sopth Sepulveda Suite 100
Los Angeles, CA 90025

In the Matter of:

Gilbert P. Hyatt

Social Security No. : 069-30-9999
or Corporation No. :
For the years :

This Demand requires you to furnish the Franchise Tax Board with information specified below from records in your possession, under your control, or from your personal knowledge. The information will be used by this department for investigation, audit or collection purposes pertaining to the above-named taxpayer for the years indicated.

1. Copy of original application for membership and type of membership.
2. Copy of any address changes submitted and date submitted.
3. Current status of membership.
4. Records of contact with the Great Expectations office.
5. Records of attendance at any functions.

FRANCHISE TAX BOARD

By: S. Cox
Authorized Representative

Dated: January 24, 1995

Telephone: (818) 556-2942

Legislation effective January 1, 1994 (S.B. 3, Stats. 1993, Ch. No. 31) consolidated certain provisions of the California Revenue & Taxation Code which caused some sections to be revised and renumbered.

FTB 01892
AA002395



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Additionally, the Corporation shall create criteria for African governments to establish matching funds based upon ability to pay and to demonstrate a national commitment to combating HIV/AIDS by establishing, for example, a national HIV/AIDS council or agency.

Additionally, Mr. Speaker, the administrative costs, or overhead associated with the AMPFA Corporation, are mandated to be no more than 8 percent of the Corporation's overall budget. The AMPFA Act authorizes the appropriation of \$200 million for each of the fiscal years 2001 through 2005. Also, for each of the fiscal years 2002 through 2005, the Act authorizes an appropriation to fund an additional amount equal to 25 percent of the total funds contributed to the Corporation.

Mr. Speaker, in a June 1999 lecture entitled "The Global Challenges of AIDS", United States Secretary General Kofi Annan stated that "no company and no government can take on the challenge of AIDS alone. What is needed is a new approach to public health—combining all available resources, public and private, local and global". It is my intent that the AIDS Marshall Plan for Africa serve as a replicable model for addressing this crisis globally. Already, this proposed legislation has received the support of over 40 Members of Congress and has caught the interest of the African diplomatic corps, African and African-American organizations, AIDS activists, and global health organizations that are interested in providing assistance to pass the legislation.

In closing, Mr. Speaker, I am committed to seeing this legislation through to final passage and encourage my colleagues to review the legislation and to contact me or my staff with questions. This bill will support Africa in a substantive and meaningful manner.

ABUSES BY STATE TAXING AUTHORITIES

HON. JERRY WELLER

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. WELLER. Mr. Speaker, I submit for the RECORD the following letter:

Hon. DAVID WALKER,
Comptroller General of the United States,
Washington, DC.

DEAR MR. WALKER: I am writing to request an investigation by the United States General Accounting Office ("GAO") of alleged abuses by State taxing authorities against former residents.

As a Member of the Oversight Subcommittee of the House Ways and Means Committee, I spent significant time last year addressing the issue of taxpayer abuses by the Internal Revenue Service. As a result of our work, and Congressional and GAO investigations, many serious tax violations and wrongdoings were uncovered within the IRS. Last year, Congress held a series of hearings on the issue and addressed these serious problems by passing significant reforms and taxpayer protections as part of the "Internal Revenue Service Restructuring and Reform Act of 1998."

I am, therefore, disturbed to learn that while we addressed taxpayer abuses at the federal level, there may be just as many oppressive actions occurring throughout the country at the State level. A recent *Forbes* Magazine article entitled "Tax torture, local style" (July 6, 1998), highlights the fact that

"[T]here are at least half as many revenue agents working for the states as the federal government" and "[C]ollectively, they are just as oppressive as the feds." See, Attached Article. In another recent article, the *Los Angeles Times* reported that the state taxing authority, the California Franchise Tax Board, "is second in size and scope only to the Internal Revenue Service—and by all accounts the state agency is the more efficient, more aggressive and more relentless of the two" and "there is little to stop the agency from becoming more aggressive." See, attached article, "State Agency Rivals IRS in Toughness," *Los Angeles Times* (August 2, 1999, page 1).

The *Forbes* article lists a number of state tax department problems including: (1) privacy violations by California, Connecticut, and Kentucky; (2) criminal or dubious activities by Connecticut, Indiana, Kentucky, New Mexico, North Carolina, Oklahoma, and Wisconsin; and (3) mass erroneous tax-due bills by Arizona, California, Indiana, Michigan, and Ohio. In addition, my office has recently received materials from taxpayers alleging abuse by State taxing agencies (e.g., materials from Mr. Gil Hyatt alleging a number of abuses by the California Franchise Tax Board ("FTB") against former residents of the State of California). See, Attachment.

I believe this issue is important and deserves study and a full investigation by the GAO. Should taxpayer abuses exist at the State level against former residents, I would consider recommending any and all appropriate legislation to address these deplorable activities and encourage State's Attorney Generals to begin separate investigations into such actions. We should do whatever we can to protect the rights of our citizens against overzealous Federal or State tax agencies.

I look forward to working with you and your staff on this important investigation.

Sincerely,

JERRY WELLER,
Member of Congress.

STATE TAXING AGENCIES ARE ABUSING FORMER TAXPAYERS IN VIOLATION OF THE CONSTITUTION

THE WIDESPREAD ABUSE

When Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998, an era of tyranny at the IRS came to an end. Congressional hearings revealed story after story of taxpayer abuse by the IRS. The stories of abuse so inflamed the public and Congress that sweeping reform soon followed. But taxpayers abuse is still as prevalent as ever—only the perpetrators of this abuse are the state taxing agencies. In its rush to reform the IRS, Congress overlooked a whole other level of taxpayer abuse at the state level. This type of abuse by state taxing agencies has received attention from the press. In the article "Tax torture, local style," William Barrett discusses the "extortion," "sweepingly false declarations of taxes," "false notices," "[p]rivacy violations," and "criminal or dubious activities" by state taxing agencies. (William Barrett, *Forbes*, July 6, 1998). Many states have resorted to the same type of abusive tactics for which their federal counterpart—the IRS—was reprimanded by Congress.

In many cases, a state taxing agency has even exceeded the IRS in its recklessness and abusiveness. In a front-page *LA Times* article entitled "State Agency Rivals IRS in Toughness", Liz Pulliam compares the FTB unfavorably with the IRS—"the Franchise Tax Board is second in size and scope only to the Internal Revenue Service—and by all ac-

counts the state agency is the more efficient, more aggressive and more relentless of the two". (Liz Pulliam, "State Agency Rivals IRS in Toughness", *LA Times*, August 2, 1999, at A1). She also quotes Mr. Dean Andal, a former FTB Board member, who criticizes the FTB as "brutal" and "hard and sometimes arbitrary" and states that "there is little to stop the agency from becoming more aggressive" (Pulliam, *supra*).

States are particularly abusive towards former residents who have moved to another state. Moving to another state is a common occurrence in the U.S., where citizens have the constitutional right to travel to and establish residency in any state in the United States. In 1996, Congress passed legislation which prevents states from taxing the pensions of retirees living in other states. This congressional legislation illustrates the need for federal intervention in order to prevent states from overreaching in their pursuit of tax revenue. Unfortunately, this action by Congress only focused on one small avenue in which states illegally pursue nonresidents for additional taxes. Another tactic is to assess a tax on citizens leaving the state by contesting when the former resident moved out of the state. Years after a citizen has relocated to another state, the state taxing agency will open a "residency audit" to extort a former resident.

THE ABUSE EXEMPLIFIED: THE CALIFORNIA FRANCHISE TAX BOARD

The abusive taxing tactics used by states is best illustrated by the California Franchise Tax Board (FTB), as indicated in the *LA Times* article *supra*:

"[The FTB] is tainted by arrogance and a stubborn unwillingness to compromise."

"For two years in a row, corporate tax executives have ranked California's [FTB] among the toughest, least fair and least predictable state tax agencies in the country."

STATE IS RANKED MOST AGGRESSIVE

Many corporate taxpayers agree. In both 1997 and 1998, company tax executives ranked California at the top of a "worst offenders" list compiled by *CFO* magazine to rate the tax agencies of the 50 states. . . . The state [California] was described as among the least predictable in administering tax policy, and among the most likely to take a black-and-white stance on unclear areas of tax law. (Pulliam, *supra*).

The FTB particularly targets for abuse Nevada residents who formerly resided in California. The FTB agents are well trained in targeting such nonresidents. For example, the FTB targets wealthy and famous people living in gated affluent communities of Las Vegas. Agents develop a list of potential victims compiled from property rolls, tax records, and newspaper accounts. This list is supplemented by trips into the wealthy neighborhoods of Las Vegas in order to survey former California residents. Wealthy and famous individuals are the preferred targets because they are particularly vulnerable to threats of violating their privacy and causing them bad publicity. The FTB then audits the victim's financial and personal affairs. This includes agents making periodic trips across state lines in order to secretly survey victims. The agents trespass onto the victim's property, record the victim's movements, and even probe the victim's garbage and mail all while making sure to avoid contact with the victim. All of this is done stealthily, without the

knowledge of the Nevada authorities. If the agents are caught in the act, they falsely claim immunity for their auditing tactics under color of authority and they claim a false constitutional right to collect taxes in Nevada—all while violating the constitutional rights of their victims and the sovereignty of Nevada. This is not a legitimate investigation, but a covert operation to uncover private information for what is best characterized as extortion of the victim.

The FTB hires inexperienced and unsuccessful recruits as auditors. Many of these auditors are untrained and unsupervised. They are given training manuals that they do not study. The training materials are illustrated with such sadistic cartoons as a skull-and-crossbones on the cover of the penalties section (which is to illustrate how to pirate an additional 75% override on the tax assessment). They have little or no legal background or training and do not know nor do they care about the victim's Constitutional rights. They except legal clichés and case law from other audits and insert them throughout their workpapers indiscriminately. They mimic comments that they read that supports the FTB's position and they ignore information about supports the victim's position. Some auditors are so inept that they actually use pseudonyms from "boilerplate" and training manuals audits (e.g., Marie Assistant) in their own audits because they do not understand such an obvious step as the need to replace the pseudonyms in the "boilerplate" audits with the actual names of the individuals in the particular case under audit. These are the kind of people that California has charged with the awesome power of auditing taxpayers—"the power to tax is the power to destroy."

The FTB gathers large quantities of private information about the victim during the audit. The FTB goes to the victim's adversaries, who are not privy to the victim's private information, and offer them a way to help dispose of their adversary, the FTB's victim, by concocting damaging victims evidence against the FTB's victim. A bitter ex-spouse or ex-girlfriend, an estranged relative, or a vengeful former employee are preferred. The FTB avoids contacting the victim's friends, and close relatives who are privy to the victim's private information because such witnesses would undermine the FTB's attack on the victim. The FTB has actually sent out intimidating and harassing letters to the victim's friends, colleagues, and business associates and has even gone so far as to audit these people apparently to intimidate and harass them, to isolate the victim, and to deprive the victim of the support that he or she needs at such a crucial time. The FTB's apparent intent is to have the victim embattled by adversaries and separated from supporters. "They tend to look at every audit as a battle. In the gray areas, they push the envelope rather than work out a reasonable compromise." (Pulliam, *supra*).

The FTB auditors boldly admit to emphasizing bad evidence for the taxpayer and ignoring good evidence for the taxpayer. In one of the FTB's largest residency audits, the auditor trumped-up a large assessment with penalties based on false affidavits from the victim's adversaries while completely ignoring all of the victim's close relatives, friends, and associates. Also in this same audit, the auditor relied on about the fifty false California connections while ignoring a thousand solid Nevada connections and preempted submission

of thousands-more solid Nevada connections by the victim. Even more significant, the thousands of Nevada connections involved thousands-of-times more value (purchase offers on custom homes).

The California Legislature was so suspicious of and concerned about the FTB that it passed the Taxpayer's Bill of Rights statute, which among other things, forbids the FTB from evaluating employees based upon revenue collected or assessed or upon revenue collected or assessed or upon production quotas. The law also states that the head of the FTB must certify in writing annually to the California State Legislature that the FTB has not evaluated employees based upon revenue collected or assessed or quotas. But this certification is misleading since, by an indications, promotions and rewards still go to those FTB employees who bring in the most revenue. And quotas by different names abound in the FTB. Once FTB employee rapidly progressed from a low-ranking auditor to a high-prestige position for making one of the FTB's largest residency assessments ever. FTB auditors must generate over \$1,000 of revenue for every hour charged to an audit. A quota system is indicated in the LA Times article *supra*: "The agency [FTB] added 362 auditors between 1992 and 1996, promising the legislative that the new positions would boost collections."

Furthermore, there is little supervising of FTB auditors. Instead, this type of auditing and tax collection appears to be encouraged by management. The FTB claims to have layers of review in order to ensure accuracy and fairness; however, these layers actually proliferate the fraud of the FTB auditors. The auditor's supervisors do not get involved in the audits, instead relying completely on an auditor's self-serving narrative report in reviewing an audit without any regard for the victim's evidence or arguments. Unbelievably, FTB auditors and management get credit for assessments and get promotions and rewards immediately after the audit even though the assessments may never be collected at all and any collection may be decades away. This encourages excessive tax assessments for immediate promotions and rewards, but the feedback that it was a bad audit may be more than a decade away.

The legal department gets involved in reviewing penalties, but indications are that the lawyers encourage unwarranted penalties to force a settlement rather than provide an independent review. This is confirmed by the fact that the FTB audit and protest proceedings are expressly exempted from the California administrative proceedings act to permit the FTB to proceed in violation of the victim's Constitutional right to due process. The FTB implies that the "protest" proceeding is an independent review of an objective protest officer, when in fact it is a continuation of the investigation to gather more information, to attempt to force the victim into an extortionate settlement, and to prepare the FTB's case for any appeal by the victim to the next stage of the administrative proceeding. The victim tells his case to a wolf-in-sheep's-clothing, misleading the victim into presenting his or her case to an independent reviewer when in fact the protest officer is an important part of the FTB's abuse. The FTB's denial of due process to a victim under the sham that the audit and the protest are merely investigations is untenable and will be easily declared unconstitutional when chal-

lenged. The FTB has deprived victims of their Constitutional rights for too long.

THE FTB'S PLOT—FALSIFY THE OFFICIAL RECORDS

By contesting the residency of former California residents who have moved from the state, the FTB assesses additional taxes on money earned after the former resident moved from California. This type of treatment of non-residents is a blatant violation of the victim's Constitutional right to move between states. Despite overwhelming evidence to the contrary from the victim, the FTB will often allege a residence date that allows it to encompass as much additional tax revenue as possible. In order to support its outlandish residency date, the FTB will disregard the victim's substantial Nevada connections, will overly emphasize and rely upon minimal (and often erroneous) California connections, will distort Nevada connections into California connections, and will devise nonexistent California connections.

The FTB maintains, for example, that a six-month lease on an apartment in Nevada and opening escrow on a custom home purchased in Nevada are not Nevada residency connections. The FTB has gone so far as to actually maintain that, for purposes of residency, a former California resident can only claim to have resided in a Nevada apartment if: 1) the apartment complex has security gates, 2) the apartment is left "trashed" after moving out, 3) the apartment managers can provide information on the movements of the tenant (even after several years have passed since the tenant lived there), and 4) poor people do not reside in the apartment complex.

Furthermore, the FTB maintains that a former California resident is only permitted to sell a California house to a stranger and that a former California resident is only permitted to reside in a Nevada house if he can prove the Nevada house was not purchased for investment or appreciation and only if the Nevada house has security gates. The FTB asserts that California voter registration and obtaining a California driver's license are significant California residency connections, but disregards the same actions when taken in Nevada as mere formalities that are easy to do and not relevant to the issue of Nevada residency despite the FTB's own regulations and decades of case law to the contrary. All of these holdings can be found in the FTB's own audit files.

Unbelievably, the FTB relies on the following considerations as supporting California residency:

An overnight stay in a California motel is a California residency connection while a six-month lease on an apartment in Nevada is not a Nevada residency connection.

A bank account in a Nevada bank is a California residency connection because the Nevada bank also has a California branch.

A mail-order purchase made from Nevada to a California mail order provider for delivery of merchandise to a Nevada home is a California residency connection even though the mail order purchase was made from Nevada by a Nevada and was delivered to a Nevada address.

This type of California mail-order purchase is a sham purchase because, the FTB argues, the Nevada could have bought the product in Nevada and saved the cost of freight.

The FTB uses circular reasoning by concocting a late Nevada residency date and then

alleging that purchases made in Nevada after the concocted Nevada residency date are California residency connections for the period before this concocted Nevada residency date in order to attempt to support this date.

Actual Nevada receipts are not Nevada connections while false California receipts that the FTB concocts are California connections.

A credit-card purchase made in Nevada for use in a Nevada house is a California residency connection if the credit-card charge, unknown to the Nevada, is cleared through a California credit-card office.

A California driver's license, surrendered to the Nevada DMV upon obtaining a Nevada driver's license, is a California residency connection because the surrendered California driver's license had not yet expired while the Nevada driver's license is not a Nevada residency connection because it is easy to get.

Gifts sent by a Nevada to an adult child or a grandchild living in California constitutes a California residency connection.

Checks drawn on a Nevada bank are California residency connection even though the checks were written in Nevada by a Nevada resident to Nevada workers for work done on a Nevada house and where the checks were even cashed in Nevada; and a regulated investment company open-ended fund (a mutual-fund money-market account) was deemed by the FTB auditor to be a California bank account constituting a California residency connection and a basis for a fraud determination even though the FTB Legal branch gave a legal opinion stating that the regulated investment company is not a bank and normally not a California residency connection.

This is only a partial list of the kind of absurd considerations that the FTB will use to rationalize its residency determinations. Such far-fetched and concocted California connections are what the FTB relies upon to support its residency determinations—the FTB must make the most of what it has available and what it can concoct in order to extort California income taxes from nonresidents.

CELEBRATING THE SERVICE OF MS. EMILY AMOR

HON. TONY P. HALL

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. HALL of Ohio. Mr. Speaker, I rise today to recognize a wonderful woman and exemplary citizen of the District of Columbia. Ms. Emily A. Amor is now 96 years old and has just been named the "Volunteer of the Century" by the Central Union Mission. She has been an active volunteer for almost 20 years.

Her dedication to God, to her country and to those in need has been proven through a lifetime of service. She has served by praying, working and volunteering. Her commitment has led her to join me every Wednesday morning at 7 am to pray for the city of Washington, DC, its leaders and its residents. She has served meals to the homeless on every major holiday for years. And before retiring at age 70, she worked with the Department of Housing and Urban Development.

She is truly an amazing example of a selfless servant. She has a heart-felt compassion for others, especially those who are poor and

hurting. Her life has truly exemplified Jesus Christ's example of loving one's neighbor, no matter who they might be. I only hope that I can have half as much life in me as she does when I reach age 96.

I ask my colleagues to join me in commending Emily for all of her great work. I am glad to be able to call her a friend and am humbled by her servant's heart. I wish her the best for many years to come.

THE NUCLEAR WEAPONS DE- ALERTING RESOLUTION

HON. EDWARD J. MARKEY

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. MARKEY. Mr. Speaker, 54 years ago tomorrow a single bomb in a single city changed our world. The atomic bomb dropped on Hiroshima leveled the city, engulfed the rubble in a fireball, and killed 100,000 people. Three days later another 70,000 people died at Nagasaki, and people are still dying today from leukemia and other remnants of those explosions.

The victims of Hiroshima cast shadows from the explosion's blinding light that were permanently etched not only in the remaining buildings but also in our souls. Since August 6th, 1945 we have lived in fear that such nuclear destruction would happen again, perhaps in the United States. Today, the accidental launch of a single missile with multiple warheads could kill 600,000 people in Boston, or 3,000,000 people in New York, or 700,000 people in San Francisco or right here in Washington, DC. If that missile sparked a nuclear exchange, the result would be worldwide devastation.

For 40 years of Cold War we played a game of nuclear chicken with the Soviet Union, racing to make ever more nuclear bombs, praying that the other side would turn aside. During the Cuban missile crisis and many other times we came perilously close to going over the cliff. Then in 1991 the Cold War and the Soviet Union ended. Yet today we not only keep hundreds of nuclear missiles with nowhere to point them, we keep many of them ready to fire at a moment's notice.

This threat from this "launch-on-warning" policy is real. On January 25, 1995, when Russia radar detected a launch off the coast of Norway, Boris Yeltsin was notified and the "nuclear briefcase" activated. It took eight minutes—just a few minutes before the deadline to respond to the apparent attack—before the Russian military determined there was no threat from what turned out to be a U.S. scientific rocket. The U.S. is not immune: on November 9, 1979 displays at four U.S. command centers all showed an incoming full-scale Soviet missile attack. After Air Force planes were launched it was discovered that the signals were from a simulation tape.

And the danger of an accidental nuclear war is growing. The Russian command and control system is decaying. Power has repeatedly been shut off in Russian nuclear weapons facilities because they couldn't afford to pay their electricity bills. Communications at their nuclear weapons centers have been disrupted because thieves stole the cables for their copper. And at New Year's the "Y2K" bug in com-

puters that are not programmed to recognize the year 2000 could cause monitoring screens to go blank or even cause false signals.

There is no reason to run the terrible risk of an accidental nuclear war. It is hard today to imagine a "bolt out of the blue" sudden nuclear attack. And even if the U.S. was devastated by an attack, the thousands of nuclear warheads we have on submarines would survive unscathed. Keeping weapons on high alert is an imperate response to an implausible event.

Mr. Speaker, it is time to take a large step away from the brink of nuclear war, to take our nuclear weapons off of hair-trigger alert. Today I am introducing a resolution that expresses the sense of Congress that we should do four things:

We should immediately remove some nuclear weapons from high alert.

We should study methods to further slow the firing of all nuclear weapons.

We should use these unilateral measures to jump-start an eventual agreement with Russia and other nuclear powers to take all weapons off of alert.

And we should quickly establish a joint U.S.-Russian early warning center before the Year 2000 turnover.

These are not new or radical ideas. President George Bush in 1991 ordered an immediate standdown of nuclear bombers and took many missiles off of alert. President Gorbachev reciprocated a week later by deactivating bombers, submarines, and land-based missiles. Leading security experts including former Senator Sam Nunn, former Strategic Air Command chief Gen. Lee Butler, and a National Academy of Sciences panel have endorsed further measures to take weapons off of high alert. Two-third of Americans in a 1998 poll support taking all nuclear forces off alert, and this week I received a petition signed by 270 of my constituents from Lexington, MA calling on the President to de-alert nuclear missiles.

I urge my colleagues to join together to cosponsor this resolution. The best way we can commemorate the anniversary of the nuclear explosion at Hiroshima is to make sure we will never blunder into an accidental nuclear holocaust.

INTRODUCTION OF LEGISLATION

HON. CHARLES W. "CHIP" PICKERING

OF MISSISSIPPI

IN THE HOUSE OF REPRESENTATIVES

Thursday, August 5, 1999

Mr. PICKERING. Mr. Speaker, I rise today to address one of the many reforms I believe are necessary to improve the administrative processes of the Federal Communications Commission (FCC). The issue that I believe needs to be addressed immediately relates to the proliferation of merger activity in the telecommunications industry.

Since passage of the Telecommunications Act of 1996, the industry has seen massive upheaval as companies try to position themselves for the new Information Age economy. Many of these companies are attempting to combine their strengths to better position themselves to compete in a deregulated marketplace. One of the problems these companies have faced recently is the regulatory uncertainty of the FCC's merger review process.



DISTRICT COURT
CLARK COUNTY, NEVADA

GILBERT P. HYATT,)
)
Plaintiff,)
)
vs.)
)
FRANCHISE TAX BOARD OF THE)
STATE OF CALIFORNIA, and)
DOES 1-100, inclusive,)
)
Defendants.)

Case No. A382999
Department No. XVIII

TRANSCRIPTION OF TAPE RECORDED PROCEEDINGS
BEFORE THE HONORABLE NANCY M. SAITTA

Recorded on Tuesday, July 10, 2001
Las Vegas, Nevada

Transcribed by: Paul E. DeGagne, CCR 161

1 APPEARANCES:

2 For the Plaintiff: HUTCHISON & STEFFEN
3 8831 West Sahara Avenue
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5 BY: MARK A. HUTCHISON, ESQ.
6 and
7 BERHARD & LESLIE, CHTD.
8 3950 Howard Hughes Parkway
9 Suite 550
10 Las Vegas, Nevada 89109
11 BY: PETER C. BERNHARD, ESQ.
12

13 For the Defendants: McDONALD, CARANO, WILSON, McCUNE
14 BERGIN FRANKOVICH & HICKS
15 2300 West Sahara Avenue
16 Suite 1000
17 Las Vegas, Nevada 89102
18 BY: BRYAN R. CLARK, ESQ.
19
20
21
22
23
24
25

1 THE COURT: Hyatt. Good morning.

2 MR. CLARK: Good morning, your Honor. Bryan
3 Clark for the Franchise Tax Board.

4 MR. BERNHARD: Your Honor, I'm also co-counsel
5 for Mr. Hyatt.

6 MR. HUTCHISON: Hi, Judge. Mark Hutchison on
7 behalf of Mr. Hyatt.

8 THE COURT: Again, I'm sure it doesn't have
9 anything to do with you, Mr. Hutchison, although I'm
10 inclined to blame you. One of the cases, again, that I
11 was educated on -- of course, that doesn't have
12 anything to do with the volumes and volumes and volumes
13 of paper that was spent in this case.

14 This is a defense motion for an extension
15 of time to file a memorandum of costs. And, you know,
16 here I have to kind of go the other way from what I
17 just said about this case.

18 It saddens me when I see counsel who can't
19 agree to allow one another what I would refer to as
20 some reciprocal extensions of time. And, you know, if
21 I don't grant your request for an extension of time, I
22 think there's a lot of money at stake.

23 MR. CLARK: Your Honor, if I may explain just
24 briefly, what they were asking for -- and they don't
25 have any substantive objection to our additional time.

1 It's really a tit-for-tat objection.

2 What we were asking for here is an
3 additional ten days within which to compile the
4 information necessary to perform a ministerial task,
5 that is, submitting cost information to the court in a
6 case that has consumed three to four years, tens of
7 thousands of pages of documents, dozens of depositions
8 across two states and numerous different cities.

9 So it is a relatively large administrative
10 task, and we are only asking for an additional ten
11 days. What they were asking for in the supreme court
12 was an additional 30 pages and a month and a half
13 within which to file a substantive motion that would
14 overturn the disposition of the case before the Nevada
15 Supreme Court.

16 So I do think that there is a fundamental
17 difference between the ten days that we're asking for
18 here and the 45 days and the 30 pages that they were
19 asking for in the supreme court on a substantive
20 disposition of the case.

21 THE COURT: Mr. Clark, I got reversed in the
22 supreme court on an issue that wasn't even raised in
23 the appellate briefs.

24 MR. HUTCHISON: That's right. So you should
25 not be happy with that whole situation, Judge.

1 MR. CLARK: I hoped that you wouldn't hold that
2 against me on my ten-day request.

3 THE COURT: I said that with a smile on my
4 face.

5 MR. CLARK: And really, the logistical problem,
6 if I may explain, is that when my firm submitted bills
7 on the case, which included cost information, they went
8 to the California Attorney General's office, which
9 would submit, in turn, its bills internally to the
10 Franchise Tax Board.

11 THE COURT: Right.

12 MR. CLARK: Those bills would incorporate not
13 only the costs incurred by the attorney general's
14 office, but also the costs incurred by my firm. So the
15 hangup is in assuring that there is no duplication on
16 those costs, and that's why the administrative task is
17 not just as simple as "Everybody give me your bills and
18 we'll add it all up." And that's why we're asking for
19 the additional time. I don't believe that there's any
20 real prejudice here.

21 MR. HUTCHISON: Judge, you know, Mr. Clark
22 wasn't involved in the extension of time thing and
23 don't blame him --

24 THE COURT: I'm not.

25 MR. HUTCHISON: I think that was the FTB's

1 decision because of just the position they have taken
2 in this litigation. But he underscores the point here.
3 We wanted a little extra time to be able to educate the
4 Nevada Supreme Court about a decision that they based
5 on an issue never raised.

6 THE COURT: Which clearly they needed to be
7 educated on.

8 MR. HUTCHISON: They clearly need to be
9 educated on it. You spent weeks going through that
10 stuff and found that there were issues of fact, believe
11 it or not, and so we said we need a little extra time
12 to be able to put that on before the Nevada Supreme
13 Court. We asked for an extension of time. It was
14 denied. As a matter of fact, actually, they came to us
15 saying, "Why don't you give us a little extra time?"
16 and we said, "We'll do that, but we need some extra
17 time, too."

18 So, you know, I don't see the difference
19 in terms of extending courtesy in terms of between the
20 parties. I understand counsel has to do what their
21 clients tell them to do, but the the fact is the
22 courtesy was not reciprocated, and then they come
23 before the court saying, "Come on. Come on. We have
24 clean hands. We need some more time here." It just is
25 a disingenuous position to take.

1 One of the more practical issues perhaps
2 is 27 days have already lapsed since the Nevada Supreme
3 Court's decision came out. Why in the heck do they
4 need more time? Plus, I don't believe that the
5 judgment has even been entered yet.

6 THE COURT: I checked again this morning. I
7 don't believe that it has been.

8 MR. HUTCHISON: So that's another five days
9 whenever that enters. We're talking about a whole
10 bunch of time already, Judge. They just don't need the
11 extra time. There's been sufficient time that has
12 passed already. They don't need the additional time.
13 They ought to stay within the framework of the rules.

14 MR. CLARK: Your Honor, we are trying to avoid
15 wasting as much time as possible for the -- we will
16 file something within five days if you deny us our
17 extension, but we'll use the additional time to try to
18 assure that there is no duplication of costs so that
19 the inevitable dispute over our memorandum of costs
20 will take as little of this court's time as possible.
21 That's why we are asking for the additional time, but
22 recognize that it is within your discretion. You need
23 to be entirely pleased with the supreme court --

24 THE COURT: And I want to make clear, although
25 the record will not reflect the fact that I, hopefully,

1 quite obviously had a smile on my face when I made that
2 comment, I never hold that against counsel. That
3 obviously would be inappropriate, and more importantly,
4 on -- as I said, I've learned a lot in this case. So
5 there is always a benefit, regardless of which column
6 you come out on, if you will.

7 Having said that, I checked again this
8 morning, and as I said, I do not believe that the
9 judgment has been filed yet. And I really, although I
10 believe that we have time constraints set forth in our
11 procedural rules for very good reason, I also have
12 practiced law before and recognize that it's awful nice
13 to have a few extra days every now and then.

14 Under the circumstances, what I'm going to
15 do is I'm going to give you -- you've requested, I
16 believe, a ten-day extension. I'm going to give you a
17 five-day extension. That's it.

18 MR. CLARK: Your Honor, I don't believe that
19 the reason -- or excuse me. I believe that the reason
20 the order has not been signed is that it is somewhere
21 in your chambers. We have submitted it.

22 THE COURT: We looked for it. I can't seem to
23 find it, because that was my concern. Let me look
24 again, but I'm -- we'll check again. We've just
25 changed administrative assistants, as you know, and we

1 are initiating --

2 MR. HUTCHISON: It needs to be resubmitted and
3 be done with it, right?

4 THE COURT: Yes, that's probably going to be
5 your best idea.

6 MR. CLARK: So this will be a total then of ten
7 days, and I will submit another copy and --

8 THE COURT: Please do.

9 MR. HUTCHISON: Judge, this is going to be a
10 big memorandum of costs.

11 THE COURT: Oh, I know.

12 MR. HUTCHISON: Guaranteed. We've already had
13 27 days. Let's say the judgment issues today. That's
14 giving them 37 days, in theory, since they have known.
15 We're not going to even have an idea of what the
16 memorandum of costs are until we see it. That's a very
17 short time frame within the rules for us to oppose. We
18 would like to have at a minimum a 20-day extension
19 beyond what we are entitled to under the rules so that
20 we can have a proper opportunity to respond.

21 MR. CLARK: We would agree to half of that.

22 THE COURT: And -- boy oh boy, you guys make my
23 job difficult.

24 In order to be fair, this is what I will
25 do. I will give you the half that you request as well.

1 I will give you an extra ten days. And please,
2 Counsel, if you need more time, get ahold of chambers
3 and I can help you out in that regard. So don't worry
4 about it.

5 MR. HUTCHISON: So, Judge, are you saying that
6 we could get on the telephone if we can't agree and
7 need more time, we could just call your chambers and
8 you could help us resolve that?

9 THE COURT: Yes. And you can do it -- that way
10 I take it out of either of your client's hands. I can
11 be the bad guy or the good guy, as the case may be. I
12 can handle it that way.

13 MR. CLARK: Thank you, Judge.

14 THE COURT: Thank you both.

15 MR. CLARK: I will submit an additional order,
16 Judge, and an order from today's hearing.

17 THE COURT: Thank you very much.

18 MR. HUTCHISON: Thank you.

19

20

21

22 ATTEST: Full, true and correct transcription of tape
23 recorded proceedings, to the best of my
24 ability.

25 
PAUL E. DEGAGNE

7/23/01
DATE



Figure 1. A schematic diagram of the experimental setup. The subject is seated in a chair, viewing a video screen. The screen displays a target (a small circle) and a starting point (a small circle). The subject's hand is positioned at the starting point. The distance between the starting point and the target is 10 cm. The subject is instructed to move the hand from the starting point to the target. The video screen is positioned 40 cm from the subject's hand. The subject's hand is positioned at the starting point. The distance between the starting point and the target is 10 cm. The subject is instructed to move the hand from the starting point to the target. The video screen is positioned 40 cm from the subject's hand. The subject's hand is positioned at the starting point. The distance between the starting point and the target is 10 cm. The subject is instructed to move the hand from the starting point to the target. The video screen is positioned 40 cm from the subject's hand.

1. *Chlorophyll a*

Weekly News and Analysis from the California Taxpayers' Association

Caltaxletter

David R. Doerr, *principal contributor*

Ronald W. Roach, *editor*

Vol. XIV, No. 26

July 3, 2001

BUDGET BLUES: IMPASSE CONTINUES

On the third day of the new fiscal year, there was no visible evidence of efforts to end the impasse over the \$101 billion state budget bill, with Republicans maintaining that the Democrats-designed plan would unnecessarily increase the sales tax.

With Tuesday's high forecast to reach a scorching 107 degrees, none of the major newspapers in the state even carried an account of presumably behind-the-scenes budget talks. Instead, editors focused on State Controller Kathleen Connell's release of heretofore-secret details of the \$43 billion in electricity contracts negotiated by the Davis Administration since January.

Newspapers sued to get the information released, and Dr. Connell beat Governor Gray Davis to the punch in getting the news out. She said that even after weeks of analyzing the 41 agreements, her staff was unable to say how much the costs would be, except that they could leave the state vulnerable to wild fluctuations over the next decade. The governor's office responded that Dr. Connell did not have all the facts.

Apparently looming larger than budget impasse news was a report that liberal Assembly Member Herb Wesson has emerged as the heir apparent to Assembly Speaker Robert Hertzberg, who cannot seek re-election next year due to term limits. Mr. Wesson would be the third Los Angeles Democrat in a row to hold the speakership and would be expected to take the helm next January, said reports in the *Los Angeles Times* and the *Sacramento Bee*.

Catching up on budget developments, or lack thereof, on the eve of the Fourth of July holiday:

The three provisions with tax relief shortfalls are the teacher tax credit, the child-and-dependent care tax credit, and the long-term care tax credit. The teacher tax credit was estimated to provide \$218 million in tax relief. Only \$134 million in credits were actually claimed. The child-and-dependent care tax credit was estimated to provide \$197 million in tax relief. Only \$154 million has been claimed. The long-term care credit was estimated to provide \$43 million in tax relief. Only \$2 million in credits were claimed.

From these three tax relief provisions in the bill, taxpayers actually got \$290 million, rather than the advertised \$456 million, a 36 percent shortfall. If the other provisions of the package are also 36 percent below what was promised, the 2000-01 tax relief would be less than \$1 billion, rather than the \$1,519 billion for which politicians took political credit.

There is also concern about fraudulent claims for the child-and-dependent care credit. According to the FTB, \$141 million in credits were attributable to refundable returns, and only \$12 million in credits were on returns that reduced the tax due. There were reports that claims for the credit had cited persons who were deceased as providers of the care.

- **Nevada Court Supports FTB.** FTB Attorney Ben Miller, who is headed for a vacation in Hawaii, 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.
- **FTB "Phase III" Construction.** Fred Cordano, in charge of the Phase III building project for the FTB, said the new buildings should be ready for occupancy in 2004. He said the "stops and starts" in the project have resulted "in a better product."

Phase III includes two new buildings for the FTB and a town hall area at the entrance that includes a 300-seat auditorium. Taxpayers will not have to go through the FTB "Checkpoint Charlie" security check to access the town hall area, which also includes an eating area and rooms for training and conferences.

Advisory Board members were impressed with the environmental features built into the plan, including rooftop photovoltaic panels. The Phase III project will be located in front of the current Butterfield Road complex, taking much of the current parking lot used by riders of Sacramento's light-rail system.

EXHIBIT 35

ORIGINAL

SEALED

FILED

AUG 7 2001

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CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

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12
13 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

14
15 *****

16 **FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,**

17 **Petitioner,**

18 **vs.**

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

22 **Respondent,**

23 **and**

24 **GILBERT P. HYATT,**

25 **Real Party in Interest.**
26
27
28

Case No.: 36390
Consolidated with Case No. 35549

**Answer to Hyatt's Petition for Rehearing
and Supplemental Petition for Rehearing**

**CONFIDENTIAL INFORMATION
FILED UNDER SEAL**

RECEIVED

AUG 7 2001

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AUG 07 2001

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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.

Answer to Hyatt's Petition for Rehearing
and Supplemental Petition for Rehearing

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.

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

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

10 1. **THE COURT PROPERLY DECIDED THE CASE ON RULE 56**
11 **GROUND**

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

20 There is no evidence, aside from Hyatt's own conclusory allegations, that
21 Franchise Tax Board's investigation unreasonably intruded into his private life or
22 seclusion, published false information about him, or published information to
23 third parties that was not of a legitimate public concern. The myriad depositions
24 and documents submitted to this court are undisputed and indicate that Franchise
25 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.

26 There is also insufficient evidence of Hyatt's remaining claim of negligent
27 misrepresentation. As with Hyatt's claims for intentional torts, there is no
28 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.

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

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

6 As the FTB previously showed at pages 5-16 of its July 7, 2000 Jurisdiction Writ¹ (FTB
7 App. Ex. 1), and at pages 3-8 of its December 28, 2000 Reply in Support of Jurisdiction Writ,
8 (FTB App. Ex. 2), FTB employees took various actions during the audit to try to verify Hyatt's
9 change of residency claim. FTB auditors requested relevant information from Hyatt's taxpayer
10 representatives. Some FTB information requests required multiple request letters to Hyatt's
11 representatives; some FTB information requests were never satisfied despite repeated requests.
12 Some information that Hyatt provided raised more questions with FTB auditors than it answered.
13 (See Cox Affidavit, FTB App. Ex. 3 at ¶¶ 7-22).

14 The essential issue of the audit was the effective date of termination of Hyatt's California
15 residency. (Cal. Rev. & Tax Code §§17014, *et. seq.*). Critical to that was Hyatt's whereabouts
16 between September 24, 1991 (the final date he claimed to have moved to Nevada), and October
17 20, 1991 (the date his rental of his Las Vegas apartment began). The exact date of termination of
18 Hyatt's California residency was important because Cal.Rev. & Tax Code § 17016 raised a
19 presumption of full-year residency if the termination date was after September 30th, and Hyatt
20 had received \$40 million of income from two of his Japanese licensees during the fourth quarter
21 of 1991.

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

- 25 1. In her August 2, 1995 tentative position letter, the auditor explained her
26 understanding of the facts at that time and specifically informed Hyatt's taxpayer
27 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,

28 ¹For 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

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

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

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

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

11 Hyatt sued the FTB for torts based on its invasion of his privacy and
12 its fraudulent conduct. Since the Court decided the Writ Petition on issues
13 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).

14 In his Supplemental Petition, Hyatt repeats:

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

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

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

1 version of the merits of his tort claims. *Id.* He even included in his appendix, his entire
2 opposition to FTB's summary judgment motion that he had filed in the district court.² Hyatt
3 clearly put the merits of his entire case before this Court. At page 15, lines 6-10 and footnote
4 48:

5 While alleged in various forms, Hyatt's invasion of privacy claims are all
6 based on the FTB's mishandling and illegal and improper disclosures of Hyatt's
7 private and confidential information. The legal and factual basis for the invasion
8 of privacy claims are set forth in detail in Hyatt's opposition to the FTB's ill-fated
9 motion for summary judgment.⁴⁸

10 ⁴⁸ Hyatt's opposition papers to the FTB's Motion for Summary Judgment are
11 attached as Exhibits 11 through 15, to Vols. VII and VIII, to the accompanying
12 Appendix of Exhibits filed with the Supreme Court.

13 Page 15, lines 11-13:

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

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

19 The legal and factual basis for these conclusions are set forth both in Hyatt's
20 opposition to the FTB's motion for summary judgment as well as the Hyatt
21 Appendix re Crime-Fraud filed in conjunction with Hyatt's briefing on the
22 discovery motion at issue in this writ Petition.⁴⁹

23 ⁴⁹Hyatt's Appendix re Crime-Fraud is attached as Exhibit 4, to Vol. II of the
24 accompanying Appendix of Exhibits filed with the Supreme Court.

25 Page 16, lines 3-5:

26 The abuse of process and outrage claims are also based on misconduct by the FTB
27 during the course of the audits. The legal and factual basis of these claims are
28 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

²See, *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").

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

3 Previously, on July 7, 2000, FTB had filed the Jurisdictional Writ (Docket No. 36390). At pages
4 5-22, FTB provided its statement of facts based upon the undisputed events that occurred during
5 the audit. (FTB App. Ex. 15).

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

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

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

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

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

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

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

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

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

27 Despite the Court's admonishment, Hyatt reasserts his improper affidavits to support his
28 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

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

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

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

12 Candace Les and the FTB auditor (Sheila Cox) were in Las Vegas in November 1995
13 when Les testified they stopped at Hyatt's house. (FTB App. Ex. 20; Les Depo pg. 262, lns. 11-
14 14). That was five months before even the first Notice of Assessment was issued on April 23,
15 1996. (FTB App. Ex. 21). While Les said: "I knew the audit was over" (FTB App. Ex. 20; Les
16 Depo pg. 273, lns. 17-18), she was mistaken because the audit was still open. The fact that the
17 audit was still open completely negates Hyatt's allegations that the November 1995 drive-by was
18 improper or that Cox was violating FTB procedures in checking out Hyatt's house.

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

22 Despite not believing Hyatt was living at his Las Vegas house even as late as November
23 1995, the FTB auditor still gave Hyatt the benefit of her doubts by giving him April 2, 1992 (the
24 date escrow closed) as the effective date of termination of his California residency. For that,
25 Hyatt villanizes her and accuses the FTB of conducting an "extortive" and "tortious" audit. The
26 auditor was simply trying to do her job and get the facts concerning Hyatt's move because he
27 would not give them to her. The record is undisputed that FTB conducted an audit; there is no
28

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.

- 1 i) Hyatt previously made this argument in his July 2, 2000 Answer to the
2 Discovery Writ at pages 12-13, (FTB App. Ex. 32); and October 13, 2000
3 Answer to Jurisdiction Writ at pages 11-13. (FTB App. Ex. 33).
4
5 ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ
6 at pages 9-10, (FTB App. Ex. 34); and December 28, 2000 Reply in
7 Support of Jurisdiction Writ at pages 6-7. (FTB App. Ex. 35).
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9 iii) As FTB showed, Hyatt's patent licensing business died when his patents
10 were successfully challenged, and, in effect became worthless. *See Hyatt*
11 *v. Boone*, 146 F.3d 1348 (Fed.Cir. 1998). Texas Instruments had
12 challenged Hyatt's patent by filing an "interference" action in the U.S.
13 Patent Office in April 1991, even before Hyatt's alleged move to Nevada.
14 As Hyatt's own representative during the audit, Mr. Cowan, said in his
15 October 13, 1995 letter to the auditor: "Many companies who produce
16 products that might infringe on patents held by others . . . wait until the
17 validity of the patent has been tested in court." The Japanese companies
18 had paid Hyatt before his patents became worthless; (FTB App. Ex. 36;
19 PBKT 06176 at pg. 2, fn. 1). (Emphasis added).

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

- 13 i) Hyatt previously made this argument in his Answer to Discovery Writ at
14 page 13, (FTB App. Ex. 37); and his October 13, 2000 Answer to the
15 Jurisdiction Writ at pages 11-13, (FTB App. Ex. 38).
16
17 ii) FTB responded in its August 8, 2000 Reply in Support of Discovery Writ
18 at pages 9-10, (FTB App. Ex. 39); and its December 28, 2000 Reply in
19 Support of Jurisdiction Writ at pages 6-7, (FTB App. Ex. 40).
20
21 iii) As FTB showed, both the Fujitsu and Matsushita agreements contained the
22 identical provision in Paragraph 7.4 authorizing disclosure of their terms
23 and conditions, including the payment amounts, to any governmental
24 agency or as otherwise required by law. (FTB App. Ex.41 and 42). All the
25 FTB did was send a single page letter to each company asking only what
26 date they wire transferred payments to Hyatt. (FTB App. Ex. 43 and 44).
27 Sheila Cox had written Mr. Kern on March 1, 1995: "I need a copy of the
28 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.

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

- 28 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

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

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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.

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

3 The Court first concluded in footnote 12 "that Franchise Tax Board (1) never produced
4 false statements."³ Hyatt claims that this conclusion is false because the FTB "produced false
5 statements" by assuring him in written and verbal forms that it would keep his information
6 confidential and would conduct a fair audit. Hyatt Supplemental Petition ("Supplement") at page
7 1, lns. 15-18. Hyatt has presented no specific evidence to prove this allegation. The FTB forms
8 that Hyatt cited to in footnotes 4 and 5 of his Supplement clearly state that the information he
9 provided could be disclosed to government officials as provided by law, and the California
10 statutes permit the FTB to use the information to conduct an audit. *See Sections 7(c) below and*
11 *5(E)(F) above.* Hyatt has presented no evidence that the FTB agreed to abrogate its statutory
12 authority and provide Hyatt with complete confidentiality with regard to the audit; this lack of
13 evidence is not surprising because in order to conduct the residency audit, the FTB had to contact
14 third parties to verify Hyatt's information and to investigate Hyatt's claims of Nevada residency.
15 It was impossible for the FTB to keep the investigation completely confidential because the
16 investigation, by its very nature, required contact with third parties. For that reason, the FTB did
17 not and would not have informed Hyatt that it would shield his audit and investigation from third
18 parties.

19 Hyatt claims that the FTB promised to conduct a fair and unbiased audit, but instead
20 buried all evidence favorable to Hyatt. Supplement at page 1, line 18. This is not a fact, it's an
21 argument against the conclusion of the residency auditor, the audit supervisor and FTB audit
22 review staff. Hyatt's charge is currently being considered in the administrative review process in
23 California, where Hyatt is free to present any evidence.

24 Hyatt argues that Candace Les claimed the "Audit narrative report re Hyatt was 'fiction,'"
25 and cites to Candace Les' deposition as support. Supplement at page 1, line 19 and n.7.
26 However, the cited pages 10 and 25 of that deposition do not discuss Les' opinion of the audit,
27

28 ³It 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.

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

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

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

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

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

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

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

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

13 Hyatt claims that Cox publicized her investigation findings outside the scope of the
14 investigation, but provides no such evidence. Hyatt alleges that Cox told Candace Les about the
15 findings and that Les did not "need to know" the information. *Id.* at page 2, line 15. Hyatt did
16 not cite to the record to support his allegation that Les did not "need to know" the information.
17 In fact, Les also was an auditor of the FTB, with whom Cox discussed the audit as a co-
18 professional.

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

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

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

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

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

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

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

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

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

4 Hyatt admittedly was a long-time resident of California who paid California income taxes
5 for many years until he moved to Nevada. The FTB had the legal and statutory right, and a
6 public duty, to investigate Hyatt's claim of change of residency. To do that, it was necessary to
7 contact persons and entities in Nevada which Hyatt had listed as sources who could verify his
8 Nevada residency. *See Industrial Welfare Com. v. Superior Court of Kern County*, 27Cal.3d 690,
9 613 P.2d 579, 587 (1980)(citing a United States Supreme Court case stating that the duty to
10 investigate involves the making of such an investigation as the nature of the case requires, and it
11 is not required to take any particular form.) In the course of the investigation, an agency may
12 seek information through those channels likely to produce the necessary information, including
13 official records and reports, and may supplement such means of inquiry by correspondence or
14 personal investigation. *Barnett v. Fields*, 196 Misc. 339, 92 N.Y.S.2d 117, 124 (1949).

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

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

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

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

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

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

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

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

1 **EXHS**

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15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 GILBERT P. HYATT,

18 Plaintiff,

19 v.

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

23 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**

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

25 ///

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27 ///

28 ///

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FILED

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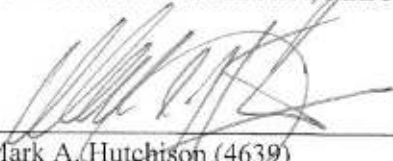
Mark A. Hutchison
CLERK OF COURT

FUS

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

3 Dated this 15th day of October, 2019.

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EXHIBIT 35

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

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

7 Hyatt also mischaracterizes a statement in the Residency Audit Training Manual as
8 requiring an auditor to determine if a third party is "uncooperative" before issuing a Demand for
9 Information.⁶ The manual broadly interprets "Section 19504 (formerly Section 19254) [as
10 authorizing] the Department to request and obtain information from third parties." (See FTB
11 00844 (FTB App. Ex. 54)).⁷

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

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

19
20 ⁴Cal. Rev. & Tax Code §19504 empowers the FTB to examine records, require attendance, take testimony, and issue
21 subpoenas. Cal. Govt. Code § 11189 provides for enforcement of § 19504 demands from "persons residing within or without the
state."

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

24 ⁶The Supplemental Petition asserts: "[s]he did so without first ascertaining that the third party was uncooperative, as
25 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
26 Demands can only be used when a third party source refuses to cooperate.

27 ⁷A 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.

28 ⁸The 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)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (2) on the solitude or seclusion of another; (3) that would be highly offensive to a reasonable
2 person.” *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630-31, 895 P.2d 1269 (1995), *modified*
3 *on other grounds*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997) (citing Restatement (Second)
4 Torts § 652A). Hyatt’s second privacy tort for public disclosure of private facts required
5 evidence “that a public disclosure of private facts has occurred which would be offensive and
6 objectionable to a reasonable person of ordinary sensibilities.” *Montesano v. Donrey Media*
7 *Group*, 99 Nev. 644, 649, 668 P.2d 1081 (1983), *cert. denied*, 466 U.S. 959 (1984). Hyatt’s false
8 light claim requires proof that the FTB put Hyatt before the public in a false light in a manner
9 that “would be highly offensive to a reasonable person,” and also that the FTB “had knowledge
10 of or acted in reckless disregard as to the falsity of the publicized matter and the false light in
11 which [Hyatt] would be placed.” *Rinsley v. Brandt*, 700 F.2d 1304, 1306 (10th Cir. 1983); *see*
12 *also PETA*, 111 Nev. at 622 n.4 (citing *Brandt*); Restatement (Second) of Torts § 652E. This last
13 variety of privacy tort requires proof by “clear and convincing evidence...” *Machleder v. Diaz*,
14 801 F.2d 46, 56 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *see also PETA*, 111 Nev. at
15 622 n.4 (citing *Diaz*).

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

25 Hyatt also argues he has a claim for “informational privacy” even though it is not pled in
26 his First Amended Complaint. Nevada, however, recognizes only “four species of privacy tort”
27 (all of which Hyatt has pled), and none of which is “informational privacy.” *PETA*, 111 Nev. at
28 629, 895 P.2d at 1278. Moreover, disclosure of Hyatt’s return information (name, address and

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

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

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

7 Hyatt does not even allege that FTB took any court action or employed any court process.
8 Instead, he alleges FTB sought to "extort" a settlement by conducting the audit and, in particular,
9 by sending Demands to Furnish Information into Nevada. California law, however, authorizes
10 FTB to send such forms to "persons residing within or without the state." Cal. Govt. Code §
11 11189; Cal. Rev. & Tax Code § 19504.

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

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

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

27 In parts IV-VII at pages 10-15 of his Supplemental Petition, Hyatt attempts to "spin" this
28 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

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

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

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

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

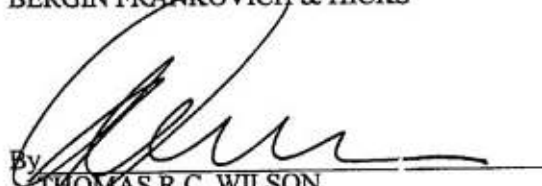
20 CONCLUSION

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

26 Hyatt's Petition and Supplemental Petition for Rehearing should be denied because this
27 Court did not overlook or misapprehend any material point of law or fact.
28

1 Dated this 7th day of August, 2001.
2

3 McDONALD CARANO WILSON McCUNE
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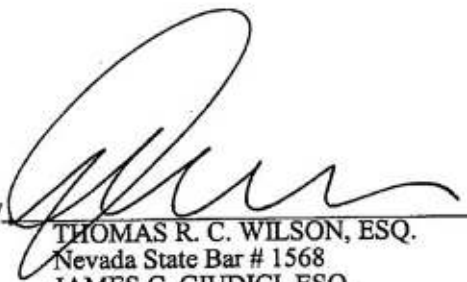
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Certificate of Compliance

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.

By



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Attorneys for Defendant Franchise Tax Board

1
2
3 **CERTIFICATE OF MAILING**

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

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26 Honorable Nancy Saitta
27 Eighth Judicial District Court
28 of the State of Nevada,
in and for the County of Clark
200 S. Third Street
Las Vegas, NV 89155

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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10 IN THE SUPREME COURT OF THE
11 STATE OF NEVADA

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JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

12 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

Case No. 36390

13 Petitioner,

14 vs.

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

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

17 Respondent,

18 and

19 GILBERT P. HYATT,

CONFIDENTIAL INFORMATION TO
BE FILED UNDER SEAL

20 Real Party in Interest.
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58

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10 IN THE SUPREME COURT OF THE
11 STATE OF NEVADA

12 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

13 Petitioner,

14 vs.

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

17 Respondent,

18 and

19 GILBERT P. HYATT,

20 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

22 Real Party in Interest Gil Hyatt submits this Errata to his 15-page Supplement to his Petition for
23 Rehearing. The 15-page Supplement was filed with this Court on July 23, 2001, and the FTB's Answer
24 was served on August 7, 2001.¹

25
26 The FTB's August 7 Answer to Hyatt's Petition for Rehearing and Supplemental Petition for Rehearing pointed out certain errors
27 in the footnotes and Appendices to Hyatt's 15-page Supplement. Hyatt appreciates the FTB pointing these out and apologizes
28 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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 cited pages from the Rehearing Appendices was inadvertent. This Errata substitutes the citation to the official record for the
28 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.

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

2 Errata No. 14: Footnote 54: "[Appdx. Exhs. 9-10]" should be "[Hyatt Appendix, Vol. VII, Exh.

3 11 (Exh. 13 attached thereto)]" (change citation to official record, rather than to Rehearing Appendix).

4 Errata No. 15: Footnote 55: "FTB" should be deleted, and "Exh. 35" should be "Exh. 33"

5 (typographical error).

6 Errata No. 16: Footnote 71: "[Appdx. Exh. 27]" should be "[Hyatt Appendix, Vol. VII, Exh.

7 11]" (change citation to official record, rather than to Rehearing Appendix).

8 For the convenience of the Court and the FTB, a copy of Hyatt's 15-page Supplement, with these

9 corrections, is attached hereto as Exhibit B.

10 DATED this 10 day of August, 2001

11 HUTCHISON & STEFFEN

12 BERNHARD & LESLIE, CHTD.

13 By: 

14 Peter C. Bernhard, Esq.
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19 GILBERT P. HYATT

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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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Honorable Nancy Saitta
Department XVIII
Eighth Judicial District Court of the State of Nevada
in and for the County of Clark
200 S. Third Street
Las Vegas, NV 89155


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



15250 Ventura Boulevard, Suite 410 • Sherman Oaks, CA 91403
(800) 993-4GNG (4464) • FAX: (818) 995-4246

14:37 1 A. I do not have a complete recollection
14:37 2 of their visit. After they came in the first thing
14:37 3 they did was to show me that one-page document, and I
14:38 4 didn't quite understand what they were saying but
14:38 5 from what I did understand, they were there looking
14:38 6 for some kind of information. So I figured these
14:38 7 people must be either from the State or the IRS
14:38 8 conducting an audit there. Then they showed me their
14:38 9 business cards. So one sat down, the other one
14:38 10 started walking around, and he asked me when I
14:38 11 started working there, where was I working, and I
14:39 12 told him that I started by working in Costa Mesa. At
14:39 13 that time I was the owner, and approximately three
14:39 14 years ago we changed the name of the owner to my
14:39 15 older brothers. I worked in Costa Mesa for a little
14:39 16 more than a year and then we went to another place
14:39 17 for like maybe four or five years and after that we
14:39 18 moved to a few other locations. Eventually we
14:40 19 settled in where we were.

14:40 20 Then he said he wanted to look into
14:40 21 the record of Hyatt, so I went to look for it. Well,
14:40 22 after I found it he saw it. I showed it to him as
14:40 23 well, and then they copied a telephone number and the
14:40 24 names and also the travel plans. Later on I realized
4:41 25 that they were not there auditing my books. They

14:41 1 were there looking into Hyatt's records. So I
14:41 2 stopped cooperating.

14:41 3 Q. If you had realized that sooner, would
14:41 4 you have stopped cooperating sooner?

14:41 5 A. Yes, that's right.

14:41 6 Q. Did they tell you that they were
14:41 7 investigating your tax regarding a special item?

14:41 8 A. No.

14:41 9 Q. Did they tell you that they wanted to
14:41 10 look into the Youngmart record relating to the travel
14:42 11 schedule of Mr. Hyatt?

14:42 12 A. They didn't say that but they said
14:42 13 they wanted to look into some information regarding
14:42 14 Hyatt.

14:42 15 Q. Did they imply that they were
14:42 16 investigating whether or not Youngmart was cheating
14:42 17 on its taxes respecting Mr. Hyatt?

14:42 18 A. No. Well, I figured that they were
14:43 19 there looking for information relating to Hyatt and
14:43 20 something was wrong with his records.

14:43 21 Q. Now, when you did provide information
14:43 22 before you realized all this, were you giving as much
14:43 23 information as you did because you were trying to
14:43 24 prove that Youngmart did not cheat on its taxes?

14:43 25 A. Yes.

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10 IN THE SUPREME COURT OF THE
11 STATE OF NEVADA

12 FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,

13 Petitioner,

14 vs.

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

17 Respondent,

18 and

19 GILBERT P. HYATT,

20 Real Party in Interest.
21

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

22 Pursuant to this Court's order, Petitioner Gil Hyatt submits this Supplement to his Petition for
23 Rehearing, timely filed on July 2, 2001 (the "Petition"). The Petition addressed the substantial evidence
24 supporting Hyatt's most significant invasion of privacy claim and his fraud claim. This Supplement first
25 demonstrates that there are material facts in dispute in regard to the four issues upon which the Court
26 based its order granting the FTB's petition and then discusses additional facts, evidence and law that the
27 Court overlooked or misapprehended in its order granting the FTB's petition.
28

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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

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].

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

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

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

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

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

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

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

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

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

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

27 ⁸ Kopp Depo., pp. 75 - 76 [Supp. Appdx., Exh. 39]; Lewis Depo., pp. 29, 45, 51 [Supp. Appdx., Exh. 30].

28 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.

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

2 Again, this Court cannot say that the FTB never publicized its investigation or findings outside the
3 scope of the investigation. If the Court believes that these publications are *de minimus*, it is performing,
4 inappropriately, a fact-finder's function.
5

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

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

12 (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

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

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

16 (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

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

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

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

25 ¹⁷ Portions of FTB 1991 tax year audit file: H 01637, 01853, 01855, 01857, 01899 [Appdx., Exh. 10].

26 ¹⁸ Petition, at 6-8.

27 ¹⁹ Petition, at 5.

28 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]

- 1 (2) Sending an unprecedented number of "Demands for Information" to individuals outside the
2 State of California;²⁴
- 3 (3) FTB promises (and policy requirements) that it would conduct a fair and unbiased audit, but
4 instead buried all evidence favorable to Hyatt;²⁵
- 5 (3) Searching through Hyatt's Las Vegas trash and mail;²⁶
- 6 (4) Taking a "trophy" picture in front of Hyatt's Las Vegas home;²⁷
- 7 (5) Initiating tax audits of close Hyatt associates;²⁸
- 8 (6) Acknowledging that the FTB believed Hyatt was "paranoid" about privacy, then warning his
9 tax attorney that without a settlement, Hyatt's finances would become public;²⁹
- 10 (7) Vowing to "get that Jew bastard."³⁰

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

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

27 ²⁴ *Infra*, at 9-10.

28 ²⁵ Petition, at 6-8.

29 ²⁶ Cox Depo., pp. 1077 [Appdx. Exh. 16]; Les Depo., pp. 268-69, 405 [Appdx., Exh. 17].

30 ²⁷ Les Depo., pp. 264, 402 - 03 [Supp. Hyatt Appendix, Vol. XIV, Exh. 49].

²⁸ Hyatt Affid., ¶ 164 [Appdx., 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].

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

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

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

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

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

18 In addition to the evidence summarized in the Petition, affidavits and depositions have
19 established the following facts, which give rise to the inference that the FTB unreasonably intruded
20 upon Hyatt's seclusion. First, FTB auditor Sheila Cox made at least three trips to Las Vegas to
21 investigate Hyatt. During these visits, Cox contacted neighbors and other fellow Nevada residents with
22 whom Hyatt either in the past or in the future has had or might reasonably expect to have social or
23 business interactions, and she either disclosed or implied to them that Hyatt was under investigation in
24 California.³³ On one trip she took a colleague, Candace Les, on a covert visit to Hyatt's Las Vegas
25 home³⁴ — after the audit was over³⁵ — and took a trophy photograph of Les standing on Hyatt's
26 property in front of Hyatt's residence.³⁶ This corroborates Les' testimony that Cox was obsessive in her
27 zeal to "get" Hyatt, personalizing the audit in ways that were clearly not "standard" and should be found
28

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].

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

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

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

23 ³⁸ California Revenue & Taxation Code § 21014, *forbidding* any FTB employee from conducting an investigation or surveillance
24 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."

25 ³⁹ California Information Practices Act of 1977, Civil Code § 1798.14; Disclosure Manual, Exhibit 118 at H 06708 [Appdx.,
26 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.)

27 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].

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

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

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

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

7 2. Supporting evidence:

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

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

27 ⁴³ See *Restatement (Second) of Torts* § 652E (1977). Courts have held, however, that to recover for false light, the subject of
28 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].

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

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

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

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

- 15 **A. Elements of claim:** Government agencies commit abuse of process when their demands
16 for information are motivated by an improper purpose, such as to harass the taxpayer or
17 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
18 **B. Supporting evidence:**

19 The FTB sent numerous Nevada business and professional entities and individual residents
20 "quasi-subpoenas" entitled "Demand to Furnish Information," which cited the FTB's authority under
21 California law to issue subpoenas and demanded that the recipients thereof produce the information
22 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

23 ⁴⁷ Ford Depo., pp. 148-55 [Supp. Appdx., Exh. 43].

24 ⁴⁸ Hyatt Affid., ¶¶ 117, 118, 174, 175 [Appdx., Exh. 6].

25 ⁴⁹ Appdx., Exhs. 9-10.

26 ⁵⁰ E.g., Chang Depo., pp. 32-33 [Supp. Appdx., Exh. 32].

27 ⁵¹ See, e.g., Hyatt Affid. ¶¶ 129, 143-44 [Appdx., Exh. 6].

28 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)].

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

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

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

27 ⁵⁵ H 01715, 01716 [Supp. Appdx., Exh. 33].

28 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.

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

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

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

20 If, in fact, the Court intended to establish new policy related to writ practice and return to pre-
21 1983 authority under which the Court reviewed denials of summary judgment motions based on

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

23 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.)

24 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.")

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

26 ⁶¹ 99 Nev. 358, 662 P.2d 1338 (1983).

27 ⁶² Order, June 13, 2001, at 3.

28 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.

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

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

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

22 ⁶⁵NGA #2 Limited Liability Co. v. Rains, 113 Nev. 1151, 1157, 96 P.2d 163, 167 (1997) ("In deciding whether summary judgment
23 is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought;
24 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.").

25 ⁶⁶As the Court is aware, Judge Saitta dismissed the declaratory relief count from Hyatt's First Amended Complaint when she
26 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
27 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
28 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).

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

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

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

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

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

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

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

19 ⁶⁸The majority of the "facts" stated by the FTB relate to whether the FTB had good reason to initiate an audit of Hyatt. Hyatt
20 does not challenge the FTB's right to conduct residency audits, or its right to audit him. His tort claims, instead, deal with the
21 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
22 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
23 evaluate whether the conduct of a particular FTB investigation was (or was not) ordinary and reasonable.

24 ⁶⁹183 Cal.App. 3d 1133, 228 Cal.Rptr.750 (1986).

25 ⁷⁰*Martinez v. City of Los Angeles*, 141 F.3d, 1373, 1379 (9th Cir. 1998) ("Here, [Plaintiff]'s allegations, go beyond the contention
26 that the LAPD officers acted improperly in deciding to seek his arrest. He alleges they acted negligently in conducting the
27 investigation . . . , and they caused his arrest and imprisonment in Mexico."); see also *Bell v. State*, 63 Cal.App. 4th 919, 929,
28 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."

29 ⁷¹The evidence is undisputed that this case has not interfered with the tax proceeding. Hyatt's Opp. to Mot. for Sum. Judg., pp.
30 55-56 [Supp. Hyatt Appendix, Vol. VII, Exh. 11] and Cowan affid., ¶¶ 43, 44 [Appdx. Exh. 6].

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

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

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

11 VII. Conclusion.

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

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

24 example, the use of it for another purpose or the disclosure of it to some third party. *Id.* at 234 n.11. California Information
25 Practices Act (Cal. Civ. Code § 1798 *et seq.*) (also providing that improper dissemination of information gathered by state
26 agencies is actionable against the state and allows claim to be brought in "any court of competent jurisdiction").

27 ⁷³ Order, June 13, 2001, n. 13.

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

⁷⁵ At a subsequent hearing before Judge Saitua 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.)

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

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

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

21 DATED this ____ day of July, 2001

HUTCHISON & STEFFEN

22 BERNHARD & LESLIE, CHTD.

23 By:

24 Peter C. Bernhard, Esq.

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

26 ⁷⁷ For example, immediately after this Court's order, the FTB was publicly touting it before its Franchise Tax Board Advisory
27 Board. "FTB Attorney Ben Miller . . . reported that the Nevada Supreme Court sustained FTB auditor efforts in the high-profile
28 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.
EIGHTH JUDICIAL DISTRICT COURT
of the State of Nevada, in and for the
18 County of Clark, Honorable
Nancy Saitta, District Judge,

RESPONSE TO ERRATA

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

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

3 ERRATA NO. 1:

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

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

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

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

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

21 To the contrary, upon examination, pages 172 and 176 of the Les Deposition do not
22 "produce sufficient facts, indicating a genuine dispute," that FTB's acts constituted intentional
23 torts. See, June 13th Order at Footnote 12. Those pages of the Les Deposition consist of nothing
24 more than the personal ramblings and opinion of a terminated employee of the FTB. The cited
25 testimony bears no relevance to the substantive work of the audit; that is, verifying Hyatt's claim
26 of Nevada residency. The work of the audit addressed: where did Hyatt live in Nevada between
27 September 24 and October 20; whether he was physically present in Nevada during that time;
28 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

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

2 ERRATA NO. 2:

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

8 ERRATA NO. 3:

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

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

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

14 ERRATA NO. 4:

15 This Errata is to Hyatt's Footnote 27 which Hyatt uses to support his argument that taking
16 a photograph from the street of his Las Vegas home was tortious because it was more than a
17 "mere visit" to his house. The photograph was taken in 1995 and showed circumstantial indicia
18 that the house may have been occupied for some time after Hyatt closed escrow on it April 2,
19 1992. That helped the auditor give Hyatt the benefit of the doubt that he had terminated his
20 California residency upon his close of escrow. Taking the photograph is not evidence of
21 sufficient facts constituting any intentional tort.

22 ERRATA NOS. 5, 6, 7 and 8:

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

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

3 ERRATA NO. 9:

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

7 ERRATA NOS. 10, 11 and 12:

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

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

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

21 ERRATA NO. 13:

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

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

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

1 information regarding Hyatt.

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

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

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

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

18 ERRATA NO. 14 and 15:

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

23 ERRATA NO. 16:

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

1 be located.

2 Dated this 22nd day of August, 2001.

3
4
5
6 By 

THOMAS R. C. WILSON, ESQ.

Nevada State Bar # 1568

JAMES C. GIUDICI, ESQ.

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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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Honorable Nancy Saitta
Eighth Judicial District Court
of the State of Nevada,
in and for the County of Clark
200 S. Third Street
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FILED

AUG 22 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY DEPUTY CLERK

12
13 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

14 *****

15
16 **FRANCHISE TAX BOARD OF THE STATE
OF CALIFORNIA,**

17 **Petitioner,**

18 **vs.**

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

21 **Respondent,**

22 **and**

23 **GILBERT P. HYATT,**

24 **Real Party in Interest.**
25

Case No.: 36390
Consolidated with Case No. 35549

RESPONSE TO ERRATA

**CONFIDENTIAL INFORMATION
FILED UNDER SEAL**



1 The envelope attached to this document contains the Franchise Tax Board of the State of
2 California's Response to Errata in the above-referenced matter. The Response to Errata contains
3 certain information, the subject of which may be precluded from public disclosure pursuant to the
4 Protective Order entered by the District Court in this case. The Protective Order is one of the matters
5 raised in the FTB's Discovery Writ Petition before this Court.

6 Dated this 22nd day of August, 2001.

7
8 McDONALD CARANO WILSON McCUNE
BERGIN FRANKOVICH & HICKS

9
10
11 By 

12 THOMAS R.C. WILSON
13 JAMES C. GIUDICI
14 BRYAN R. CLARK
15 JEFFREY A. SILVESTRI
2300 West Sahara Avenue, Suite 1000
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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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Honorable Nancy Saitta
Eighth Judicial District Court
of the State of Nevada,
in and for the County of Clark
200 S. Third Street
Las Vegas, NV 89155

Dated this 22nd day of August, 2001.

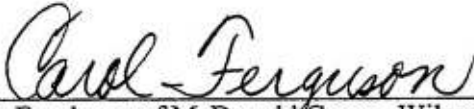

An Employee of McDonald Carano Wilson
McCune Bergin Frankovich & Hicks LLP

EXHIBIT 38



Caution
As of: October 8, 2019 11:04 PM Z

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

[HNI](#) [📄] 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

AA002491

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., concurring 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.

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 [NRCF 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

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.

[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.](#)

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

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

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

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).

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

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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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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OPINIONS BELOW

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 protest¹ 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.³ (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

³ 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. "Taxes 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.

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EXHIBIT 40

No. 02-42

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner.

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

Respondents.

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

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IN THE
Supreme Court of the United States

No. 02-42

**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 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

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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

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.

II

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.

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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
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Respondents.

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

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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, 232-33 (1998), involved a personal injury lawsuit between private parties. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 (1988), and *Phillips Petroleum 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

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

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ATTORNEY GENERAL

NO. 1751 P. 13/14

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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.² In this case the unexpected has occurred and only this Court can respond to it.

² 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.

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CONCLUSION

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

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P.14

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EXHIBIT 42

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 15, 2004

Mr. Donald T. Rula
Richard C. McKelvie
300 S. Grand Ave., Suite 2900
Los Angeles, CA 90071-1179

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

Dear Mr. Rula:

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

The petition for a writ of certiorari is granted.

Sincerely,



William E. Butler, 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](#).

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*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 protest¹ 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 entitles 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 Petroleum 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 Petroleum 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 law: 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 Cardozo, *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 Full 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 determine 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, effective review and investigation necessarily involves some out-of-state review; however, the out-of-state investigation 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 assessments¹⁷, (2) establishing a taxpayer's cause of action for a tax agency's failure to follow published procedures¹⁸, 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.

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.

(i)

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IN THE
Supreme Court of the United States

No. 02-42

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

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