IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, HONORABLE NANCY SAITTA, District Judge, Respondent, and GILBERT P. HYATT, Real Party in Interest.	Supreme Court Case No. 36390

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF PURSUANT TO N.R.A.P. 29 AND FOR LEAVE TO FILE LATE BRIEF

The Multistate Tax Commission (the "Commission"), by and through its counsel, Marquis & Aurbach, hereby move this Honorable Court for leave to file its Amicus Curiae Brief pursuant to N.R.A.P. 29 and for leave to file a late Brief.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Commission is an organization of state tax agencies that seeks to work cooperatively with taxpayers to equitably and efficiently administer tax laws that apply to multistate and multinational commerce. Although the time periods for filing of briefs expired some time ago, the Commission was prevented from learning the nature of the lawsuit because of a protective order. In early January 2001, the Commission obtained pleadings filed in the United States District Court, which apparently were not subject to the protective order. It was only then that the Commission had the opportunity to evaluate and examine the potential implications of this case on multistate taxation issues. After reviewing the pleadings, it became apparent that the

consequences of this Court's decision whether or not to grant comity would directly impact the interests of the Commission and its membership. The Commission received the necessary authorization to file a Brief in this matter two weeks ago. The Commission thereafter prepared and now seeks with leave of this Court to file its Brief.

II. ARGUMENT

The Court should permit the Commission to file its Amicus Curiae Brief. N.R.A.P. 29 provides that an Amicus Curiae Brief may be filed upon leave of court upon the showing of: (1) the interest of the applicant; and (2) the reasons why the brief is desirable. Moreover, the Court "for good cause shown may upon motion...permit an act to be done after the expiration of such time." N.R.A.P. 26(b); *see also* N.R.A.P. 29.

Considering the interest of the Commission and circumstances that prevented it from filing a timely Brief, this Court should respectfully grant the instant Motion. First, the Commission has a significant interest in the issues to be decided in this case. Second, the Commission's Brief should be considered because it presents unique issues for the Court's consideration, most likely not addressed by the parties. Third, good cause exists to allow the late filing of the Commission's Brief, because the Commission was prevented from the learning of the true nature of the matter because of a protective order and did not learn of the significant issues involved and received authority to file the Brief approximately two weeks ago. Therefore, the Commission respectfully requests that this Court consider its Amicus Curiae Brief.

A. THE COMMISSION HAS SUFFICIENT INTEREST IN THE MATTER AT BAR.

In the instant matter, the Commission has a substantial interest in the outcome of the captioned matter to justify the granting of leave to file its Brief. The Commission, is a government entity consisting of cooperating member states.[1] The United States Supreme Court has recognized one of the Commission's stated purposes — ***"facilitating proper determination of state and local tax liability of multistate taxpayers***." *U.S. Steel Corp. v. Multistate Tax*

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[1] In all, 45 states (including Washington, D.C.) participate in the Commission.

Commission, 434 U.S. 452 (1978) (emphasis added). In addition to recognition by the Supreme Court, 21 States (including Washington, D.C.) have codified The Multistate Tax Compact into their respective statutes.

The Commission serves the important interest of facilitating cooperation between the various States regarding tax issues. The Commission represents the interests of its member States in requesting that this Court grant leave to file its Brief. Given that the Commission and its member States' interests are directly at issue in this case, this Court should consider the Commission's Brief.

B. THE COMMISSION'S BRIEF IS DESIRABLE BECAUSE IT PRESENTS UNIQUE ISSUES FOR THE COURT'S CONSIDERATION.

The Amicus Curiae Brief addresses multistate tax implications most likely not addressed or even foreseen by the parties. The Commission understands that the parties' dispute arises from a tort action against the Franchise Tax Board of the State of California (the "Board") by a taxpayer who claims that a change in residence exempts him from California taxes.[2] The Brief does not address the merits of any motion to dismiss, but rather a *public policy* argument that this Court should grant comity to California regarding this matter because of state and federal consequences. Because of its role in multistate tax issues, the Commission's perspective is unique in comparison to that of the litigants.

Should the Court assert jurisdiction over this matter and refuse to grant comity, the decision will potentially destroy ongoing efforts of the various States to modernize and simplify their tax systems. The Commission does not believe any compelling State interest would be served by the Court asserting jurisdiction in this matter. In fact, Nevada's interest, as well as that of all other States, will be harmed if this Court allows interference with a sister State's tax audit processes. Moreover, the ***Executive Director of the Nevada Department of Taxation, does not object to the filing of the Commission's Brief***.[3] Given the potential danger to Nevada and its

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[2] The Commission has obtained copies of pleadings filed in the United States District Court for Nevada, which it believes are not the subject of any protective order.

[3] When contacted by the Commission, the Executive Director of Taxations stated that he had no objection to the Commission's filing of an Amicus Curiae Brief.

sister States, and in deference to California's law, this Court should grant leave to consider the Commission's argument for comity.

C. THE COURT SHOULD GRANT LEAVE TO FILE A LATE BRIEF.

Generally, Amicus Curiae Briefs must be filed within the time allowed to the parties to file Briefs. *See* N.R.A.P. 29. However, for cause shown, the Court shall grant leave for a later filing. *See* N.R.A.P. 26(b) and 29. In the instant matter, significant cause exists to support a late filing.

Because of the protective order, the Board was not allowed to seek the Commission's assistance in this matter in any way that would allow for a substantive evaluation of the merits of the respective positions of the parties. Moreover, the Protective Order prevented the Commission from filing a timely Amicus Curiae Brief. The Commission did not learn of the general nature of the case until it finally obtained the pleadings in this case. Thus, disadvantaged by the protective order, the Commission could not timely file its Brief.

Although the Commission understands that its Brief is being tendered at a late juncture, the issues involved are of such a nature that, *had the matter not been subject to a protective order*, and *had the Commission been aware of the matter sooner*, it would surely have timely filed its motion for leave to file an Amicus Curiae Brief. Through no fault or dilatory act of its own, the Commission was not able to learn of the matter in the time normally allowed by the Court for the filing of an Amicus Curiae Brief. Given the potentially far-reaching effects of this Court's decision, and given the circumstances, the Brief should be allowed to be filed late.[4] It is therefore respectfully submitted that this Court should allow the late filing of the Commission's Amicus Curiae Brief for cause shown.

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[4] However, the Commission does not request to participate in oral arguments in this matter.

DATED this _____ day of March, 2007.

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MULTISTATE TAX COMMISSION'S BRIEF OF *AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission ("Commission") files this brief pursuant to N.R.A.P. 29, as *amicus curiae* in support of the Franchise Tax Board of the State of California ("Board").[1] The Commission submits that *this Court should extend comity to the State of California*. Nevada's exercise of jurisdiction here could significantly weaken our federal union by adversely impacting the current, but fragile, cooperation of the States in the administration of state taxes.[2]

A. CONSEQUENCES OF THIS DECISION.

The exercise of jurisdiction in this case could unnecessarily[3] create antagonism and suspicion among the States over state tax matters and unnecessarily[4] dampen expanded utilization of joint or cooperative auditing. The first of these unfortunate developments would impact the ease with which States reach mutual understanding and accommodation among themselves in state tax matters with multistate impact. The second would impede the progress toward lessening tax agency administrative burden and taxpayer compliance burden. Overall, Nevada's exercise of jurisdiction would be to the detriment of cooperative federalism in state taxes.

Unilateral action in the area of state taxes without sensitivity to the needs of, and consultation with, other States is fast becoming an anachronism. The modern economy has little room for unilateral state action. Without this recognition and a focus on the need for a more *national* state tax system, States are at the risk of suffering diminished state tax sovereignty.

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[1]The Commission notes at the outset that it has not had access to the record of this matter, due to the issuance of a protective order that has not been reviewed. However, the Commission has had access to the collateral record of the removal proceedings that occurred in the U.S. District Court for the District of Nevada, which were apparently not covered by the protective order. The Commission files its *amicus* brief because there are important policy concerns that pertain to the nature of the claims being brought, which may not be apparent from the precise facts of this case.

[2]The Commission emphasizes discretionary comity. The Commission itself operates through the voluntary cooperation of the States participating in the multistate tax matters that come before it.

[3]The Commission uses the word "unnecessarily" because it has been unable to identify any compelling interest of Nevada that could justify incurring the identified risks.

B. **THE COMPACT.**

The Commission's view arises from the experience that led to the adoption of the Multistate Tax Compact, MULTISTATE TAX COMPACT, STATE AND LOCAL TAXES: ALL ST. TAX GUIDE ¶701 *et seq.* (1995) ("COMPACT"). The COMPACT serves as the organic instrument that formed the Commission in 1967.

The specific purposes of the COMPACT include:

? Facilitation of proper determination of state and local tax liability of multistate taxpayers;

? Promotion of uniformity or compatibility in significant components of tax systems;

? Facilitation of taxpayer convenience and compliance; and

? Avoidance of duplicative taxation.

COMPACT, art. I, *supra*.

C. **THE COMMISSION.**

In simple, but accurate terms, the Commission promotes "Our Federalism"[1] by attempting to arbitrate the competing interests of the supreme Federal Government and the several States and to mediate the sometime fractious interaction of the States themselves. The Commission performs its functions through the power of persuasion. Since the Commission has no power of compulsion, it must rely upon the voluntary cooperation of the States. In the end, participating States must recognize their own long-term self-interest that prompts the needed voluntary sovereign act.

1. **<u>Formation of the Commission.</u>**

The National Association of Attorneys General and the National Legislative Council proposed the COMPACT, an interstate agreement, to the States in 1966. *See* Crawford & Uzes,

[1]*Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (stating that "['Our Federalism'] represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' . . , occupies a highly important place in our Nation's history and its future.")

Income Taxes: The Distinction Between Business and Nonbusiness Income ¶ 1140.02.D., p.4 (1996). The founding States then adopted the COMPACT in 1967 and the Commission was created to promote substantial reform in state taxation of commerce among the States. Without this voluntary reform, States believed it would be difficult to preserve their recognized tax sovereignty over interstate (and now foreign) commerce. In fact, increased cooperation among the States was necessary to reduce compliance burdens and to avoid Congress exercising its power under the Commerce Clause to regulate state taxation heavily. The States themselves viewed the proposed congressional regulation as inconsistent with the continued vitality of the States as important partners in our federal form of government. *See* D. Brunori, *Interview: Gene Corrigan, a 'Proud Parent' of the MTC*, 17 STATE TAX NOTES 1295 (November 15, 1999).[2]

2. **Commission Activities.**

The Commission undertakes several activities to fulfill its purpose and to assist in the preservation of state tax sovereignty. While the Commission's activities are too expansive to list, the following activities serve as an example of the Commission's role.

? **Multistate Auditing:** Multistate auditing allows an interstate company to be audited once for several States thereby avoiding the inconvenience of multiple separate audits by different individual States. As is discussed later, relief of the multiple state tax audit burden is one of the goals States seek in cooperative federalism in the administration of state taxes. *See infra* p. 15.

? **Alternative Dispute Resolution:** Alternative dispute resolutions of multistate tax issues offers the potential to gather the taxpayer and the affected States into a single forum — a collection of parties that is otherwise not reasonably available to either the taxpayer or the States. As a result of this program, the Commission, while not having to conduct a formal ADR proceeding, has been instrumental in

[2] The concern over possible regulatory and/or preempting federal legislation arose from the Willis Committee, a congressional study of state taxation mandated by TITLE II, PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959). The Willis Committee made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce. *See generally* INTERSTATE TAXATION ACT: HEARINGS ON H.R. 11798 AND COMPANION BILLS BEFORE SPECIAL SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMM. ON THE JUDICIARY, 89th Cong., 2d Sess. (1966).

promoting agreement among a taxpayer and two States that were seeking to tax the same income of an individual.

? **National Nexus Program:** This Program encourages voluntary disclosure by taxpayers that assists taxpayers to assure themselves that they are in compliance with state filing requirements.

? **Nationwide Standards:** The Commission is facilitating the adoption of a nationwide standard of a numeric code, which identifies taxing jurisdictions for purposes of applying, among other things, state sales and use taxes to mobile telecommunications. Congress assigned this role to the Commission and the Federation of Tax Administrators in the Wireless Telecommunications Sourcing Act, Pub. L. 106-252, 114 Stat. 646, (codified at 4 U.S.C. §119(a)(2)(C) (2000)).[1]

? **Lobbying:** The Commission actively lobbies the legislative and executive branches of the Federal Government to ensure consideration of the effect that national policy initiatives might have on state taxation and the ability of the States to fulfill their function in our federal union. The results of this effort include substantial modification of proposed legislation, including, for example, the assignment of the role to develop nationwide standards.

? **State Support:** The Commission supports emerging cooperative federalism among the States in the area of state tax administration with multistate impact. The Commission's substantial support of the Streamlined Sales Tax Project ("SSTP"), is a prime and relevant example of this activity. *See infra* p. 8-9.

The Commission pursues its purposes and conducts its activities to ease the tension of "inconveniences" of a federal system of government with two different levels of sovereigns operating within their own spheres of influence. Federalism, the great invention of the American experience, allows for *national issues to be resolved nationally* and *local issues locally*. This

[1]The Mobile Telecommunications Sourcing Act was the product of intense, but cooperative, negotiations among industry, the Commission, affected taxing jurisdictions, and other national groups. In the end, the Act was adopted because industry recognized the revenue need of the taxing jurisdictions and the States recognized the need of the industry for a uniform taxing system in order to avoid undue compliance burdens.

form of government fulfills an important role in preserving the American democracy. *See Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991).

D. **THE TAXING POWER.**

The actual inconvenience of federalism which is of concern to the Commission is the necessary state taxing power. No one denies that States as governments need their own source of revenue — governments without revenue are governments that lack any possibility of governing. *See Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995) *(*quoting *Dows v. City of Chicago*, 78 U.S. 108, 110 (1871) (stating that "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible").

But having a need for revenue does not excuse States from blindly exercising their taxing power without regard to the needs of the national and international economy, though the U.S. Supreme Court has repeatedly indicated that the national and international economy should bear its fair share of taxes. *See, e.g.*, *Goldberg v. Sweet*, 488 U.S. 252 (1989). Thus, the Commission promotes mutual respect, trust, and voluntary cooperation in the adoption and implementation of tax policies impacting multijurisdictional commerce within the States. Presently, 21 party States (including the District of Columbia) have adopted the COMPACT as a part of their respective state statutory law.[1] Three States are sovereignty members, a class of membership that entitles States to full consultative membership without having enacted the COMPACT into the State's statutory

[1]Nevada was once a party State, but withdrew its membership over a dispute over which of the two competing States had the first right to assess a sales and/or use tax on sales occurring in interstate commerce. However, Nevada has recently re-joined cooperative state tax administration of interstate commerce by becoming a participating State in the Streamlined Sales Tax Project ("SSTP"). *See SSTP for the 21st Century*, (visited January 26, 2001) <www.geocities.com/streamlined2000>. The SSTP is a cooperative multistate effort to address many issues arising from the application of state sales and use taxes to interstate commerce, including the issue of determining which State has the right to impose a sales or use tax on a sale occurring in interstate commerce. The Commission has provided substantial support to this cooperative, multistate effort by contributing staff and other resources. The Commission is the only participating state organization whose primary organizational focus is on making state taxation of interstate commerce workable.

Before filing this brief, the Commission contacted the Executive Director of the Nevada Department of Taxation and he did not oppose the filing of an amicus brief supporting California.

law. Eighteen States have joined as associate member States to express their commitment to the goals of the Commission, although they have not enacted the COMPACT into their state law. Three additional States participate in projects undertaken by the Commission in furtherance of the COMPACT's objectives.[2] Most importantly, the U.S. Supreme Court upheld the validity of the COMPACT in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

ARGUMENT

This matter is appropriate for a discretionary grant of comity by this Court to the state of California for its own administration of its personal income tax. It is in Nevada's own best interest to use its discretion to grant comity to the State of California. First, comity should be granted to avoid undermining existing cooperative federalism in state taxation. The efforts now being undertaken cooperatively include initiatives having great significance to the revenues of the States and impacting the preservation of state taxing power in our federal union. We illustrate this point by reference to the experience of your *Amicus* and the development of the Streamlined Sales Tax Project ("SSTP"). *See SSTP for the 21st Century*, (visited January 26, 2001) <www.geocities.com/streamlined2000>. Second, the circumstances of this matter satisfy well-established conditions for an appropriate exercise of comity. Third, the relevant interests and reasonable expectations of the two parties-in-interest, including the acknowledgment that the Board represents not only the abstract concept known as the State of California but also all its residents, strongly favors comity. These considerations fully justify the discretionary grant of comity, even apart from the other legal bases that may be presented by the Board in support of a compelled dismissal of this action.

A.

[2]The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The three sovereignty member are the State of Florida, Kentucky, and Wyoming. The associate members are the States of Arizona, Connecticut, Georgia, Illinois, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, West Virginia, and Wisconsin. The project members are the States of Iowa, Nebraska, and Rhode Island. *See Multistate Tax Commission*, (visited Jan. 28, 2001) <www.mtc.gov/#membership> (illustrating the representation of States active in the Commission).

A. THE COURT'S DECISION SHOULD NOT UNDERMINE EXISTING COOPERATIVE FEDERALISM IN STATE TAX MATTERS THAT IS RESPONDING TO THE DEMANDS OF A GLOBAL MARKETPLACE.

Cooperative Federalism is a necessity in the modern world. Before addressing the Commission's concern that a failure to grant comity carries with it the risk of undermining existing cooperative federalism in state tax matters, we must first illustrate the existence of this cooperative federalism.[1]

The States' response to the threat of federal intrusion into state taxes led to the adoption of the COMPACT and brought about the formation of the Commission. The States also addressed the need to simplify state taxes whose complexity arose in no small measure from their diversity in form and substance from State to State. Among other things, States adopted the Uniform Division of Income for Tax Purposes Act, 7A UNIFORM LAWS ANNOTATED 331 (WEST 1985) ("UDITPA"), in whole or substantial part. The States also responded by forming the Commission under the COMPACT, which authorized systematic studies of state taxes, development of more uniformity in state taxes, assistance to the States in implementing the COMPACT and to taxpayers in their compliance obligation, and other necessary and incidental actions. *See* COMPACT. art. VI, ¶ 3. The Commission's accomplishments that reflect these assignments are described on the Commission's webpage. *See Multistate Tax Commission*, (visited Jan. 28, 2001) <www.mtc.gov>.

More recently, cooperative federalism has become increasingly important. The U.S. Supreme Court concluded that states may not impose a use tax collection obligation on a remote seller whose only contact with the taxing State is by common carrier or the U.S. mails. *See Quill v. North Dakota*, 504 U.S. 298 (1992). Equally as important, a very efficient method of remote commerce has emerged — the Internet.[2] Therefore, it immediately became apparent to many

[1]The Commission has already discussed above the cooperative federalism in state tax matters that followed the Willis Report. *See* n. 5 and accompanying text, *supra*.

[2]For an interesting description of the parallels that exist between the first and second phases of cooperative federalism, *see* Paull Mines, *Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales*

States that without some change in the compliance burden of sales and use taxes, the revenue of the sales tax was under significant threat.

The challenge presented by the changing marketplace prompted largely unsuccessful efforts to resolve the issue with business.[3] These failures prompted the States to realize that they held the keys to their own destiny — *if they worked cooperatively*. The States decided that *cooperatively* they could lessen the burden of complying with state sales and use taxes. This realization resulted in the formation of the SSTP. *See SSTP for the 21st Century*, (visited January 26, 2001) <www.geocities.com/streamlined2000> (stating its mission as developing "measures to design, test and implement a sales and use tax system that radically simplifies sales and use taxes").

The SSTP, ***of which Nevada is a member***, seeks to preserve individual state tax sovereignty, while at the same time lessening compliance burdens. The SSTP is organized in the spirit of cooperative federalism that promotes uniform understanding of sales and use taxes while still accommodating the peculiar interests of the individual States that are collectively determined to be worth preserving. Obviously, this process is dependent upon a great amount of mutual trust and good will among the participating States.

Examples of the SSTP's commitment to cooperative federalism include:

? a declaration of a commitment to cooperative federalism, Uniform Sales and Use

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and Use Tax Reform, 52 TAX L. REV. 581, 620 n.190 (1997).

[3]The failures included the State/Direct Marketing Association negotiations, *C. Douglas Prospects Dim for Prompt Accord Between Direct Marketers and States*, 13 STATE TAX NOTES 1235 (Nov. 17, 1997), 97 STN 219-42 (November 13, 1997) (visited January 28, 2001) <www.taxbase.org/>, and the failed National Tax Association's Communications and Electronic Commerce Project. *See C. Douglas NTA Electronic Commerce Project Approves Report*, 17 STATE TAX NOTES 627 (Sept. 13, 1999), 1999 STT 173-32 (September 7, 1999), (visited January 28, 2001) <www.taxbase.tax.org/>. Although the cited authority does not actually state the complete demise of the DMA negotiations, the parties in fact did not come together again to explore further possibilities of agreement. In the meantime, Congress passed the Internet Tax Freedom Act that was a part of Title XI of P.L. 105-277, the Omnibus Appropriations Act of 1998. The Advisory Commission on Electronic Commerce was formed under that Act. This federally chartered Commission also failed to gather sufficient votes to issue an official report, although a majority of the Commission nevertheless issued a discussion it called its report.

Tax Administration Act § 7 (as amended 01/24/01), (visited Jan. 31, 2001) <www.geocities.com/streamlined2000/fnlact1222.html>;

? collective or cooperative decision making, Streamlined Sales and Use Tax Agreement (as amended 01/24/01) ("Agreement"), *id.*, art. VIII, § 800 (amending agreement), art. III, § 300 and art. IX, § 902 (each State adopts required conditions that are cooperatively established), and art. VII (membership collectively determined); and

? clear anticipation that joint or collective auditing may be used. *See* Agreement art. III, § 302.

In essence then, the Act and the Agreement rely completely on the continued cooperation of the member States as separate sovereigns to respond to the need of a nationwide system of sales and use taxation that meets the needs of the modern economy.

The point of describing the experiences of the Commission and the SSTP is not to suggest that these initiatives apply directly to state administration of the personal income tax and examinations of taxpayers flowing from that tax. Rather, these events are clear evidence that States have pursued and continue to pursue coordination of significant state tax matters through cooperative federalism and that the matters being pursued are significant and important.

It is therefore respectfully suggested that this Court should be reluctant to embark upon an interpretation of comity that could hinder cooperative federalism. Any ruling that the Nevada courts will entertain an individual taxpayer's direct challenge of a sister State's administration of its own tax in the absence of a compelling (Nevada) State interest has great potential to unsettle the State community. Cases of this sort may well initiate a cycle of increased conflict among the States that would undermine the growing level of cooperative federalism in state tax matters. The impact of any such development on preserving a vibrant state taxing power with respect to matters having multistate implications are clear.[4]

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[4] We cannot leave this discussion without noting that California is not a participating State in the SSTP or the recent

B. CONDITIONS JUSTIFYING A DISCRETIONARY GRANT OF COMITY EXIST IN THIS MATTER.

Dismissal based upon the grant of comity is a discretionary act, while dismissal based upon the strictures of the Full Faith and Credit Clause and/or constitutional choice of law principles is a compelled act. Even though this argument is limited to the former, the considerations that lead to the latter are necessarily intertwined in the determination of whether discretionary comity should be granted. Indeed, compelled dismissal is grounded in comity. *See Nevada v. Hall*, 440 U.S. 410, 421 (1979) (recognizing a possibility of a mandate for federal court enforcement of interstate comity).

Although compelled dismissal is grounded in comity, the holding of *Nevada v. Hall* does not establish any restriction on a State granting discretionary comity to a sister State. "[The States] are free to do so." *Nevada v. Hall*, 440 U.S. at 426. The observations in *Nevada v. Hall* may even suggest some suasion in support of granting comity to another State's claim of sovereign immunity. Thus, the Supreme Court noted that the Framers of the Constitution presumably believed it likely that one State's courts on a principle of comity would not entertain a claim against the sovereign interests of another State. *See id.* at 419. The Court also noted, "It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability." *Nevada v. Hall*, 440 U.S. at 426.

The Nevada Supreme Court has also recognized the importance of comity. *See Mianecki v. Second Judicial District Court*, 99 Nev. 93, 658 P.2d 422 (1983). "[C]omity is a principle

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action taken by the National Conference of State Legislatures, an advisory body to state legislatures. *See NCSL*, (visited February 1, 2001) <www.ncsl.org/programs/press/2001/pr012901.htm>. We believe these circumstances indicate how fragile cooperative federalism is within the SSTP and the need for all interested States to foster its strengthening. We acknowledge that having California as a participating State in the SSTP would greatly increase the probability of success for simplified state sales and use taxes. We would thus hope that the decision in this matter would not cause California to have suspicions about the good intentions of other States.

The effect of NCSL's non-binding actions on the SSTP is unclear at this time. It has been reported to some that some States will proceed with the Uniform Sales and Use Tax Administration Act and the Streamlined Sales and Use Tax Agreement without regard to the non-binding action of NCSL. What other States may do in light of this development is as yet undetermined. But here again, differences over the scope of the SSTP among different leaders within the several States suggest the fragile nature of cooperative federalism within the SSTP.

whereby courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction ***out of deference and respect***." *Mianecki*, 99 Nev. at 98, 658 P.2d at 425 (emphasis added). Moreover, the principle is invoked by the sound discretion of the court acting without obligation. *See id.* Where it is not contrary to the policies of Nevada, comity should be afforded to sister states. *Id.*

These comments take on added significance in the present day. The U.S. Supreme Court has moved decidedly in the direction of preserving the sovereign immunity of the States since *Nevada v. Hall*. *See Alden v. Maine*, 527 U.S. 706 (1999) (finding that the provision in Fair Labor Standards Act authorizing private actions against non-consenting State in state court is an unconstitutional abrogation of state sovereign immunity); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (concluding that federal Trademark Remedy Clarification Act did not validly abrogate state sovereign immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (recognizing that federal Age Discrimination in Employment Act did not validly abrogate states' sovereign immunity from suit by private individuals); *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) *(*interpreting the *Ex Parte Young* doctrine and acknowledging that an exception to state sovereign immunity could not be applied in action implicating special sovereign interests); *Nat'l Private Truck Council, Inc. v. Okla. State Tax Comm'n*, 515 U.S. 582 (1995) (finding that federal courts may not entertain state action under federal Civil Rights Act, nor may state court do so for injunctive or declaratory relief; whether state court may entertain damage action not established).

Taken together, these developments suggest greater deference to claims of sovereign immunity by a sister State. Considerations of modern federalism indicate that it ought not to be just the *legitimate* interest of the forum State but a *compelling* interest of the forum State that would led it to dispatch the acting State's claim of sovereign immunity. But apart from these powerful, preliminary comments we note that there are strong policy reasons that suggest that *granting comity in this case is in Nevada's own best interest.*

C.

C. STRONG NATIONAL AND STATE PUBLIC POLICY FAVORS THE GRANT OF COMITY.

Granting comity would further the public policy of Nevada, its sister states, and tax administration. In contrast, refusing to grant comity would be counter-productive to national and state public policy.

1. California Would Grant Comity to Nevada.

California would grant comity to Nevada under circumstances similar to those at bar. Cal. Gov't. Code §860.2 provides that no entity is liable for any injury caused by any act interpreting or applying a tax. Thus, were the acts of a Nevada auditor examining for liability under the Nevada sales and use tax made the subject of a tort claim in California, California (in light of Nevada's sovereign immunity for discretionary acts, *see* NRS §§ 41.031 and 41.032) would undoubtedly not take the case. California would have no legitimate, *let alone compelling*, state policy to vindicate in light of its absolute immunity for "acts or omissions in the interpretation or application of any law related to tax." Cal. Gov't. Code §860.2(b).

2. There is No State Policy That Favors Preserving a Tax Audit Claim Against Another State.

Nevada has not adopted any legitimate, let alone compelling, state policy suggesting that it would wish to preserve for its residents a claim against a sister state for a tax audit. Nevada has not waived its sovereign immunity for a "discretionary" act as distinguished from "operational" acts. *See* NRS §41.032. Nevada's waiver of sovereign immunity was not intended to allow tort claims whenever a state employee makes a discretionary decision. *See Hagblom v. State Dir. Of Motor Vehicles*, 93 Nev. 599, 604, 571 P.2d 1172 (1977) (finding the manner of conducting internal agency investigations immune as discretionary acts of agency).

This Court has defined a discretionary act as:

> [T]hat "which require[s] the exercise of personal deliberation, decision and judgment." A ministerial act is an act performed by an individual in a prescribed legal manner in accordance with law, without regard to, or the exercise of, the judgment of the individual.

Foster v. Washoe County, 114 Nev. 936, 942, 964 P.2d 788, 792 (1988) (quoting *Pittman v. Lower Court Counseling*, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994), *overruled on other grounds by Nunez v. City of North Las Vegas*, 116 Nev. Adv. Op. 63, 1 P.3d 959 (Nev. June 9, 2000). Under this standard, a tax audit by a state auditor cannot be viewed as an operational act. *The mere determination as to whether to conduct an audit is a discretionary act*, to say nothing of the manner and extent of any audit that is actually undertaken.

Thus, were this same type of case involving different taxes (like Nevada's sales and use tax) to arise solely in Nevada with respect to a Nevada tax audit, it is respectfully submitted that Nevada courts would not entertain the claim.[5] There is simply no way a State could convert an audit into an operational act, given that the audit itself necessarily turns on what the specific issues are and how best to resolve these issues in the most expeditious way that reflects the taxpayer's level of cooperation. This is not the type of case where Nevada can reasonably determine that it would permit recovery against itself under similar circumstances, a condition commonly examined in state cases determining whether to grant comity with respect to a sister's State's claim of sovereign immunity. *See Schoeberlein v. Purdue University*, 544 N.E.2d 283, 288 (Ill. 1989); *Daughtry v. Arlington County*, 490 F. Supp. 307, 312-13 (D.C. 1980); *Head v. Platte Co.*, 749 P.2d 6, 9-10 (Kan. 1988); *Haberman v. Washington Public Power Supply Systems*, 744 P.2d 1032, 1066 (Wash. 1987); *Biscoe* v. *Arlington County*, 738 F.2d 1352, 1357 (D.C. Cir. 1984); *Morrison v. Budget Rent A Car System, Inc.*, 657 N.Y.S.2d 721 (N.Y. App. 1997); and *Struebin v. State*, 322 N.W.2d 84, 87 (Iowa 1982), *cert. denied*, 459 U.S. 1087 (1982).

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[5]A similar case could arise in Nevada in the context of Nevada's own sales and use tax. Thus, a Nevada auditor could undertake a background examination to determine whether a Nevada resident had made a sizeable purchase that had not previously been subjected to the Nevada sales and use tax but that potentially was subject to that tax. In the course of the audit, it might be necessary for the auditor to make a disclosure of the item in issue in order to make a proper determination as to whether a taxable sale had in fact occurred. The taxpayer might view that disclosure as an invasion of privacy or some other tortious act. The State's position would be that the disclosure was necessary to make the required audit determination. Not granting comity in this case is tantamount to acknowledging that this kind of official act would be subject to a potential tort claim within Nevada and that the immunity for a discretionary act would not be available as a defense.

This Court has concluded that Nevada is willing to acknowledge that a similar failure of Nevada's own state court supervision program would give rise to a tort claim in Nevada. *See Mianecki*, 99 Nev. 93, 658 P.2d 422. This Court in *Mianecki* apparently rested its ruling on the conclusion that a State sending a probationer into another State under the policies of the Interstate Compact for Supervision of Parolees and Probationers had *no discretion* not to perform certain acts. *Id.* The Interstate Compact sought protection of the community through rehabilitation with adequate controls and intelligent supervision. *Id.* at 97. These strong policies did not allow the sending State any discretion in determining whether it should investigate where the sexual offender was going to live in the receiving State and whether to warn those with whom the offender was going to reside of the probationer's prior offenses. *Id.* Therefore, ***unlike this case***, the acting State had an "operational" duty so to inquire and to give notice in all events in *Mianecki*. *Id.*

3. <u>Without Comity, Nevada is Susceptible to Unnecessary Liability.</u>

Denying comity in this case would indicate that Nevada is willing to face the prospect of being subject to a tort claim in another State for the actions of its own tax auditors in that other State.[6] The denial of comity here would also mean Nevada would accept facing the possibility of a tort claim in the State of Oregon out of a sales and use tax audit examining the acquisition of an item arising in the State of Oregon.[7] Oregon is referred to because it does not have a sales and use tax, while Nevada does. In making its determination of comity, this Court should respectfully not base its conclusion upon the differing tax policies of California (with its personal income tax) and Nevada (without a personal income tax). ***Comity based upon differing state tax policy is a treacherous road to follow***.

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[6] It is not entirely clear (because of the protective order) that the taxpayer, in the instant matter, can establish that the alleged tortious acts of California even occurred in Nevada.

[7] Nevada might want to determine if the "sale" of the item occurred in Oregon or Nevada or whether the item had been shipped to Nevada and was thereby subject to the use tax.

4. **Nevada Should Cooperate With its Sister States.**

This matter involves the state taxing power, an essential power of governance by the States in our federal union. *See supra*. While this power is easily characterized as necessary for a State to fulfill its "sovereign responsibilities" within the meaning of note 24 of *Nevada v. Hall*, our point here is not to suggest a mandatory obligation to dismiss this action under the Full Faith and Credit Clause. That argument is for the Board to make. Rather, our argument with respect to discretionary comity is respectfully to suggest that dismissal, in the instant matter, sends the appropriate message to other States that *Nevada seeks to foster cooperation, promote harmony, and build goodwill in state tax matters*. That kind of message can only inure to the benefit of Nevada and the other member States of our federal union.

5. **Comity Promotes Cooperative Auditing.**

The failure to exercise comity will have a chilling affect on the movement toward more joint or cooperative auditing among the States. Cooperative auditing reduces the burden of state tax administration that allows for a more efficient government and the burden of taxpayer compliance that avoids multiple, disruptive individual state tax audits.

The COMPACT promotes the use of cooperative auditing. *See* COMPACT, art. VIII. The SSTP also foresees the need for this approach. *See* Agreement, art. III, sec. 302, (visited January 31, 2001) <www.geocities.com/streamlined2000>. In this regard, the Court should also note one legislative proposal of the last Congress that likely will be reintroduced in the current U.S. Congress. This proposal seeks to authorize state sales and use taxation of remote commerce that makes authorization subject to the condition, among others, of allowing the business being audited to have a single, nationwide audit. *See* Internet Tax Moratorium and Equity Act, §4(a)(10), S. 2775, 106th Cong. (2000) (visited January 31, 2001 <www.thomas.loc.gov/>.

There may be reluctance on the part of States to participate in cooperative audits if forum States decide they should deny comity for state tax audits of sister States undertaken to enforce

the tax laws of the sister States. This Court is invited to consider a cooperative audit with nine participating States ("acting States") that choose to examine the activities of a taxpayer in a tenth State ("forum State"). If the joint auditor pursues a course of examination that the taxpayer alleges is tortious, may the taxpayer make a claim against all nine acting States in the tenth or forum State? Is it necessary to determine for which State the auditor was acting when the alleged tortious act occurred before any claim might be brought? Would the action be brought against only that State? How would the forum State evaluate the impact of differing rules of each of the nine acting States as to sovereign immunity and/or actions that may be taken in the course of an audit examination? In the absence of clear answers to these issues, is it likely that the risk management agency of a State would recommend that cooperative auditing be avoided except in the rarest of circumstances? The diminished use of cooperative auditing flowing from these concerns would be detrimental to the interests of all States that seek to maintain taxing jurisdiction over multijurisdictional commerce by ensuring that taxpayer compliance becomes less burdensome.

6. **Comity Promotes Sound Tax Administration.**

Principles of sound tax administration that require an exhaustion of remedies counsels great care in deciding not to grant comity. Handling claims of the type brought by this taxpayer will only interrupt proper handling of the tax protest. The tort claim here is inextricably tied to the determination of whether the taxpayer's claimed change of residence is valid and, if so, the date of the change. To understand differently is to conclude that the merits of the claimed change in residence would have no impact on the tort claim — a condition that cannot be satisfied in this instance. The Complaint, a copy of which was attached to the Board's removal petition, challenges the legitimacy of the Board's audit itself.

The taxpayer apparently recognizes the reality that the paramount question revolves around the validity of the claimed residence change. His First Cause of Action seeks a determination of whether the taxpayer was a resident of Nevada at the relevant times. We also

note, the taxpayer alleges he is concerned about the Board's continued actions in his tax matter and with respect to his claimed change in residence. *See* Complaint ¶¶ 17, 21, 22, and 23. If the validity of the claimed change in residence is related to the tort claims, then a final determination should be made as to the validity of the claimed change in residence that presumably is the subject of the full and fair hearing of the taxpayer's protest or protests.

D. RELIANCE INTERESTS AND REASONABLE EXPECTATIONS OF THE REAL PARTIES-IN-INTEREST FAVOR CALIFORNIA.

A long-time resident taxpayer of a State cannot reasonably have the expectations that are an inherent part of the claims the taxpayer is bringing in the instant suit. Any sophisticated resident with access to professional advisers would understand that a claimed change in residence occurring a few days before the receipt of a substantial amount of income would likely be examined by audit. The resident would also appreciate, depending upon the amount of income at issue, the audit could conceivably extend to an examination of the bona fides of any identified address in the new State of residence. In essence, the new address claimed by the taxpayer would become the central focus of the audit.

Additionally, the taxpayer would be charged with knowing the law of the State of the old residence. In California's case, this law includes many provisions authorizing audit procedures for issues involving a change in residence. *See* Cal. Rev. & Tax Code §§ 17014, 19501, 19504 and 19545;[8] Cal. Gov't. Code § 11189. The taxpayer similarly should appreciate any claim of sovereign immunity that the State of the old residence establishes. *See* Cal. Gov't. Code § 860.2.

Any taxpayer with a claimed change of residence in these circumstances could not reasonably anticipate that the law of the State of the new residence would govern the manner and extent of the audit examination to be undertaken by the State of the old residence. Any other understanding is incompatible with the federal union of cooperating sovereigns that "Our

[8]We understand that a California classifies an audit examination as a administrative proceeding.

Federalism" envisions. It is hardly in the interest of a viable federal union to be proposing a concept of comity that could lead to individual States choosing to frustrate the application of their sister State's tax laws through direct intervention in the sister State's administration of its own tax laws. It is one thing to adopt tax laws that encourage others prospectively to take advantage of the tax climate that exists in a State. However, it is quite another to intrude directly upon the sovereign authority of another's States administration of its very own tax laws.

Finally, the interests of the State of California reflect the interest of all its residents. The Board owes an appropriate examination of the facts of any claimed change in residence to be fair to all other residents who pay taxes because of the benefit of the organized society offered by California. Fairness in this sense is not the sole province of the taxpayer in this case.

CONCLUSION

The Commission respectfully submits that this Court grant comity to the State of California. Growing comity is in Nevada's best self-interest and indeed in the interest of all States in our federal union. The executive branch of ***the State of Nevada committed to cooperative federalism*** through its promulgation of an executive order authorizing Nevada to become a participating State in the

Streamlined Sales Tax Project. Exec. Order (Nov. 13, 2000). We hope that the judicial branch of the State of Nevada will similarly subscribe to the values of "Our Federalism" by dismissing this action as an act of comity.

Dated this ____ day of February, 2001.

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CERTIFICATE OF FRANK M. FLANSBURG, III, ESQ.,
PURSUANT TO N.R.A.P. 28(A)

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

Frank M. Flansburg III, Esq., being first duly sworn deposes and says:

1. I am an associate with the law firm of Marquis & Aurbach, a member of the State Bar of Nevada.

2. I have read and fully considered the Amicus Brief on behalf the Multistate Tax Commission.

3. To the best of my knowledge, information and belief, the Commission's brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

4. The Commission's Amicus Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of N.R.A.P. 28(e).

5. FURTHER THIS AFFIANT SAYETH NAUGHT

Dated this _____ day of February, 2001.

_____
Frank M. Flansburg, III, Esq.

SUBSCRIBED AND SWORN to before me
this ___ day of February, 2001

_____
NOTARY PUBLIC in and for said
County and State

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2001 that I served a copy of the foregoing **Interest of *Amicus Curiae*** and **Motion for Leave to File Amicus Curiae Brief Pursuant to N.R.A.P. 289 and for Leave to File Late Brief** by enclosing same in a sealed envelope upon which first class postage was fully prepaid and sending copies via facsimile, addressed to the following:

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