No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,
PETITIONER,

V.

GILBERT P. HYATT,
RESPONDENT.

On Writ of Certiorari
to the Supreme Court of Nevada

BRIEF AMICUS CURIAE OF
ALAN B. MORRISON & DARIEN SHANSKE
IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by the petition is whether this Court's decision in *Nevada v. Hall,* 440 U.S. 410 (1979), should be overruled. Amicus agrees that *Hall* correctly held that Nevada was subject to suit in the courts of California and that the Nevada statute limiting the liability of the State in that situation to $25,000 did not preclude the judgment of $1,150,000 entered by the California courts. The principal reason why *Hall* was correctly decided is that the accident that injured the plaintiff in *Hall* occurred on California roads as a result of the negligent driving of an

[1]This brief is filed pursuant to blanket consents provided by all parties. No person other than an amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

employee of the University of Nevada (a state institution) who was driving a university vehicle on university business at that time. No principle of constitutional law allows one state to immunize itself for wrongful conduct of its agents in the territory of another state. Nor does a state's limit on the amount of damages that it can be assessed in its own courts carry over to the courts of another state. Having chosen to send its employee into California, the State of Nevada had no constitutional basis to object to being sued in California, nor to having California applying its laws compensating victims for injuries that the Nevada employee caused there.

But this case involves facts very different from those in *Hall*, where the events giving rise to liability all occurred in California, the same state where the suit was brought. In this case, by contrast, most if not all of the allegedly wrongful conduct giving rise to the judgments based on claims of fraud and intentional infliction of emotional harm occurred in California, not in Nevada where this case was brought. Because of this difference, this Court need not decide whether *Hall* should be overruled, but if it does reach that question, *Hall* should be re-affirmed.

However, there are very troubling aspects of the rulings below that should not stand. This case is an effort by respondent to recover damages for what he considers to be highly improper treatment of him by agents of petitioner Franchise Tax Board. Petitioner is the entity responsible for deciding disputes about how much an individual such as respondent must pay in California income tax for the time when that individual was a California resident. Because the focus of the appellate record in this case was not directed at the location of the conduct that respondent alleged gave rise to his claims, a remand may be necessary to make a final determination of where the alleged wrongful conduct took place. But assuming that most if not all of it occurred in California, there are two separate, but inter-related reasons why petitioner, which is an agency of the State of California, could not be sued over these claims in Nevada.

First, the Nevada courts had no authority to tell petitioner – under pain of paying damages for disagreeing – how to conduct its audit proceedings regarding respondent's California income tax liabilities for the period when respondent was a California resident. The Nevada courts properly rejected respondent's efforts to have them determine the residence question that was at the center of the California litigation, and they also should have rejected respondent's effort to set down the rules by which petitioner must conduct its audits. Due Process precludes Nevada from applying Nevada law to the conduct of petitioner arising out of its audit of respondent's taxes where that conduct did not take place in Nevada. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 822 (1984). Just as Nevada could not legitimately dictate to California the rules by which Nevada residents drive their cars in California, so too Nevada cannot, under the guise of protecting its citizens, tell petitioner what it may and may not do outside Nevada in auditing respondent's California tax returns. Because the judgments below were founded on an unconstitutional extra-territorial application of Nevada law to proceedings before a California state agency, they cannot stand. [2]

Second, as is required for every case, unless waived, there must be personal jurisdiction over the defendant. The question presented does not include a claim of lack of personal jurisdiction, but that does not necessarily preclude the Court from deciding the case on that basis. In any event, the Court's personal jurisdiction jurisprudence has changed since this case began over twenty years ago, and it would be appropriate for the Court to remind state courts that the rules regarding personal jurisdiction apply to suits against government entities as well as those against corporations and individuals.

Under this Court's recent decisions, general jurisdiction would not be available against petitioner since it is plainly "at home" only in

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[2] Respondent was a Nevada resident when this case was brought, but he was indisputably a California resident for at least the first nine months of 1991. His claim that he became a Nevada resident in October 1991 is the basis of the tax dispute pending before petitioner. As a result of the audit that petitioner conducted for 1991, it concluded that respondent did not become a Nevada resident until April 1992, and so asserted income tax liabilities against him for that portion of 1992. The legitimacy of that assertion is not at issue in this case. As far as amicus can determine, the alleged wrongful acts by agents of petitioner related to both tax years, and so for reasons of simplicity, this brief will treat all of the alleged wrongful conduct as arising from the audit of his 1991 California income tax return.

California. While there previously might have been a basis under *International Shoe v. Washington,* 326 U.S. 310, 317 (1945), to obtain general jurisdiction over the Franchise Tax Board or the State of California itself based on their "continuous and systematic" activities in Nevada, that test no longer suffices for general jurisdiction. The only option available for respondent would be specific jurisdiction, which would require that the factual basis for his claims arise from, or be directly related to, activities of petitioner in the State of Nevada. While there appear to be some acts undertaken by agents of petitioner in Nevada, they fall far short of being sufficient to support respondent's broad claims for fraud and intentional infliction of emotional harm whose locus is in California. The heart of respondent's claims involved conduct relating to petitioner's examination of respondent's tax return which were initiated in California, although their effects may have been felt by respondent in Nevada after he moved there. Those effects, however, are not sufficient to sustain specific jurisdiction over the vast majority of the claims here. *See J. McIntyre Ltd. v. Nicastro,* 564 U.S. 873 (2011); *Walden v. Fiore*, 571 U.S. 277 (2014). At the very least, specific jurisdiction can be upheld only based on a close analysis of petitioner's activities in Nevada and their relations to the claims that respondent had made.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE REVERSED.

A. *NEVADA V. HALL* WAS CORRECTLY DECIDED.

There is nothing problematic about the outcome in *Nevada v. Hall.* The facts involved a commonplace automobile accident in California in which the driver of the car that injured the plaintiff was from out of state and suit was brought in a California state court. At least since *Hess v. Pawloski,* 274 U.S. 352 (1927), there would be no question of personal jurisdiction over that defendant. The driver in *Hall* was an employee of the University of Nevada, a state university, who was driving a university car on university business at the time of the accident. For that reason, the complaint named the University and the State of Nevada as defendants. There would have been no question of immunity from suit by any of the defendants if the driver had been employed by a private university or by the University of California. This Court correctly ruled in *Hall* that no different outcome was required because the State of Nevada was a defendant.

In addition to all of the immunity cases cited by the majority in *Hall*, that decision is consistent with basic principles of law as well as common sense. Those principles include the right of each state, subject to limits in the Constitution, to establish the laws that apply within its territory.

Those laws include those creating liability for wrongful or negligent acts in that state, and so Nevada could not, for example, object that California's speed limits were too low or that its law provided for comparative and not contributory negligence. The same principle applies to the laws making a principal responsible for the acts of its agent or the owner of a car liable for the negligence of a person who was authorized to drive it. When Nevada chose to send its employee into California, Nevada could not object to non-discriminatory California laws, including that the employer of the negligent driver was legally responsible for the harms that the driver caused.

The fact that Nevada did not "consent" to be sued in California courts for this accident was irrelevant. If Nevada does not like those California laws, it can simply not allow its employees to drive there, and its decision to send its employee to California is all the "consent" that the Constitution requires for the court where the accident took place to obtain personal jurisdiction over the out-of-state driver and the owner of the vehicle. *Hess*, 274 U.S. at 356 (upholding "implied consent" to suit against out-of-state driver). Thus, the decision in *Hall* sustaining the right to sue Nevada on account of the accident at issue there was plainly correct and should not be overturned. Indeed, without the protections of *Hall,* California citizens, injured in their own state by employees of other states, would be forced to sue in a state which has no relation to their injury and be subject to the laws and immunities of the other state.

There was a second immunity claim in *Hall* that was also properly resolved for essentially the same reason. Under Nevada law, the State was not liable for damages in excess of $25,000 if the suit had been brought in Nevada. The State argued that the cap on liability was a form of immunity and that it had to be honored by California courts. That defense was also properly rejected. Just as Nevada cannot export any absolute immunity it might have under Nevada law, it cannot export any limits on the amount of damages that it has "consented" to pay when the conduct giving rise to its liability occurs outside of Nevada. Surely, if Nevada had a law like the federal Westfall Act, 28 U.S.C. § 2679(b), under which federal employees are not liable for their torts, but the United States is, the employee who committed a tort outside the state could not rely on that law to claim immunity in the courts of that other state. The converse situation, reflected in the facts of *Hall,* does not require a different result.[3]

[3] As this Court previously ruled in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016), if California had a limit on liability applicable either to employers generally or to the State as employer, that level of protection would also have had to be afforded to Nevada in *Hall.*

B. *HALL* DOES NOT SUPPORT THE JUDGMENT IN THIS CASE.

1. The Nevada Courts Could Not Constitutionally Apply Nevada Law to Proceedings Before a California State Agency.

The heart of respondent's liability claim is that petitioner behaved so badly toward respondent in conducting the audit of his 1991 California income tax return that it must pay him $100,000 in damages. That assessment of petitioner's conduct in pursuing the California audit was based solely on Nevada law, as respondent never claimed that petitioner had engaged in conduct that violated California law. In *Hall*, all the relevant acts of the defendant occurred in the state where the case was brought, and the courts applied the law of the state where those acts occurred. However, in this case, respondent's Statement of the Case from his brief the last time that this case was before this Court (reproduced in the Addendum) shows that the vast majority of the acts of petitioner's employees that allegedly caused harm to respondent took place in California, not Nevada, rendering the use of Nevada law unconstitutional as a violation of due process. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 822 (1984).

Those alleged wrongful acts fall into four geographic categories: (1) acts that took place wholly in California, such as inquiries from petitioner that were directed to respondent or third parties, that petitioner believed might have information relevant to respondent's income tax liabilities, when those persons were, at the time the inquiries were made, physically in California; (2) acts that emanated from California, but were directed to third parties outside of California, such as a request for information from, or a disclosure to, such persons; (3) a request for information made by an agent of petitioner in California directed to respondent in Nevada; and (4) acts taking place wholly outside of California, primarily in Nevada, such as the allegation that agents of petitioner peered into respondent's home, or rummaged through his garage, as part of their audit of respondent.

The essence of the disagreement between the parties relates to whether the manner in which petitioner conducted the audit of respondent's tax returns was proper, or constituted fraud or the intentional infliction of emotional injury on respondent. The Nevada courts found for respondent by applying Nevada law to adjudicate the legality of the manner in which a California agency reviewed respondent's tax returns, and in applying Nevada law, it erred. In these circumstances, with the exception of acts in category (4) above, the legality of petitioner's conduct should have been judged as a matter of California, not Nevada law. No case let alone any provision of the Constitution authorizes one state (Nevada) to dictate that its laws may apply to conduct that took place in the territory of another state (California), let alone that sought to mandate the manner in which that other state carried out an essential governmental function, here collecting the taxes owed to it. For this reason, the Court need not delve into any immunity that petitioner might have, but can set aside the judgment because Nevada unconstitutionally applied Nevada law to respondent's claims against petitioner based on conduct that took place principally in California.

The flaw in Nevada's attempted usurpation of the authority of California to enact the substantive laws that apply within its borders can be seen from *Pennoyer v. Neff,* 95 U.S. 714 (1874). In concluding that the state court there lacked personal jurisdiction in the original suit brought against Neff, the Court observed, in language fully applicable here, that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse." *Id.* at 720. Subject to any limits imposed by the Constitution, such as the Due Process Clause of the Fourteenth Amendment or the Privileges and Immunities Clause of Article IV, § 2, cl. 1, the State of California, just like Nevada and every other State, is free to conduct its procedures for the imposition and collection of income taxes owed to it by whatever procedures its laws provide. On that subject, the State of Nevada has nothing legitimate to say. The failure of the Nevada courts to recognize this principle resulted in a very significant judgment – in both financial and public condemnation terms – against petitioner for conduct that complied with California law and the

United States Constitution. That judgment must be reversed.

This Court has made clear that, while states have considerable latitude in deciding which state laws to apply in cases properly before them, the Due Process Clause does impose some outer limits. Thus, in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1984), this Court held that a Kansas state court could not constitutionally apply its law governing the rate of interest payable for late payments for royalties on leases held by the plaintiff class when "over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit" and the defendant was incorporated in Delaware and had its headquarters in Oklahoma. *Id.* at 815. That same Due Process limitation on applying Nevada law to tax audit proceedings that took place before a California state agency, and that related to liabilities under California law, should have, but did not, preclude the Nevada courts from applying its laws to acts, 97% of which occurred outside of Nevada. *See Franchise Tax Board of California v. Hyatt,* 538 U.S. 488, 494 (2003) (recognizing authority of Nevada to apply its laws, but only "with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders").

Surely, if the Nevada legislature enacted rules purporting to govern how the California Franchise Tax Board conducts its audits and other proceedings for individuals who claim Nevada residence, they would be struck down as an unconstitutional usurpation of the authority of California to control the proceedings before its own state agencies. Yet the effect of this tort judgment has precisely the same prohibited effect on petitioner and the state of California. As this Court observed in a case involving a conflict between a federal and a state regime, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959).

Another example of this Court striking down a state's attempt to apply its laws to conduct in another state is the decision in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003). The plaintiff had persuaded the state court to allow the jury to consider the acts of the defendant in other states under the law of the forum state in assessing punitive damages against the defendant. Among other rulings on punitive damages, the Court expressly rejected that extra-territorial application of the forum state law:

> A State cannot punish a defendant for conduct that may have been lawful where it occurred. [*BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996)] *supra,* at 572; *Bigelow v. Virginia,* 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of

> another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co. v. Head,* 234 U.S. 149, 161 (1914) . . .; *Huntington v. Attrill,* 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States").

State Farm, 538 U.S. at 421. If applying local law to out-of-state conduct offends due process when the defendant is a private company or individual citizen, it is surely more offensive to due process and federalism when the defendant is an out-of-state agency seeking to enforce its own laws.

A similar result, albeit in a different but related context, was reached in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). The Illinois statute at issue sought to regulate the means by which an out-of-state corporation made a takeover bid for an Illinois corporation (as defined by that statute). The law was challenged on federal preemption grounds, not relevant here, and Dormant Commerce Clause grounds, which formed the basis of setting the law aside. Three Justices concluded that the case was moot and hence did not reach the merits. A majority concluded that the law imposed an excessive burden on interstate commerce and therefore was invalid under *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970), while four Justices concluded that the Illinois law was invalid because it was "a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect." 457 U.S. at 642. The Court further observed that the "Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" and that the "limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Id.* at 642-43. These authorities make it clear that, if Nevada attempted to regulate, for example, the manner in which a California company dealt with complaints from its employees, it would be barred from doing so, even if the employee in question were a Nevada resident. Again, the extraterritorial intrusion on the sovereignty of another state here is even more improper because it was directed at an agency of another state.

The error of the Nevada courts in using Nevada law to judge the propriety of a California state tax audit can also be understood by applying what Nevada did here to the converse situation in *Hall*. Suppose that the Nevada speed limit at the time of the accident there was 75 mph, while the California had a limit of 50 mph where the accident happened. Could an employee of the State of Nevada successfully argue that he was entitled to drive at 75 mph instead of the 50 mph mandated by California? Of course not. Similarly, if a defendant in a negligence case in Nevada were entitled to six preemptory challenges in selecting a jury, that would not have entitled a Nevada defendant in a case like *Hall* to six challenges if California law provided for only three. For the same reason, if petitioner has different rules on discovery or cross-examination than does the comparable tax agency in Nevada, respondent would have no basis to argue that his Nevada rights are being violated, whether he does so in the proceeding itself or by way of collateral attack through a claim for money damages for petitioner's failure to follow Nevada law, as respondent did here.

The law in a related area confirms the illegitimacy of what the Nevada courts did here. This past term, this Court considered the question of whether a state could impose an obligation on out-of-state sellers of goods shipped into the state to collect a use tax that was lawfully owed by the purchaser who resided in that state. *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (2018). All nine Justices agreed that the prior ruling, under which that duty to collect was lawful only if the seller had a physical presence in the collecting state, was not a correct interpretation of the Dormant Commerce Clause. However, the Court divided over whether the prior ruling should be overturned because of their differing views over how to apply stare decisis there. In the course of agreeing that South Dakota could enforce its law, the Court did not overturn the requirement that there be a "nexus" between the conduct of the out-of-state seller and South Dakota. Rather, it found that the requirement was satisfied by the action of the seller in sending its products into South Dakota at the request of a South Dakota resident. *Id.* at 2099.

But suppose instead that South Dakota had sought to require out-of-state sellers to collect its use tax not only when sellers sent their products into South Dakota, but also when the South Dakota buyer took delivery at the seller's location in another state. That effort would fail because there would be no nexus between the actions of the seller and South Dakota, just as there was no nexus between what almost all of what petitioner's agents did during the audit of respondent's 1991 income tax return and the State of Nevada here.

Ironically, the Nevada courts refused to entertain respondent's efforts to have them declare that he was a Nevada, not a California resident during the disputed time period, but they nonetheless upheld his claim that Nevada law protected him from the acts of petitioner's agents in enforcing California's tax laws. The fact that Nevada sought to impose legal obligations on an agency of a sister state, rather than on a private party, only serves to make its effort to export its laws more of an affront to our federal system. Amici agree that there would be the required nexus between Nevada's laws and petitioner for those acts, such as peering into respondent's window, looking through his garbage, or making unlawful disclosures about respondent to Nevada residents, but they are few and far between among respondent's grievances against petitioner. To be sure, even if respondent does owe California for unpaid income taxes, that does not mean that petitioner was free to use any tactics it chose to collect the amounts owed. But to prevail on those claims, respondent must rely on the laws of

California, a federal statute, or the Constitution, and not Nevada law as he did here.

2. Properly Applying Principles of Personal Jurisdiction May Readily Resolve This and Other Similar Cases.

The grant of certiorari in this case is at least as important for future cases, in which other states may seek to impose their laws on the agencies of another state, as it is to enable petitioner here to avoid paying the $100,000 in damages (and perhaps attorneys' fees and costs) which the Nevada courts upheld. Accordingly, amici suggests that it would be appropriate for the Court to point out that the defense of lack of personal jurisdiction may now be available to state agencies to avoid having to decide the choice of law issue here, even if its applicability was less clear in 1998 when this case was filed.

Petitioner timely moved to dismiss for lack of personal jurisdiction over it in the Nevada state courts, but it withdrew that motion and hence the defense may not have been properly preserved. Moreover, whether that motion would have succeeded then is unclear. However, in the interim, the law of personal jurisdiction has evolved considerably in ways that make it much harder for plaintiffs to keep an out-of-state defendant in court. Amici recognize that the question presented in the petition does not include the personal jurisdiction defense, and they take no position on whether this Court could properly resolve this case on personal jurisdiction grounds, or whether it should remand the case for the Nevada courts to decide that question. In any event, the Court surely could make clear in its opinion that, in cases like this, the state court must assure itself that it has personal jurisdiction over an agency of another state.

Hall involved an automobile accident that occurred entirely in the jurisdiction in which the suit was filed, and so there was no issue of personal jurisdiction. By contrast, as described *supra* at 9-10, this case involves claims filed in a Nevada court, alleging that the actions by defendant's agents, largely in California, in the course of determining whether plaintiff owed certain California income taxes, constituted fraud and intentional infliction of emotional distress. The allegations of wrongs that took place in Nevada appear to be very minor parts of respondent's claim, and as such would not likely suffice to support personal jurisdiction over petitioner for the whole range of claims made by respondent.

In recent years, this Court has refined the constitutional limits on the law of personal jurisdiction and, in doing so, narrowed the circumstances in which general jurisdiction and, to a lesser extent, specific jurisdiction are available to bring in non-residents of the forum state. Beginning with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), followed by *Daimler AG v. Bauman*, 571 U.S. 117, 137-38 (2014), and then *BNSF Railway Co. v. Tyrell,* 137 S. Ct. 1549, 1558-59 (2017), the Court has made it clear that general jurisdiction for businesses, which presumably would include states and localities, is limited to where they are "at home." For them, the Court has ruled that, except in exceptional circumstances, general jurisdiction is limited to their place of incorporation and principal place of business.

For many years, the courts and many business defendants read *International Shoe* and its progeny to permit state courts to exercise general personal jurisdiction in cases in which the challenged conduct did not take place in the forum state, but the defendant was engaged in substantial business there. That is no longer true. The clearest example of the impact of this change in the understanding of general jurisdiction is from *BNSF v. Tyrell*. For years, the railroad, which was not at home in Montana, but had a substantial physical as well as business presence there, was sued, without objection, in state courts there by its employees for accidents that occurred outside of Montana. But it was not until the Court decided *Daimler* that the railroad took its objection to personal jurisdiction to this Court, which rejected the claim of general jurisdiction, ruling that the Montana courts had no personal jurisdiction over claims for injuries unless they occurred in Montana. *BNSF*, 137 S. Ct. at 1359. Thus, while there may have been a colorable claim for general jurisdiction over petitioner when this case was filed, based on California's extensive activities in Nevada, no such claim is likely to be viable today.

The absence of general jurisdiction would not be fatal if the Nevada courts had specific jurisdiction over respondent's claims, but that too seems unlikely. The essence of respondent's claims is that petitioner's agents committed numerous tortious acts against respondent during the course of its audit of his 1991 California income tax return. As discussed above, they fall into four geographic categories, but most of them occurred entirely or largely outside Nevada, even if their effects were felt by respondent when he was living in Nevada. However, there is little doubt that a claim that petitioner's agents, in the course of an authorized audit of respondent, invaded his privacy by peering into his windows or rummaging through his garbage, would give rise to specific jurisdiction over those claims to which the law of Nevada could properly apply.

The problem for respondent is that those specific acts were a tiny portion of his claims against petitioner during the four month trial as exemplified in the Addendum to this brief which is his statement of facts when this case was previously before this Court. Moreover, even if the Nevada-related facts created a tort for petitioner, they would likely to give rise to only very limited injuries and hence very modest damages, well below the $50,000 upheld by the Nevada Supreme Court on both of his claims. Indeed, one of the claims that was upheld was for fraud, which appears to be unrelated to these invasions of privacy, and the other – intentional infliction of emotional distress – would seem to require much more than these few acts to qualify under Nevada law, as explained by the Nevada Supreme Court in this case. *See Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 741 (Nev. 2017).

At the very least, if specific jurisdiction were to be based on those few acts, the claims based on them would have to be tailored to those acts, unless there were some specific connection made between the Nevada acts and those arising from conduct undertaken in California.

The middle categories – information requests or disclosures sent from California either to third parties or respondent – raise somewhat different specific jurisdiction questions. First, some acts – wrongful disclosures to Japanese companies doing business with respondent – might give rise to specific jurisdiction where the disclosures were made, as well as in California, but not in Nevada. Second, as for requests for information, amici are aware of no case that would confer personal jurisdiction in the state to which the request was directed (here, Nevada), but even if it did, the claim would be probably limited to harms that result directly from that request in Nevada and would not bring in all the other allegedly wrongful conduct that took place elsewhere, mainly in California. *See Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S.Ct. 1773 (2017) (rejecting effort to aggregate claims by non-residents of forum state with claims of residents over same drug and same injury). Third, the wrongful disclosures, if made in Nevada, would provide a jurisdictional hook for those claims, *Calder v. Jones*, 465 U.S. 783 (1984), but not the entire panoply of complaints that respondent presented to the jury at trial. Fourth, as for requests for information from respondent himself, a similar jurisdictional objection would also apply, but, as discussed above, the greater objection is that Nevada may not rely on its substantive laws to police the efforts of petitioner to audit the tax returns of respondent whose obligation to pay California income taxes was the basis of the audit.

Whether petitioner's defense of lack of personal jurisdiction was preserved, this Court should make it clear that states and their agencies are entitled to defend on grounds of lack of personal jurisdiction and that only specific not general jurisdiction may be used by plaintiffs suing in another state. Indeed, this Court should remind state courts that the first issue that they should address in future cases is whether the court has specific jurisdiction over each of the claims that the plaintiff has alleged. In cases like *Hall,* the answer will surely be that it has jurisdiction, but in cases like this, a much more focused inquiry, directed at the factual basis and geographic location for each claim, must be undertaken.

CONCLUSION

For the foregoing reasons, the decision in *Nevada v. Hall* should not be overruled, but the decision below should be reversed and remanded for further consideration in light of the decision by this Court.

Respectfully Submitted,

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September 18, 2018

ADDENDUM

BRIEF OF RESPONDENT (at 2-4) FRANCHISE TAX BOARD OF CALIFORNIA V. HYATT NO. 14-1175

STATEMENT

1. The issues in this case arise out of a state-law tort suit, one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute stemmed from a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." JA259, 265. According to testimony from a former Board employee, the auditor freely discussed personal information about respondent - much of it false - leading her former colleague to believe that the auditor had created a "fiction" about respondent. JA261, 263-65.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. JA267. After she had closed the audit, she boasted about having "convicted" respondent and returned to his Nevada home to take trophy-like pictures. JA253-55. The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. JA261, 267-68.

Within her department, Ms. Cox pressed for harsh action against respondent, including rarely issued fraud penalties. JA263. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *E.g.,* JA208-09, 213-23. And she often spoke coarsely and disparagingly about respondent and his associates. JA259-61, 265-67.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *E.g.,* JA224-45, 263. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. JA238-41, 243-45. The Board also disclosed its investigation to respondent's patent licensees in Japan. JA247-51.

The Board knew that respondent, like many inventors, had significant concerns about privacy and security. JA242. Rather than respecting those concerns, however, the Board sought to use them to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." JA277-78. Both Cowan and respondent himself understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. JA272, 274-75.