

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRANCHISE TAX BOARD OF :

4 CALIFORNIA, :

5 Petitioner, :

6 v. : No. 02-42

7 GILBERT P. HYATT, ET AL. :

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9 Washington, D. C.

10 Monday, February 24, 2003

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 11:02 a.m

14 APPEARANCES:

15 FELIX LEATHERWOOD, ESQ., Deputy Attorney General,

16 Los Angeles, California; on behalf of the

17 Petitioner.

18 H. BARTOW FARR, III, ESQ., Los Angeles, California; on

19 behalf of the Respondent.

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1 P R O C E E D I N G S

2 [ 11: 02 a. m. ]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in number 02-42, Franchise Tax Board of California  
5 versus Gilbert Hyatt.

6 Mr. Leatherwood.

7 ORAL ARGUMENT OF FELIX LEATHERWOOD

8 ON BEHALF OF PETITIONER

9 MR. LEATHERWOOD: Mr. Chief Justice, may it  
10 please the Court:

11 Respondent has prompted the Nevada courts to  
12 extend their authority over California's tax process. The  
13 Nevada court has said at Joint Appendix 138, the entire  
14 process, of FTB audits of Hyatt, including the FTB's  
15 assessment of taxes and the protests, is at issue in this  
16 case, end quote. This has been said to mean, at Joint  
17 Appendix 138, that the tax process is under attack.

18 This lawsuit interferes with California's  
19 capacity to administer these taxes. The administration of  
20 taxes is a core, sovereign responsibility from which all  
21 functions of State Government depend on. It is protected  
22 by immunity laws of common-law tort lawsuits, like the  
23 kind presented by Respondent.

24 California has invoked the protection of its  
25 immunity laws, but the Nevada courts have allowed

1 respondents laws to proceed, not by extending full faith  
2 and credit. And this refusal threatens our constitutional  
3 system for cooperative federalism in violation of Article  
4 IV, Section 1 of the United States Code.

5 QUESTION: Mr. Leatherwood, may I ask you a  
6 threshold question? Some of your friends in this case  
7 have invited an overruling of Nevada against Hall. Of  
8 course, California was favored by that decision. Do you  
9 join in the plea to overrule Nevada v. Hall, or do you say  
10 this case is different because it involves core sovereign  
11 functions?

12 MR. LEATHERWOOD: Justice Ginsberg, we do not  
13 join in the chorus to overrule Nevada v. Hall. This case  
14 is different. This case goes to footnote 24 of Nevada v.  
15 Hall. It's our feeling that Nevada v. Hall is good law in  
16 the sense that it does -- it does not implicate another  
17 state managing another state's core sovereign function.  
18 It's -- Nevada v. Hall was strictly an automobile  
19 accident.

20 QUESTION: But the comparison would be between  
21 the university, education, which was the -- which was the  
22 defendant, and the tax authorities. Both of those,  
23 education and tax, seem core. Or if you're going to  
24 compare the tort itself, it would be a comparison between  
25 negligent driving, on the one hand, and going into another

1 state and committing -- you know, peering through windows,  
2 going through garbage, totally wrongly getting all the  
3 neighbors to reveal private information, et cetera. So  
4 comparing the particular acts, what's the difference, or  
5 comparing sovereign functions, what's the difference?

6 MR. LEATHERWOOD: I mean, compared -- I thank  
7 you, Your Honor -- in comparing the sovereign functions --

8 QUESTION: Education versus tax.

9 MR. LEATHERWOOD: Yeah, and driving an  
10 automobile in another state's -- on another state's  
11 highway --

12 QUESTION: That's not the sovereign function.

13 MR. LEATHERWOOD: That's not --

14 QUESTION: I'm saying that --

15 MR. LEATHERWOOD: -- the sovereign function.

16 QUESTION: -- it seems like that's apples and  
17 oranges to me. That is, in the one case, we're looking at  
18 the acts they're complaining of, and here the plaintiff is  
19 complaining of acts that took place in Nevada that were  
20 miles outside what would be reasonable. I'm not saying  
21 he's right, but that's his complaint. In Nevada v. Hall,  
22 they were complaining about negligent driving. So what's  
23 the difference there?

24 Or, alternatively, in Nevada v. Hall, it was a  
25 driver who worked for a university, and here it is an

1 investigator who works for the tax board. So what's the  
2 difference there?

3 MR. LEATHERWOOD: Well, to answer the Court's  
4 question directly, the most significant difference is that  
5 the tax function is -- is much more significant than the  
6 education function.

7 QUESTION: Well, that's -- that -- that --that  
8 would be a very difficult premise for us to say, that  
9 education is somehow secondary.

10 MR. LEATHERWOOD: Well --

11 QUESTION: You're -- you're saying Nevada can't  
12 have a great university -- can have a great university by  
13 keeping its people within its own borders. They can't go  
14 to California to get information to solicit, to recruit  
15 students? That -- that would be a very difficult decision  
16 for us to write on that premise.

17 MR. LEATHERWOOD: No, Your Honor, I would agree  
18 with you that that would be a difficult --

19 QUESTION: For the State of California to argue  
20 that education is not a core state function is, to me,  
21 rather astounding.

22 MR. LEATHERWOOD: No, Your Honor, I'm not  
23 arguing that education is not a core sovereign function.  
24 What I'm arguing is that taxation is an essential core  
25 sovereign function since that education cannot move

1 forward --

2 QUESTION: Well, Mr. --

3 MR. LEATHERWOOD: -- to provide taxation.

4 QUESTION: -- Leatherwood, we -- this Court  
5 tried to follow a core state function test under the Tenth  
6 Amendment. And in Garcia, kind of gave it up, didn't it,  
7 as being an unworkable thing. Now, why would we want to  
8 resurrect that here? And why is it that you don't say,  
9 well, if the Court wants to overrule Nevada v. Hall,  
10 that's fine; I'll win. I mean, I don't understand your  
11 position. You're asking us to go back to a test that we  
12 rejected under the Tenth Amendment in Garcia, but you  
13 don't want to say, sure, if you want to overrule Nevada v.  
14 Hall, be my guest.

15 MR. LEATHERWOOD: Yes, Your Honor. Justice  
16 O'Connor, what we are attempting to say here is that this  
17 case is more analogous to this Court's jurisprudence in  
18 the area of the Federal Tax Injunction Act along the line  
19 of fair assessment -- the fair assessment cases, where the  
20 Court has directed that the Federal Government will back  
21 off on trying to manage state taxes.

22 QUESTION: There you have a specific act of  
23 Congress that tells the Federal Government to back off.  
24 And I don't believe you have any such thing here.

25 MR. LEATHERWOOD: But we do have the Full Faith

1 and Credit Clause, which directs that a state is to  
2 recognize the public acts of another state. And we do  
3 have an immunity law applicable here, and this directs  
4 that Nevada should respect the immunity laws of the State  
5 of California. And the immunity law, in this particular  
6 instance, provide absolute immunity for conduct as  
7 undertaken in a -- in a tax audit. Anything that's  
8 associated with tax audit, is protected.

9 QUESTION: But Nevada did recognize California  
10 law to the extent it was similar to Nevada's -- that is,  
11 saying you had immunity from the negligent acts. And then  
12 it went on to say, no, you don't have immunity from  
13 intentional acts, even though California law does give  
14 immunity from intentional acts. But surely you wouldn't  
15 go to the extreme that you would say someone could come  
16 over to Las Vegas from California and just beat up  
17 somebody because they haven't paid their taxes, would  
18 they?

19 MR. LEATHERWOOD: Absolutely, I agree with the  
20 Court on that point. The --

21 QUESTION: Why not?

22 MR. LEATHERWOOD: -- the extension of that --

23 QUESTION: Why do you agree on that point? I  
24 don't understand that?

25 MR. LEATHERWOOD: Because the extension of our



1 immunity law does not cover physical torts or torts --

2 QUESTION: Oh.

3 MR. LEATHERWOOD: -- outside the scope --

4 QUESTION: I see.

5 MR. LEATHERWOOD: -- of course, the scope of --  
6 of the -- the acts that are incidental to --

7 QUESTION: I see. So under California law,  
8 there would be -- that would be actionable; whereas, under  
9 Nevada law, here, what they're doing is actionable. You  
10 just want to use the California standard rather -- rather  
11 than the Nevada standard.

12 MR. LEATHERWOOD: Well, in fact, Your Honor, if  
13 they would use the Nevada standard, use the same standard  
14 that Nevada applies to its own taxing agencies, then this  
15 case would be on a hold. What Nevada has done in this  
16 particular case is that it has gone outside its own  
17 precedent and applied a different standard to California  
18 taxing agencies, and it's not --

19 QUESTION: But that's not what they're -- the  
20 Nevada court said, we're going to treat the tax collectors  
21 from anywhere who come in to our state and act here, and  
22 we're going to -- the Nevada Supreme Court said, we're  
23 going to apply our rule, and our rule is negligence,  
24 there's immunity; intentional, there isn't. So you're  
25 asking us to discredit or disbelieve the Nevada Supreme

1 Court when it said, the law we apply to tax collectors who  
2 act in this state is the same as we apply to Nevada tax  
3 collectors.

4 MR. LEATHERWOOD: Your Honor, I am not asking  
5 this Court to not believe the Nevada Supreme Court. But  
6 what I'm saying is that Nevada has published precedent, as  
7 recent as 1989, where it requires that a taxpayer forego  
8 bringing a lawsuit until they -- until there has been --  
9 until there's a resolution of all statutory procedures.

10 QUESTION: Oh, but this -- but Nevada Supreme  
11 Court, I thought, made very clear that what they were  
12 dealing with is tortious conduct, harassing conduct.  
13 They, in fact, refused -- Nevada Supreme Court refused to  
14 decide where this man was domiciled, because that would  
15 interfere with the ongoing procedure in California on the  
16 tax liability. I thought that the Nevada Supreme Court  
17 had made it clear that they were dealing with the way  
18 their resident is being harassed and not with where he was  
19 domiciled on a magic date.

20 MR. LEATHERWOOD: Your Honor, what has happened  
21 in this particular case, 97 percent of the conduct that  
22 occurred during the course of this audit occurred in  
23 California. And, quite naturally, what Nevada is -- what  
24 Nevada is doing is permitting Mr. Hyatt to go behind the  
25 actual tort and make a collateral attack on the tax

1 itself.

2 QUESTION: Well, that may be, but the that isn't  
3 the issue that we've got in front of us here. I mean, the  
4 question in front of us is not how far can the Nevada  
5 courts go in reviewing California's tax practice. The  
6 issue before us is, among others, in a claim of tort  
7 against your -- your operative in Nevada, for the manner  
8 in which the tax is collected is their absolute immunity.  
9 And, you know, maybe the Nevada courts are going too far  
10 in discovery, but that's not the issue in front of us.

11 MR. LEATHERWOOD: I would absolutely agree with  
12 the Court that the issue is whether or not Nevada was  
13 obligated to apply our immunity laws with respect --

14 QUESTION: All right.

15 MR. LEATHERWOOD: -- with respect to conduct  
16 undertaken incidental to this audit.

17 QUESTION: May I go back to Justice Stevens'  
18 question, because I'm not sure of your answer to it. What  
19 if the State of California passed a statute tomorrow  
20 morning saying the use of thumbscrews in tax collection is  
21 authorized? Is -- would your answer to Justice Stevens'  
22 question be that -- or wouldn't your answer to Justice  
23 Stevens' question be that if you went into Nevada and you  
24 used thumbscrews, you would be entitled, on your theory,  
25 to absolute immunity? Isn't that correct?

1                   MR. LEATHERWOOD: Your Honor, no. What I'm  
2 saying is that, under that particular theory, I do not  
3 think that you could pass law in the State of California  
4 that will essentially sanction a crime, and there was no  
5 crimes committed within the course of this audit.

6                   If the -- if an auditor commits an intentional  
7 tort, such as a burglary or a trespass in Nevada or in  
8 California, it's -- it's our position that that particular  
9 conduct is not incidental to --

10                  QUESTION: It doesn't matter. I mean, we're  
11 trying to get the -- we're trying to get the analysis of  
12 it, and I'm having exactly the same problem. Imagine that  
13 there, California did say there is absolute immunity, even  
14 if you beat somebody up, absolute tort immunity. Okay?  
15 Even for beating people up. Now, suppose they did have  
16 that; you could prosecute it as a crime. Now you're in  
17 Nevada, and they say, the plaintiff, he beat me up, he  
18 came across the state line, down from Lake Tahoe. He was  
19 in a bad mood, lost too much money at the casino, and he  
20 beat me up. All right? Now, can Nevada bring that  
21 lawsuit or not? That's, I think, what Justice Stevens'  
22 question was.

23                  MR. LEATHERWOOD: Well -- well, I understand  
24 that, Your Honor. My position is that even though that  
25 law does not exist in California --

1 QUESTION: Yes.

2 MR. LEATHERWOOD: -- but applying --

3 QUESTION: If it did.

4 MR. LEATHERWOOD: -- applying it -- my -- our  
5 particular theory --

6 QUESTION: Yes.

7 MR. LEATHERWOOD: -- that, yes, we -- then  
8 Nevada would be obligated under the Full Faith and Credit  
9 Clause to apply that particular law. But --

10 QUESTION: And, therefore, you could not bring  
11 the lawsuit in Nevada about somebody beating somebody up.

12 MR. LEATHERWOOD: If --

13 QUESTION: If that were the law in California.

14 MR. LEATHERWOOD: -- if that were -- if that was  
15 the case. But --

16 QUESTION: Yeah, okay.

17 MR. LEATHERWOOD: -- in this particular case,  
18 that's illegal in California and that's illegal in Nevada.

19 QUESTION: So how, then, do we reconcile that  
20 position, where we're back to our starting place, with the  
21 fact that he could bring an action if on his way down from  
22 Lake Tahoe in the state car, he happened to drive a little  
23 negligently and ran somebody over? I mean, that's Nevada  
24 v. Hall, just reverse the states.

25 MR. LEATHERWOOD: No, and we're agreeing with

1 Nevada v. Hall.

2 QUESTION: I know. So this is why we're having  
3 a problem. It's clear that if our tax collector, on his  
4 way down from Lake Tahoe, runs over a Nevada resident, the  
5 Nevada resident can sue and apply Nevada law.

6 MR. LEATHERWOOD: Yes, I --

7 QUESTION: You say, if, in fact, that same tax  
8 collector beats up somebody, and the California law is  
9 that you cannot sue, Nevada cannot apply its own law.

10 MR. LEATHERWOOD: That's not what I'm saying,  
11 Your Honor. I'm saying if that conduct -- if that conduct  
12 is connected to the actual audit itself, then it's  
13 protected. But what I'm saying, I cannot possibly see,  
14 under any possible theory, that a beating, that it -- that  
15 breaking into someone's house could actually be part of  
16 the assessment -- tax assessment process. If an auditor  
17 engages in that kind of behavior, the auditor is not  
18 covered under the absolute immunity. That is outside the  
19 scope of that --

20 QUESTION: Okay.

21 MR. LEATHERWOOD: -- of that statute.

22 QUESTION: And is the reason that the answer is  
23 different in the two cases, the reason that there is  
24 something special about tax collection or is the reason  
25 that there is a closer connection in the hypo of the

1 beating up for tax collection than the driving the  
2 automobile for tax collection?

3 MR. LEATHERWOOD: Well --

4 QUESTION: Which is it? Is it the nature of the  
5 tax collection or the nature of the activity which leads  
6 to the tort liability?

7 MR. LEATHERWOOD: Well, I think it's both, Your  
8 Honor. Well, first of all, tax -- tax collection, by  
9 definition, is an intrusion of someone's life. The  
10 allegations alleged here are principally invasion of  
11 privacy, disclosure of information, that sort of thing.  
12 Ninety-seven percent of that conduct occurred in  
13 California. You cannot possibly investigate or prosecute  
14 Mr. Hyatt's case without intruding into that tax --

15 QUESTION: Mr. Leatherwood, if I understand your  
16 position, it would be exactly the same if a hundred  
17 percent of the conduct had occurred in Nevada.

18 MR. LEATHERWOOD: Absolutely, Your Honor. That  
19 -- but -- but --

20 QUESTION: But the problem I have -- may I just  
21 ask this question. Assume there is a -- there's a  
22 difference between Nevada law and California law, as I  
23 understand it. Some things are actionable against a tax  
24 people in one state and not the other. Why is it, in your  
25 view, that if the same conduct had occurred six months

1 later, but by Nevada tax collectors instead of by  
2 California tax collectors, because he's been in both  
3 states and probably is subject to tax in both, Nevada  
4 would allow the suit against its own tax people but not  
5 allow it against the California tax people? Why does that  
6 make sense?

7 MR. LEATHERWOOD: Well, Your Honor, in this  
8 particular case, as I've indicated, according to our  
9 reading of Nevada precedent, published precedent, that  
10 they would not permit this lawsuit to proceed until the  
11 tax process has been concluded. With respect to -- to  
12 directly answer your question, it does not appear that  
13 Nevada would prosecute its own -- would permit a  
14 prosecution of its own agents in the case where the  
15 allegations are principally that there is an intrusion  
16 into Mr. Hyatt's life or that there --

17 QUESTION: Well, we understood the reasoning of  
18 the Nevada Supreme Court to say they would. I think -- I  
19 must have misread the opinion. Is that --

20 MR. LEATHERWOOD: No, absolutely not, Your  
21 Honor. I don't think you misread the opinion. What I  
22 think the Nevada Supreme Court said is that they will  
23 permit intentional tort prosecution of government  
24 employees. This case does not involve a government  
25 employee. This case involves a government agency itself,



1 a tax agency. And under Nevada law, you cannot proceed  
2 against the Nevada tax agency without first exhausting  
3 your administrative and statutory remedies to contest the  
4 underlying tax itself.

5 QUESTION: But certainly this sort of thing  
6 isn't the kind of thing you could have exhausted your  
7 remedies on, is it?

8 MR. LEATHERWOOD: Absolutely, Your Honor. In  
9 our -- in our -- it is our position that this entire --  
10 the entire lawsuit is linked up to our tax process,  
11 because the conduct that the Respondent is complaining  
12 about here is that the tax itself is -- the tax itself and  
13 the tax process is engaged in bad faith. And I would --

14 QUESTION: Now, what is -- was your answer to  
15 the question? Suppose that this tax collector were  
16 driving negligently in Nevada --

17 MR. LEATHERWOOD: Part --

18 QUESTION: Suppose the tax collector were  
19 driving negligently in Las Vegas. It's very important for  
20 the tax collector to go examine the record, and he's  
21 driving negligently. What --

22 MR. LEATHERWOOD: I think, under Nevada v. Hall,  
23 he would be -- he would be subject to negligent liability.  
24 It's not connected to a core silent function because the  
25 function here is -- the function here is a tax

1 investigation, whereas, driving is something that you can  
2 investigate independent of the tax process itself.

3 QUESTION: So suppose that we -- we conclude  
4 that footnote 24 does not provide sufficient guidance for  
5 us to have a stable jurisprudence and that you will lose  
6 unless Nevada versus Hall is overruled. Would you then  
7 ask us to overrule Nevada versus Hall?

8 MR. LEATHERWOOD: Your Honor --

9 QUESTION: I know you don't want to entertain  
10 that possibility, but suppose that's what we conclude.

11 MR. LEATHERWOOD: Well, we -- we've thought  
12 about this, Your Honor, of course, and we would accept a  
13 win, if that's the Court's direction, through overruling  
14 Nevada v. Hall, but it's our contention that the Court  
15 doesn't have to go that far to get -- to get to this  
16 point. The Court can literally analogize to the special  
17 protections that are provided to state tax systems within  
18 the federal system itself.

19 QUESTION: But then that, as I suggested  
20 earlier, is a difficult thing to do, because there are  
21 congressional statutes that mandate that here. And all we  
22 have is the Full Faith and Credit Clause. Now, perhaps  
23 you say that's sufficient, but isn't it possible that  
24 there might be other emanations of the Full Faith and  
25 Credit Clause, other than just footnote 24, or whatever it

1 is, in Nevada against Hall. I'm not talking about  
2 overruling it, but developing it, perhaps.

3 MR. LEATHERWOOD: Yes, Your Honor. I would  
4 agree with that. Of course, we think that Nevada's  
5 failure to recognize or give dignity to California's  
6 immunity statute is not only a violation of the Full Faith  
7 and Credit Clause, but is a hostile act, and this kind of  
8 hostility is contrary to our whole concept of --

9 QUESTION: What -- what about a congressional  
10 statute? That is, suppose the opinion read -- what would  
11 your objection -- I know you'll object to this possible  
12 opinion, and I want to hear what your objection is -- the  
13 opinion says they're complaining here, as far as we're  
14 concerned, with a serious tort, invasion of privacy, you  
15 know, a whole lot of really bad behavior, et cetera --  
16 they're complaining about that taking place by a  
17 California official in Nevada, and we can't really  
18 distinguish that from the automobile accident taking place  
19 in Nevada. They're both torts. They're both very bad --  
20 you know, this is worse conduct. Now, it's true that our  
21 investigation of this may interfere with California's tax  
22 authority's ability to sort of run investigations in  
23 general. But if that turns out to be a problem, a big  
24 problem, Congress can legislate.

25 MR. LEATHERWOOD: Well, that still creates --

1 that still creates the situation where Nevada is  
2 supervising and managing California's tax practices.

3 QUESTION: Back to activities happening in  
4 Nevada.

5 MR. LEATHERWOOD: Yeah. In this lawsuit -- this  
6 lawsuit is -- is being prosecuted -- is being investigated  
7 almost exclusively in California. The -- the intrusion  
8 here, the interference here, is that Nevada has permitted  
9 Mr. Hyatt to use this lawsuit both as a -- as a wall and a  
10 battering ram. It has almost suppressed the entire  
11 California tax investigation. It's creating an entire  
12 class of possible plaintiffs that can sue California just  
13 for literally going across the state line and making an  
14 inquiry as to whether or not a former California resident,  
15 a former California taxpayer, actually owes any taxes.

16 QUESTION: Well, they would have to show its an  
17 intentional -- whatever that means under Nevada law -- not  
18 just negligent wouldn't they --

19 MR. LEATHERWOOD: Well, the intentional act here  
20 is that California created a tax system in bad faith to --  
21 bad faith to extort an exit -- an exit tax from -- from a  
22 taxpayer.

23 QUESTION: I thought that, again, the Nevada  
24 Supreme Court said, we are not going to touch the question  
25 of where this man was domiciled. That's for California to

1 decide. What we are dealing with is this new thing. One  
2 allegation was trespass and going through the man's trash,  
3 and another was calling -- maybe the calls emanated in  
4 California -- calling people in Nevada insinuating bad  
5 things about this person. And that has nothing to do with  
6 where the man is domiciled. It's a question that  
7 California is deciding and Nevada says it won't touch.

8 MR. LEATHERWOOD: Yeah, and I would -- I would  
9 direct the Court to Joint Appendix 133, where -- where the  
10 Court would -- the Nevada courts have indicated that  
11 almost all the action in this -- in this lawsuit occurred  
12 in California. And --

13 QUESTION: Well, you -- you recognized that  
14 there were two trips into California.

15 MR. LEATHERWOOD: Actually, Your Honor --

16 QUESTION: I mean, to Nevada.

17 MR. LEATHERWOOD: Actually, Your Honor, I  
18 believe there were three trips, and they were short trips  
19 -- they were trips of extremely short duration.

20 QUESTION: And what was there about -- on one of  
21 those trips, there was a trespass on his property and  
22 rummaging through his trash.

23 MR. LEATHERWOOD: Well, that's not part of --  
24 that's not part of the allegations of the -- of the  
25 complaint itself. The complaint is saying that --

1                   QUESTION: It was a more -- a more general  
2 interference with his privacy, but those were examples  
3 that were alleged, if not in the complaint, somewhere.

4                   MR. LEATHERWOOD: No, there has been deposition  
5 testimony that there -- on one of the trips, that the  
6 investigator looked at the timing of Mr. -- of  
7 Respondent's trash delivery and also looked at --  
8 determined whether or not Respondent was receiving any  
9 mail at that particular location. That does not justify  
10 the pervasive nature and the extent in which this lawsuit  
11 has reached into California and literally attacked the tax  
12 process.

13                   And, once again, I will refer the Court to the  
14 Joint Appendix at page 60, where it is alleged that the  
15 California tax system itself is a -- is a fraud -- that  
16 is, put together in bad faith for the specific purpose of  
17 extorting an exit tax from former residents who -- as they  
18 leave California.

19                   Well, if the Court has no more questions in this  
20 regard, I would like --

21                   QUESTION: Do you want to reserve your time, Mr.  
22 Leatherwood?

23                   MR. LEATHERWOOD: -- reserve the balance of my  
24 time, thank you.

25                   QUESTION: Very well.

1 Mr. Farr, we'll hear from you.

2 ORAL ARGUMENT OF H. BARTOW FARR

3 ON BEHALF OF RESPONDENT

4 MR. FARR: Thank you, Mr. Chief Justice, and may  
5 it please the Court:

6 In our federal system, it's recognized that the  
7 states will sometimes have overlapping jurisdiction. When  
8 that happens, the Constitution allows each state to apply  
9 its own laws against the background principle of comity  
10 where they believe it would be appropriate to defer to the  
11 laws of another state. And I submit that the Nevada  
12 courts here have applied these principles very carefully.

13 Nevada, of course, correctly held that they were  
14 not required to apply California's legislative-created law  
15 of immunity. At the same time, however, they have applied  
16 principles of comity to strike out the declaratory  
17 judgment count that would have gone to the very issue that  
18 is being contested in the Florida -- excuse me -- in the  
19 California tax proceeding, which is the date that  
20 Mr. Hyatt moved to Nevada. And they have also given  
21 California complete immunity for any negligence that it  
22 has committed.

23 So in this case, it seems to me, the system is  
24 working --

25 QUESTION: Mr. Farr, can I ask you, do you think

1 they were compelled by the Full Faith and Credit Clause to  
2 grant immunity on the negligence claim?

3 MR. FARR: That's an interesting question,  
4 Justice Stevens, because Nevada officials themselves have  
5 immunity. There would be a question, I suppose, of  
6 whether the Full Faith and Credit Clause requires that.  
7 My general feeling is probably not, but that is really not  
8 a question so much of whether -- a choice of law between  
9 California law and Nevada law, but simply a question of  
10 what Nevada law would apply. So I don't think that the  
11 Full Faith and Credit Clause itself speaks to that issue,  
12 but I do think principles of comity will traditionally  
13 reach that result. And, in fact --

14 QUESTION: Well, are principles of comity  
15 dictated by the Constitution? Suppose --

16 MR. FARR: They are --

17 QUESTION: -- suppose Nevada said they were not  
18 going to grant comity?

19 MR. FARR: That's correct, yes. And I don't  
20 think there is a federally enforceable law of state  
21 comity, but I think that is the system that has existed  
22 essentially between sovereigns for much longer than the  
23 United States is --

24 QUESTION: Well, is it your position then the  
25 private plaintiff can always bring suit against a state in



1 the courts of another state?

2 MR. FARR: Well, the first question, of course,  
3 is whether the court has legislative -- the first Full  
4 Faith and Credit question is whether the court in which  
5 the suit is brought has legislative jurisdiction. So  
6 there is a requirement that that state have  
7 constitutionally sufficient contacts with the law --

8 QUESTION: Well, then under due process. Well,  
9 that's easy to satisfy.

10 MR. FARR: So assuming that they've satisfied  
11 that, they are entitled to bring a suit. Then the  
12 question is whether the state -- and I -- and I believe at  
13 that point the state is free to apply its own laws to  
14 protect its own interests. I think that's what the Full  
15 Faith and Credit Clause allows. And it is the doctrine of  
16 comity that provides the acknowledgment of the state --  
17 the other state's interests. And that's typically, in  
18 fact, what's happened since Nevada --

19 QUESTION: It's very --

20 MR. FARR: -- versus Hall --

21 QUESTION: -- it's very odd to me that  
22 California can't be sued in its own courts and it can't be  
23 sued in a federal court, but it can be sued in a Nevada  
24 court, which, if we follow that declension really has the  
25 -- has the least interest in maintaining the dignity of

1 the State of California.

2 MR. FARR: Well, there are two -- two factors  
3 here, Justice Kennedy. First of all, there is the fact  
4 that Nevada has some very real interests of its own, its  
5 own sovereign interests to protect here. I mean, there  
6 have been torts which were both committed in Nevada and  
7 directed at a Nevada resident. So, to begin with, before  
8 one gets to the immunity question, Nevada, as a sovereign  
9 state, has important interests in assuring compensation  
10 and also in deterring that kind of conduct. So the idea  
11 that a legislatively created immunity by another state  
12 should be able to prevent Nevada from protecting those  
13 interests seems inconsistent with the federal system

14 Now, if one goes beyond that to the question of  
15 inherent immunity, the very idea that a state should have  
16 to be subject to sue in the courts of another state, I  
17 think, first of all, as you know, we don't believe that  
18 issue is properly presented on the question presented in  
19 this case. But if you would like me to address it just  
20 for a moment, I think there -- there are differences if  
21 one looks to the -- to the way that the -- essentially  
22 immunity has been resolved in -- in the course of -- of  
23 the United States.

24 First of all, in its own courts, it has the  
25 common-law immunity based on the idea that it is both the

1 king being sued in its own court, and also typically it is  
2 also the progenitor of the law, so to speak, to Justice  
3 Holmes' point.

4 In the United States, there's -- the courts of  
5 the United States, there's a very specific situation. At  
6 the time of the convention, the states were, obviously,  
7 forming a new sovereign, and the question of whether that  
8 sovereign was going to grant them the immunity they had in  
9 their own courts or whether that sovereign would be in the  
10 same position essentially as foreign sovereigns typically  
11 were, which is that they did not have to provide  
12 sovereignty except as a matter of comity. That's The  
13 Schooner Exchange opinion.

14 But -- so the states, at that point, had a very  
15 real interest in deciding that question, and they did, in  
16 fact, decide that question, as the court has recognized.  
17 That is not true with respect to the immunity that they  
18 have had in the courts of other states.

19 QUESTION: Is -- how does Alden fit into this?  
20 In Alden, I take it the court now -- we've held that a  
21 citizen of Maine suing in the State of Maine's courts  
22 alleging that Maine had violated a federal law can't do  
23 it. Sovereign immunity. Right? That's Alden.

24 All right. Suppose the citizen of Maine walks  
25 into a New Hampshire court and brings the same lawsuit

1 against Maine, assuming New Hampshire has appropriate  
2 jurisdiction under its own laws.

3 MR. FARR: Uh-huh.

4 QUESTION: Do we get a different result?

5 MR. FARR: Okay, I think that is not a question  
6 that is within the notion of the question in this case.

7 QUESTION: No, no, well --

8 MR. FARR: I'm sorry. I --

9 QUESTION: -- you see, what I --

10 MR. FARR: Excuse me.

11 QUESTION: -- nonetheless, although --

12 MR. FARR: No, I --

13 QUESTION: -- what I'm trying to do is -- is  
14 sort out what, in my mind, are a set of impossible  
15 anomalies, and that's why I ask you that question.

16 MR. FARR: I'm sorry. I started to answer in  
17 the wrong way.

18 QUESTION: Go ahead.

19 MR. FARR: What I -- I reserve, of course, the  
20 point, always, that I don't believe this is within the  
21 question presented.

22 QUESTION: Yeah, yeah, of course.

23 MR. FARR: But I actually was going -- what I  
24 meant to say is that I don't think it's the same kind of  
25 question in the sense that I think still when you're

1 talking about enforcement of a federal cause of action in  
2 another state, that is still really a federal-state  
3 question.

4 QUESTION: See, but --

5 MR. FARR: That's still --

6 QUESTION: -- your answer, then --

7 MR. FARR: -- an evolving question.

8 QUESTION: -- your answer to my question is  
9 Alden cannot be avoided simply by the Maine citizen  
10 walking into a New Hampshire court and bringing the same  
11 case.

12 MR. FARR: That's correct.

13 QUESTION: All right.

14 MR. FARR: I think that is --

15 QUESTION: And I would guess that's right.

16 MR. FARR: -- still a federal-state --

17 QUESTION: All right, assuming that's right --

18 MR. FARR: -- I think that is still a federal-  
19 state issue.

20 QUESTION: -- assuming that's right, now, look  
21 at the tremendous anomaly, which you were just about to  
22 address, and I want to be sure you do. Our citizen of  
23 Maine walks into the New Hampshire court and sues the  
24 State of Maine under federal law. And the answer is, he  
25 can't do it because of sovereign immunity. Our citizen of

1 Maine does the same thing, but this time his cause of  
2 action is state law. And now you say he can do it.

3 MR. FARR: That's right. And --

4 QUESTION: And the only difference between the  
5 two cases is that his cause of action is federal law in  
6 the first case, and he can't sue the state; but state law  
7 in the second case, and he can, which, of course, means  
8 that the law of New Hampshire binds Maine in a way that  
9 federal law cannot. Now, that, to me, I just can't --  
10 that, to me, seems so anomalous that -- that I'd like an  
11 explanation --

12 MR. FARR: Well --

13 QUESTION: -- if you can give it. And you see  
14 how I'm thinking of it as connected here, because the  
15 facts here are just part of that general anomaly.

16 MR. FARR: That's correct. Actually, Justice  
17 Breyer, I think that's something that the court, to some  
18 extent, addressed in Alden itself --

19 QUESTION: Uh-huh.

20 MR. FARR: -- in distinguishing the opinion in  
21 Nevada versus Hall, when it noted that when you get into  
22 the situation of a state being sued in the courts of  
23 another state and, as in Nevada versus Hall, under a state  
24 cause of action, you have now implicated the sovereignty  
25 of a second sovereign. So when one is now looking at the

1 -- at the issues of sovereign immunity, one is looking at  
2 a different platform of issues and also at a different  
3 historical base.

4 QUESTION: But that seems to make their case  
5 even harder. It would be difficult to conceive that the  
6 framers thought that Virginia could be sued in  
7 Pennsylvania but not in a federal court. I would think  
8 that the presumption would be that this was an even  
9 stronger case for the exercise of sovereign immunity than  
10 when all of the citizens of the union are involved as in  
11 the Alden situation --

12 MR. FARR: Well, I think that --

13 QUESTION: -- in the Eleventh Amendment.

14 MR. FARR: I mean, I think that there are two  
15 things going on. I mean, first of all, the question is  
16 not whether they can be sued, but if not, why not. For  
17 example, with Pennsylvania and Virginia, as I'm sure the  
18 Court is aware, had a -- Nathan versus Virginia is a case  
19 in which that very situation came up. But in the courts  
20 of Pennsylvania, the Pennsylvania Attorney General urged  
21 its own courts to recognize sovereign immunity. So that  
22 could naturally fit within the idea that Schooner Exchange  
23 has made clear, which is that when you're talking about  
24 co-equal sovereigns of that nature, one is talking about  
25 sovereignty that -- excuse me, immunity that is extended

1 as a matter of comity, not as a matter of absolute right  
2 of the other sovereign. And the reason is -- excuse me --  
3 the reason is that if you don't allow the sovereign to  
4 execute its own laws within its own territory, you're  
5 depriving that sovereign of part of its sovereignty.

6 QUESTION: Well, doesn't our original  
7 jurisdiction as the states between states bear something  
8 on this question?

9 MR. FARR: It bears a little bit. But, of  
10 course, Article III itself is not a exclusive jurisdiction  
11 provision. The Section 1251 provides exclusive  
12 jurisdiction with respect to suits between states.

13 QUESTION: The idea that the framers would  
14 provide for its original jurisdiction in the Supreme Court  
15 in -- for suits by one state against another suggests they  
16 thought it might be pretty hard to bring such a suit  
17 anywhere else.

18 MR. FARR: Well, and they -- certainly as a  
19 practical matter, they would have been right, Mr. Chief  
20 Justice. I mean, as a practical matter, it has always  
21 been difficult to bring a suit against a state, either in  
22 its own courts or in the courts of another state. I mean,  
23 even since Nevada versus Hall, typically states have  
24 granted immunity to other states for when they're sued in  
25 their own courts. And if they haven't granted absolute



1 immunity, what they have done, which I think is an  
2 important principle emerging -- emerging principle of  
3 comity, is they have tended to look at their own immunity  
4 to see what kinds of suits could be brought against them  
5 and to try, then, to grant to the -- to the outside  
6 sovereign that same type of immunity.

7 QUESTION: Mr. Farr, have you found other  
8 examples around the country of suits by citizens of one  
9 state against another state in the other state's courts?

10 MR. FARR: I --

11 QUESTION: Is this relatively rare, or is it  
12 happening? And in what context is it happening?

13 MR. FARR: It's relatively rare, and -- but  
14 there have been some suits. There are a few of them cited  
15 in our red brief, if I can find the page number, pages 38  
16 and 39. The -- there are suits, for example, negligence  
17 suits involving the release of dangerous persons within  
18 another state who have created injury to citizens --

19 QUESTION: Uh-huh.

20 MR. FARR: -- of that state. There are more  
21 commercial-type things involving contracts or -- one, in  
22 particular, is a it for invasion of privacy when someone  
23 who wrote a book disclosed information. In general,  
24 though, Justice O'Connor, as I say, some of those suits,  
25 the courts have just said, we're not going to hear them

1 whether you have a valid cause of action or not. We're  
2 simply not going to -- going to recognize that in our  
3 courts because of the sovereignty of the defendant. Other  
4 courts have said, yes, we will open our courts, but we are  
5 going to look to our own immunity to try to have  
6 essentially a baseline to measure the sort of immunity  
7 that we are going to --

8 QUESTION: Mr. Farr, are you saying --

9 MR. FARR: -- accept.

10 QUESTION: -- that that, too, is just a matter  
11 of comity?

12 MR. FARR: I do think that that's --

13 QUESTION: Doesn't --

14 MR. FARR: -- just a matter --

15 QUESTION: -- doesn't the Privileges and  
16 Immunities Clause of Article IV have something to say? If  
17 you can treat a tax collector from California differently  
18 from the tax collector in Nevada, you're not giving their  
19 tax collectors equal privileges and immunities in Nevada.

20 MR. FARR: If one granted lesser immunity? Is  
21 that the question --

22 QUESTION: Yes. If one -- you said that the  
23 only stopper was a notion of comity, and I'm suggesting  
24 that you might not be able to treat two officials, one  
25 from out of state, one from in state, to treat -- to favor

1 the in-state official. But maybe Privileges and  
2 Immunities have -- has something to do with that.

3 MR. FARR: If a state is entitled as a defendant  
4 to invoke Privileges and Immunities against the courts of  
5 another state, I would think that's right. Certainly in  
6 the case --

7 QUESTION: Is it?

8 MR. FARR: I --

9 QUESTION: I mean, I thought --

10 MR. FARR: I would have thought not.

11 QUESTION: -- that would go to individual  
12 liability, but it would -- it would not affect this  
13 question, but I may be wrong.

14 MR. FARR: Well, no, I -- that would be my  
15 assumption, also, Justice Souter. I think that the -- the  
16 Privileges and Immunities and Equal Protection are -- are  
17 provisions that apply to individuals who are claiming  
18 discrimination in -- in another state. I don't think they  
19 would apply directly to a state.

20 But, as I say, the -- the notion that comity is  
21 -- is something that -- that doesn't have a force, even  
22 though it's not federal enforceable, it seems to me is a  
23 little bit of a misperception. Because, again, if one  
24 goes back to the notion of the law of nations or separate  
25 sovereigns, comity essentially has been the provision that

1 governs their relations since well before the convention.

2 QUESTION: Well, there is some reluctance to say  
3 that California officials can run amok in Nevada without  
4 Nevada being able to do anything about it. I suppose if  
5 it were a pervasive practice, Nevada might be able to sue  
6 California in the original jurisdiction under some *parens*  
7 *patriae* theory. I'm not sure about that.

8 MR. FARR: Well, I mean, let me suggest a couple  
9 of other possibilities, Justice Kennedy, as well. I don't  
10 -- I don't know whether the court would take original  
11 jurisdiction of that question or not, but, I mean, the  
12 most direct example of something states could do,  
13 obviously, is they could reach agreements between  
14 themselves. I mean, there have been two cases before this  
15 court involving suits against states in the courts of  
16 other states. One was Nevada in California's courts.  
17 This is California in Nevada's courts. If those states,  
18 who are neighboring states, feel that this is an issue  
19 that they need to address, they could reach some sort of  
20 agreement and, therefore, have reciprocal legislation.

21 And, for example, under the Full Faith and  
22 Credit Clause for years, as the Court may know, there is a  
23 doctrine that said that states didn't have to enforce the  
24 penal laws of another state, even though Full Faith and  
25 Credit, on its face, would make you feel that maybe they

1 would have to.

2 But, in fact, states eventually began, through  
3 reciprocal agreements in decisions, and I think in  
4 legislation also, to say, you know, we essentially will  
5 enforce the penal laws or the tax laws of other states, so  
6 long as they do for us. So, again, the states --

7 QUESTION: Penal laws or penal judgments?

8 MR. FARR: No, no, penal judgments, the court  
9 said in -- in Milwaukee County, have to be enforced, but  
10 they -- they distinguished at that point, Mr. Chief  
11 Justice, the idea that a law itself would have to be  
12 enforced before it had been reduced to --

13 QUESTION: Right, but what -- what -- what is  
14 the -- I don't want to -- I don't want you to get  
15 distracted, because I thought Justice Ginsberg and maybe  
16 Justice Kennedy and I were driving at the same problem,  
17 which is that imagine Nevada v. Hall is good law. All  
18 right, now, the question comes up, How do you prevent  
19 Nevada from going wild? All right. And so now we have  
20 several answers: (a), Congress can pass a statute --

21 MR. FARR: Correct.

22 QUESTION: -- (b) interstate compacts -- that  
23 was what you were suggesting.

24 MR. FARR: And -- and --

25 QUESTION: All right.

1 MR. FARR: -- if I may --

2 QUESTION: Yeah, the --

3 MR. FARR: -- if I may intercede, it doesn't

4 necessarily even have to be a compact. I'm not sure --

5 QUESTION: Right, some --

6 MR. FARR: -- it's agreements that have to be

7 proven.

8 QUESTION: -- kind of a voluntary action by the

9 states.

10 MR. FARR: Right, correct.

11 QUESTION: (c) Privileges and Immunities, which

12 has the problem that it refers to citizens and not states,

13 (d) equal protection doesn't work, I don't think, because

14 it says, again, citizens. A due process clause, is a

15 state a person under the Due Process Clause?

16 (e), what's (e)? I mean, you see? If Nevada --

17 (e) is, of course, footnote 24, but then that gets us into

18 the National League of Cities problem. And so National

19 League of Cities --

20 MR. FARR: Well, there could --

21 QUESTION: -- that -- that -- that approach --

22 equal -- no, Privileges and Immunities, due process of

23 law, voluntary action states, Congress enacts a law,

24 anything else? Have we got -- is that the exhaustive list

25 that we must choose from?

1 MR. FARR: It's --  
2 QUESTION: Or --  
3 MR. FARR: -- it seems exhaustive --  
4 QUESTION: And the only -- all right, that's --  
5 if -- if nothing in that list works, then the only  
6 alternative is overrule Nevada v. Hall.  
7 QUESTION: Is --  
8 QUESTION: -- or, excuse me --  
9 QUESTION: -- is comity on the list?  
10 MR. FARR: Well, comity --  
11 QUESTION: Well, I mean -- I mean I --  
12 MR. FARR: -- excuse me -- comity is --  
13 QUESTION: Comity -- comity is not the answer to  
14 the problem, because -- well, it is, in a sense. It is,  
15 in a sense.  
16 MR. FARR: Yeah, I mean --  
17 QUESTION: Voluntary restraint.  
18 MR. FARR: Excuse me. I don't -- I certainly  
19 don't mean to minimize the theoretical possibility that  
20 suits in courts of one state could ultimately prove to be  
21 a problem, generally. What I'm suggesting is that there  
22 is nothing, first of all, in the history of the Full Faith  
23 and Credit Clause that would suggest that once a state has  
24 proper legislative jurisdiction, as I think everybody  
25 concedes that Nevada does here, that somehow that clause

1 was intended to displace the law of that state simply  
2 because another state had made different policy choices  
3 about, let's say, here, compensation and immunity.

4 QUESTION: But can you say that categorically  
5 and absolutely? I mean, there are all sorts of  
6 permutations of facts that could come up.

7 MR. FARR: Well, what -- the permutations of  
8 facts, I think, go particularly to what constitutes  
9 legislative jurisdiction. So perhaps in that sense, my  
10 statement is broader, or seems broader in the context of  
11 this case than I mean it to be. But I do -- but I do  
12 think, in general, that I don't see any warrant in the  
13 Full Faith and Credit Clause, given the fact that it was  
14 enacted with very little debate, and almost all of the  
15 debate was about judgments and not about enforcement of  
16 other states' laws, I think it would be stretching the  
17 clause beyond recognition to say that at some point it was  
18 -- it was telling states, you're going to have to set your  
19 laws aside and apply the laws of another state.

20 QUESTION: There was a time in the '30s and '20s  
21 when this court came pretty close to that, the cases that  
22 preceded Pacific Employers.

23 MR. FARR: That's correct, Mr. Chief Justice.

24 QUESTION: Clapper and Bradford.

25 THE COURT Yes.



1           MR. FARR: That's correct. And as I think that  
2 as my argument might suggest, I think the Court was  
3 correct to essentially back away from that kind of  
4 balancing test and essentially go back to the principle of  
5 saying when a state is competent to legislate, then it may  
6 apply its own laws, leaving the additional questions about  
7 what might happen at that point to questions of comity  
8 where a state is the defendant. And, as I've suggested,  
9 Nevada courts have shown considerable comity already here,  
10 and the case, of course, is not yet concluded.

11           QUESTION: Comity is something like a hearty  
12 handshake. I mean, it -- it's something that you can't  
13 put any -- any force to.

14           MR. FARR: That's -- that's true in one sense,  
15 Mr. Chief Justice. I mean, when I say it's not -- that  
16 there's no federally enforceable state law of comity, I --  
17 that's true. But at the same time, I mean, the Court's  
18 decisions about comity since back in the late 18th century  
19 have emphasized that it is a serious doctrine. It's a  
20 doctrine built of respect for -- for other sovereigns.  
21 And in particular -- and I think this -- this is -- also  
22 goes to the practical problem that Justices Kennedy and  
23 Breyer are asking about -- it also does have a healthy  
24 measure of self interest in it.

25           I mean, when -- when you are talking about co-

1 equal sovereigns, any sovereign that is exercising  
2 jurisdiction over another sovereign understands that  
3 that's -- the first sovereign -- or the second sovereign  
4 has the same power and authority over it.

5 QUESTION: Is -- is the question of comity one  
6 that has a federal component so that this court should  
7 weigh in on when it has to be exercised?

8 MR. FARR: I don't believe so state versus  
9 state, Justice O'Connor. Of course, in the -- in the  
10 types of cases that the board was referring to this  
11 morning, like McNary, there are comity elements. And  
12 there -- and there is a jurisprudence of this court with  
13 respect to federal and state relations which does depend  
14 on comity, and that is, of course, federally enforceable.  
15 I don't believe that there is a concomitant enforceable  
16 doctrine --

17 QUESTION: But you're arguing --

18 MR. FARR: -- state to state.

19 QUESTION: Even in the face -- even in the face  
20 of some development by state -- a state court that seems  
21 totally out of whack with our constitutional structure?

22 MR. FARR: Well, Justice O'Connor, I suppose I  
23 should --

24 QUESTION: Are there no extremes? Is there no  
25 limitation?

1           MR. FARR: Well, I -- I mean, I'm -- I suppose I  
2 should pause in the sense that -- that if there is  
3 something that is so threatening to the constitutional  
4 structure and something for which there is no historical  
5 basis in -- in terms of the -- the way that sovereigns  
6 deal with each other. Now, see, that's -- that's where I  
7 think this case is very different, because even though  
8 there was certainly a practical tradition that states were  
9 not to be sued in other states, as I say, since Schooner  
10 Exchange, and, indeed, in Verlinden in 1980, this Court  
11 has always taken the position that when you're talking  
12 about relationships between sovereigns, and they're co-  
13 equal sovereigns, and the issue is immunity between them,  
14 that is a matter of comity.

15           QUESTION: All right, but leave -- say, this  
16 case, I can easily see on your theory writing the part of  
17 the opinion that says the acts in Nevada, the acts in  
18 Nevada that were arguably torts are certainly up to Nevada  
19 to pursue. But the discovery commissioner here, they say,  
20 went way too far in ordering discovery and ordered  
21 discovery that would have been relevant only to negligent  
22 action and only negligent action, really, that took place  
23 in California, though a Nevada resident was at issue. And  
24 they can't do that, says the opinion, because -- because  
25 -- and now this is where it seems to me there -- something

1 -- what do I fill that blank with. They can't do that.  
2 They can't go over and, in Nevada, complain about  
3 negligent action as this discovery commissioner may have  
4 done, negligent action in California aimed at a Nevada  
5 resident where it's a tax action. They can't do that  
6 because -- and now what? You see -- do you see what's  
7 bothering me?

8 I -- at this point, it seems to me there has to  
9 be something in the Constitution that limits that, and  
10 this case may raise that problem because of the actions of  
11 the discovery commissioner. And, therefore, I think I  
12 need something to fill that blank with.

13 MR. FARR: Well, as -- I don't think, to start  
14 with, that the answer is the Full Faith and Credit Clause.

15 QUESTION: All right, what is it? .

16 MR. FARR: I mean --

17 QUESTION: I -- it's an odd -- an awkward  
18 vehicle, Full Faith --

19 MR. FARR: Right.

20 QUESTION: -- but what is the answer?

21 MR. FARR: Well, I mean, I still think that, in  
22 the end, the answer is that this is a matter that one  
23 trusts to the judgment of states --

24 QUESTION: So the answer is if they want to do  
25 that, they can do it.

1           MR. FARR: -- that if, in fact, there is a  
2 question about discovery, that --

3           QUESTION: Uh-huh.

4           MR. FARR: -- I mean, that I -- accepting the  
5 characterization, although I dispute it to some extent,  
6 but to the extent there's a question about discovery, that  
7 is simply part and parcel of the states being able to  
8 exercise their jurisdiction. I don't --

9           QUESTION: I thought discovery was --

10          QUESTION: Okay.

11          QUESTION: -- interlocutory. I thought that we  
12 couldn't write in an opinion, as Justice Breyer has  
13 suggested, if I didn't think that that question was  
14 currently reviewable.

15          MR. FARR: Well, there's certainly nothing  
16 specifically in the question presented about discovery.  
17 The -- the -- the -- again, to come back to the question  
18 presented, because we've discussed a wide range of issues,  
19 most of which I don't think are within the question  
20 presented, but when we come back to the question  
21 presented, the question is basically was the Nevada or the  
22 Nevada courts required to dismiss this action on summary  
23 judgment because of California's law of immunity? And --  
24 and the reason for that is because, according to  
25 California, the Full Faith and Credit Clause requires

1 Nevada to enforce California's law of immunity.

2 QUESTION: Mr. Farr --

3 MR. FARR: Our view is -- yeah?

4 QUESTION: -- do I understand -- your comity  
5 argument basically is -- it's kind a self-executing thing,  
6 because each time a state has to answer the comity  
7 question, it asks the question, what would I do if the  
8 tables were reversed? And as history teaches us, they  
9 generally treat the other sovereign the way they would  
10 want to be treated themselves. And that's --

11 MR. FARR: Well --

12 QUESTION: -- well, that's the rule that seems  
13 to have been developed without any overriding  
14 constitutional command order here.

15 MR. FARR: That's correct, Justice Stevens. And,  
16 in fact, they have become more specific in applying  
17 comity, I believe, in saying we want to treat the other  
18 sovereign as we do treat ourselves, not just as we want to  
19 be treated. We are treating the other sovereign the way  
20 we treat ourselves.

21 QUESTION: What if the -- what if the case came,  
22 and they didn't do it? Justice Breyer's question, how do  
23 I fill in the blank? I -- if, let's say, through this  
24 intrusive discovery process, systematically applied, they  
25 really were interfering with California's taxation,

1 couldn't California bring an original action to enjoin  
2 this interference?

3 MR. FARR: I certainly think that's possible.  
4 And, of course, as I've said, I mean, California can try  
5 to talk to Nevada and try to reach agreement at a  
6 sovereign level about this, or if, in fact -- the Full  
7 Faith and Credit Clause has a specific express commitment  
8 to Congress of the right to declare the effects of other  
9 laws.

10 QUESTION: What would be the underlying --

11 QUESTION: Underlying --

12 QUESTION: -- substantive law in Justice  
13 Souter's proposed original action?

14 MR. FARR: The -- I suppose, I mean, based on  
15 what California has said before -- said up to now, it  
16 would bring it under the Full Faith and Credit Clause,  
17 that it would say that there is some requirement --

18 QUESTION: Well, but we wouldn't need an  
19 original action for the Full Faith and Credit Clause. If  
20 that's so, it could apply in this case.

21 MR. FARR: That's correct. I mean, whether  
22 they're --

23 QUESTION: So what's the -- what would an  
24 original action -- there was -- there's no underlying  
25 substantive standard to apply?

1           MR. FARR: I mean, the question would be, is  
2 there -- obviously, the question that's being raised. I  
3 am not aware of the federal substantive standard --

4           QUESTION: We haven't --

5           MR. FARR: -- that says --

6           QUESTION: -- in boundary cases, though,  
7 adopted, as a federal rule, something maybe different from  
8 the law of either state.

9           MR. FARR: That's correct. Now, you do have --  
10 there are certain cases, in fact, in which you can't have  
11 overlapping jurisdiction, where you can't own the same  
12 water, you can't own the same land, you can't escheat the  
13 same property. So that's true. The court has addressed  
14 those kinds of cases.

15           In a situation where you're simply saying  
16 another state is applying its laws, I prefer that they  
17 apply our laws, and I'm troubled by the discovery that  
18 they have -- they have allowed in applying their own laws,  
19 I'm not sure what the federal principle --

20           QUESTION: It's not simply that --

21           MR. FARR: -- is that entitles you to stop it.

22           QUESTION: -- it's a prior action pending.  
23 That's what makes this case different, and one of the  
24 things that makes it different from Nevada v. Hall. Why  
25 is it -- is the California proceeding ongoing? Isn't it



1 normal for a second court to stay its operations so it  
2 won't interfere with that prior action?

3 MR. FARR: It -- in fact, the Nevada court  
4 dismissed the declaratory judgment action precisely  
5 because it didn't want to get into the question that was  
6 at issue in the California proceeding.

7 QUESTION: Yes, but what about the intrusive  
8 discovery?

9 MR. FARR: Well, most of the -- most of the  
10 other material -- with one exception, most of the other  
11 issues involved things that have nothing to do with the  
12 merits of the California inquiry. I mean, whether  
13 confidential information has been improperly disclosed has  
14 -- is not -- does not require you to adjudicate the  
15 California tax liability in order to understand that. The  
16 only thing that has any bearing that is close to that, I  
17 submit, is something that is roughly akin to like a  
18 malicious prosecution suit. And tort law itself, over  
19 time, takes care of that. We've not gotten to that issue  
20 yet in the Nevada Supreme Court.

21 QUESTION: Thank you, Mr. Farr.

22 Mr. Leatherwood, you have five minutes  
23 remaining.

24 REBUTTAL ARGUMENT OF FELIX LEATHERWOOD  
25 ON BEHALF OF PETITIONER

1                   MR. LEATHERWOOD: Thank you, Your Honor.

2                   In this particular case, I'd like to go back to  
3 Justice Breyer's thumbscrew example. I don't think the  
4 Full Faith and Credit Clause would actually force Cal --  
5 force Nevada to apply -- apply a California thumbscrew  
6 statute, because that would actually be outside the tax  
7 function.

8                   What I'm saying in this particular case what has  
9 happened is that Nevada's failure to give us back to  
10 California's immunity statute has resulted in interference  
11 with California's tax system. If this court does not  
12 intervene and give us back to our particular proposed  
13 test, which would look into California to see whether or  
14 not we would grant immunity, then essentially that would  
15 permit any defendant any form of taxpayer to run to the  
16 border and literally sue the State of California or any  
17 other state to prevent the enforcement of that particular  
18 statute.

19                   In addition, I pointed out that this gives  
20 another state the power to intrude into the actual  
21 operation of another state, and that's what has happened  
22 here.

23                   There has been some -- some discussion as to  
24 whether or not Nevada has legislative jurisdiction. We  
25 concede that they have legislative jurisdiction over the

1 tort. But we -- what we complain about is that they won't  
2 respect our legislative jurisdiction or our tax process  
3 over our immunity laws, and that is our particular  
4 complaint.

5 We submit the case.

6 CHIEF JUSTICE REHNQUIST: Thank you,  
7 Mr. Leatherwood. The case is submitted.

8 (Whereupon, at 11:59 a.m., the case in the  
9 above-entitled matter was submitted.)

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