

**COPY**

**In the Supreme Court of the State of California**

**FRANCHISE TAX BOARD,**

**Petitioner,**

Case No. S176943

v.

**THE SUPERIOR COURT OF THE CITY  
AND COUNTY OF SAN FRANCISCO,**

**Respondent;**

**SUPREME COURT  
FILED**

**NOV - 2 2009**

**Frederick K. Ohlrich Clerk**

**TOM GONZALES, as Personal  
Representative, etc.**

**Real Party in Interest and  
Respondent.**

**Deputy**

California Court of Appeal, First Appellate District, Division Five,  
Case No. A122723  
San Francisco County Superior Court  
Case No. CGC-06-45497  
The Honorable John K. Stewart, Judge

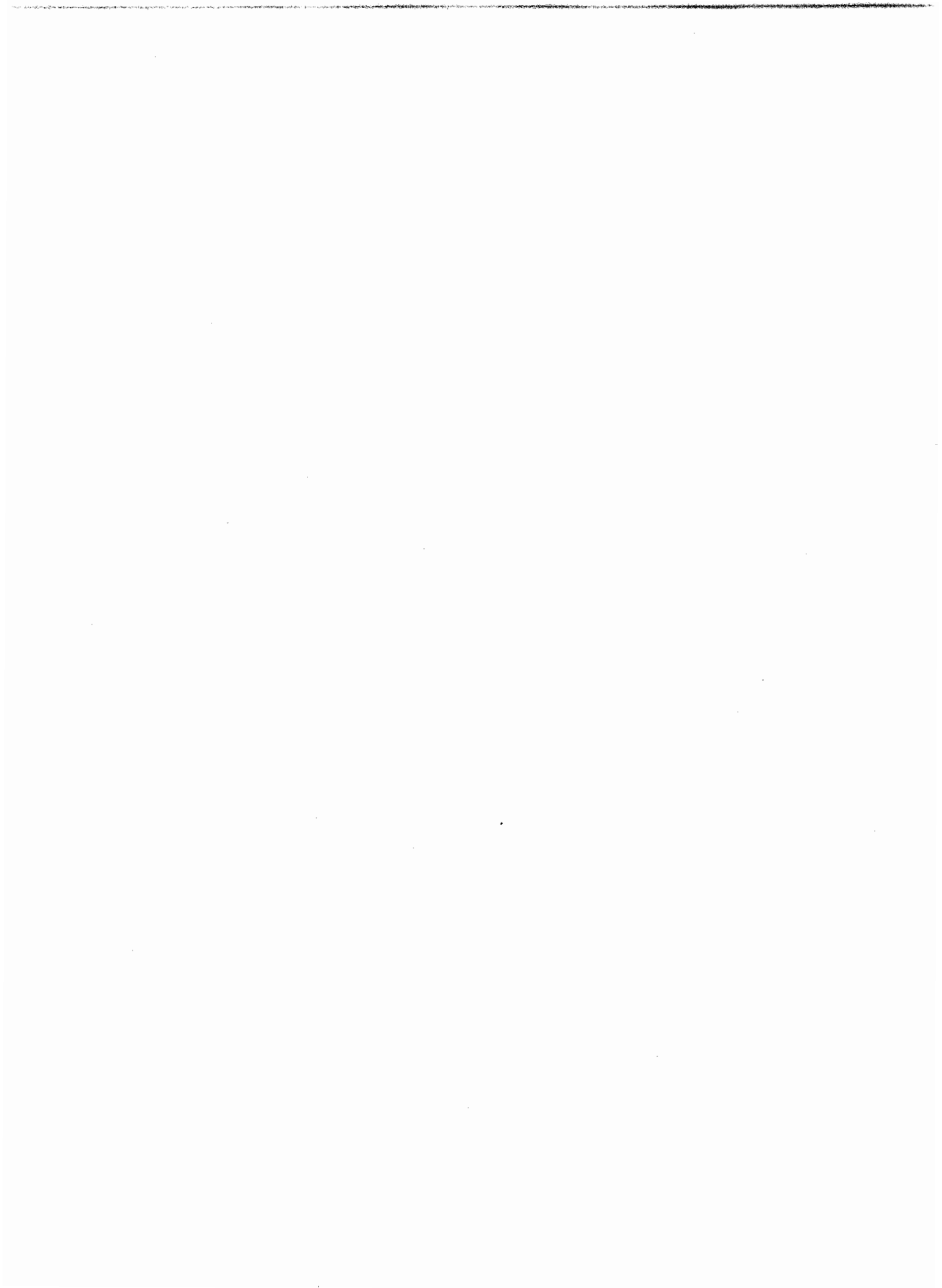
**ANSWER  
REPLY TO ~~OPPOSITION~~ TO PETITION FOR REVIEW**

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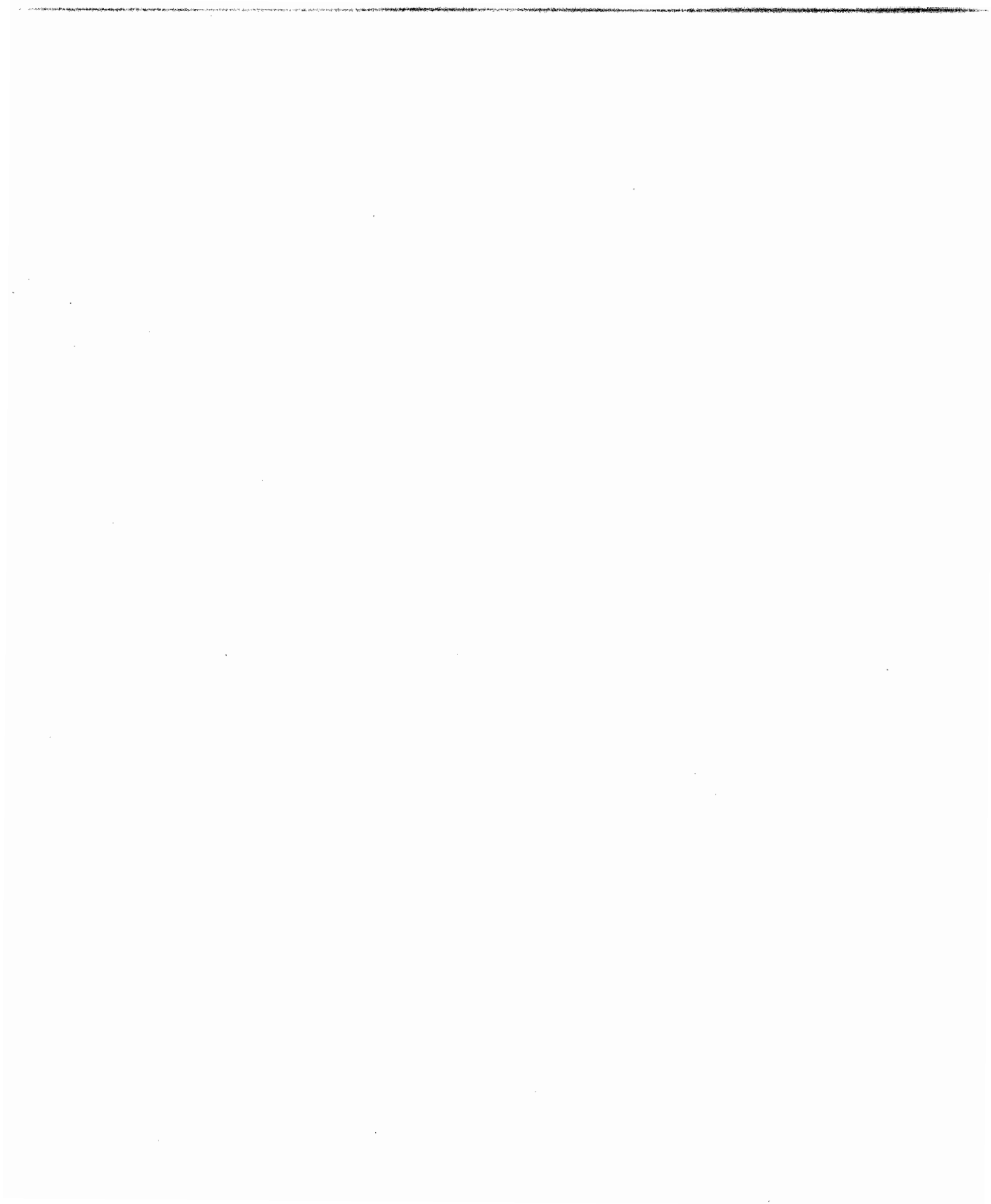
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**I. RESPONDENT HAS FAILED TO SHOW THAT REVIEW OF THE OPINION BELOW IS NOT NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW**

Petitioner Franchise Tax Board (“FTB”) seeks review of the Court of Appeal’s opinion on the ground that review of the opinion is necessary to settle an important question of law, pursuant to California Rules of Court, rule 8.500(b)(1). As set forth in the petition, the opinion, if not reversed, would fundamentally alter the practice of law in the field of tax refund litigation, both in and outside of the courts.

First, the new right to a jury trial will alter the costs and risks of litigating tax disputes for both sides. Most notably, it would change the bargaining strategies of the agencies and the taxpayers in settlement discussions. Second, the opinion below will lead to more jury trials. Jury trials are more costly and burdensome for the litigants and the courts. Third, the opinion below would immediately affect dozens of pending refund suits in which jury trials may still be requested.

Respondent faults the FTB for failing to submit “empirical data” and “evidence” to the lower courts that the issue is important enough to merit review by this Court. (Opp. br. at p. 9.) That is absurd. The FTB was required to raise the issues in the court below, of course, or risk forfeiting them. (Cal. Rules of Court, rule 8.500(c)(1).) But the place to explain the importance of the issues is in the petition for review (see Cal. Rules of Court, rule 8.500(b)(1)), not the trial court or the Court of Appeal.

Respondent’s opposition brief fails to address the merits of the FTB’s contention that review is warranted under California Rules of Court, rule 8.500(b)(1) and, moreover, agrees with the FTB’s contention that jury trials will provide taxpayers with an incentive to litigate tax refund actions and alter the bargaining strategies of the parties in settlement discussions. (See Opp. br. at p. 9 [“The availability of the right to jury trial will undoubtedly



result in some jury trials of tax refund actions but the right to a jury trial simply gives taxpayers an additional option in litigation.”].)

**II. PRIOR TO THE OPINION BELOW ONLY ONE AMERICAN COURT HAD HELD THAT THE RIGHT TO A JURY TRIAL FOR A TAX REFUND ACTION WAS ROOTED IN THE COMMON LAW AND THAT DECISION WAS INAPPOSITE AND ERRONEOUS**

*United States v. New Mexico* (10th Cir.1981) 642 F.2d 397 (*New Mexico*), is the only published American decision that has held that the right to a jury trial for a tax refund action is rooted in the common law. In *New Mexico*, the United States sued the State of New Mexico for declaratory and injunctive relief and restitution because the state had assessed and collected an allegedly unauthorized tax against a private contractor, working for the United States, who ultimately passed the tax on to the federal government. (*Id.* at pp. 398-400.) The State of New Mexico requested a jury trial and the trial court denied the request. (*Id.* at p. 399.) On appeal, the Tenth Circuit held that the suit was in effect an action for a tax refund and found that the taxpayer had an historical right to a jury trial in such an action, stating: “[w]e are persuaded that the right of a taxpayer to a jury trial in refund cases is rooted in the common law and was preserved by the Seventh Amendment.” (*Id.* at p 401.)

*New Mexico* is inapposite. Unlike this case, the government was not a “taxpayer” suing a governmental agency for a refund of taxes it paid based upon a statute waiving sovereign immunity and granting the taxpayer the right to sue for a tax refund. In *New Mexico*, the tax at issue was assessed against and paid by the government’s contractor. The government then sued the State of New Mexico for declaratory and injunctive relief and for restitution, because there was no statute which was applicable to a “federal claim for refund of a tax imposed by state law.” (*New Mexico, supra*, 642 F.2d at pp. 400-401.) Therefore, the Tenth Circuit took excessive liberty in characterizing the government’s lawsuit as a tax refund suit with respect to



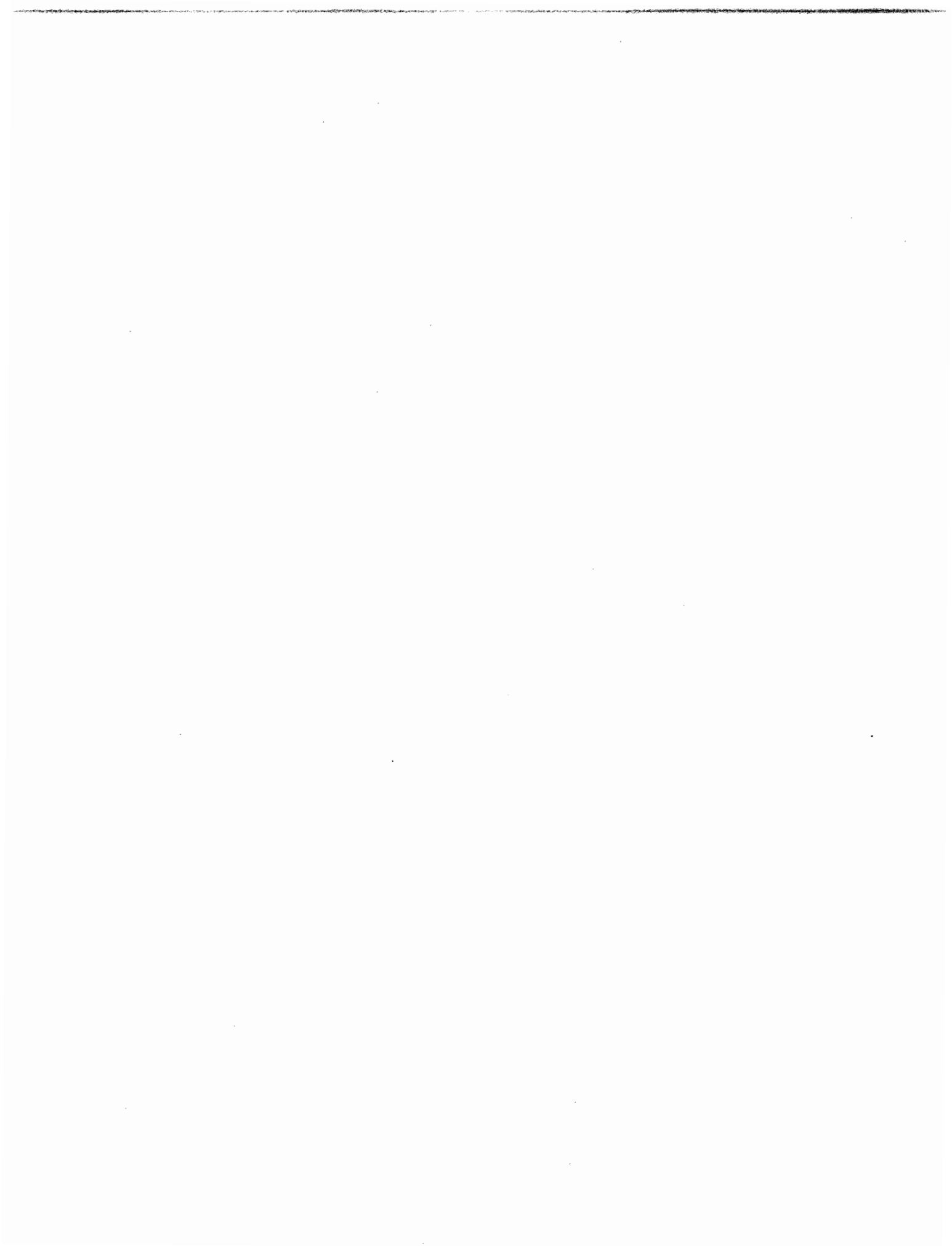
the jury trial issue: “Whatever language is used, the United States is in the position of a taxpayer who wants to get his money back. The question is whether in 1791, when the Seventh Amendment was adopted, a taxpayer would have been entitled to a jury trial in a tax refund suit.” (*New Mexico, supra*, 642 F.2d at p 400.) In *New Mexico*, the plaintiff was neither a “taxpayer” suing for a “tax refund” nor did it demand a jury trial.

Moreover, the Tenth Circuit’s conclusion in *New Mexico* that the federal jury trial statute was a “reaffirmation” of a historical right to a jury trial in tax refund cases (*New Mexico, supra*, 642 F.2d at p. 401) was criticized by the Ninth Circuit in *Standard Oil Company of California v. Arizona* (9th Cir.1984) 738 F.2d 1021:

The oil companies correctly point out that the Tenth Circuit in *United States v. New Mexico* was wrong in at least one respect. The court looked at historical practice in England and early America and concluded there was an historical right to jury trial in tax refund cases. The United States Supreme Court in *Lehman v. Nakshian*, 453 U.S. 156,161 n. 8, 101 S.Ct. 2698, 2702 n. 8, 69 L.Ed.2d 548 (1981), in a footnote observes that there was great historical reluctance to provide for jury trials against the United States in tax refund cases. The Supreme Court says that Congress “broke with precedent” by establishing a statutory right to jury trial in tax refund cases in 1954, whereas the Tenth Circuit said that the 1954 jury trial provision was a “reaffirmation” of a historical right to jury trial in tax refund cases. 642 F.2d at 401. *The Tenth Circuit appears to be wrong on this point.*

(*Standard Oil Company of California v. Arizona, supra*, at p. 1027, fn 8 [emphasis added].)

With the exception of the Tenth Circuit Court of Appeals’ decision in *New Mexico*, the United States Courts of Appeal have consistently ruled that no common law right to a trial by jury exists in federal tax cases. (See *Masat v. Commissioner* (5th Cir.1986) 784 F.2d 573, 575 [Tax Court]; *Parker v. Commissioner* (5th Cir.1984) 724 F.2d 469, 472 [no



constitutional right to jury; right only exists if statute so provides]; *Bagur v. Commissioner* (5th Cir.1979) 603 F.2d 491, 500, fn. 11 [no constitutional right to jury trial in refund cases in either Tax Court or District Court]; *Martin v. Commissioner* (6th Cir.1985) 756 F.2d 38, 40 [Tax Court]; *Blackburn v. Commissioner* (6th Cir.1982) 681 F.2d 461, 462 [Tax Court]; *Funk v. Commissioner* (8th Cir.1982) 687 F.2d 264, 266 [no right of action at common law against sovereign; no statutory right granted in Tax Court]; *Mathes v. Commissioner* (5th Cir.1978) 576 F.2d 70, 71, cert. denied, (1979) 440 U.S. 911 [cited in the petition at p. 5].)

In sum, the opinion's conclusion that a modern statutory tax refund action is analogous to a taxpayer's common law action against an individual tax collector such as to give rise to the right to a jury trial is supported solely by the *New Mexico* decision. Neither respondent nor the Court of Appeal have cited any apposite and correct case authority to support the proposition that the right to a jury trial for a modern statutory tax refund action is rooted in common law.

### **III. THE RIGHT TO SUE THE STATE FOR A TAX REFUND IS PERMITTED ONLY BY STATUTE AND IS NOT THEREFORE CONTRACTUAL IN NATURE**

The United States Supreme Court held in 1868 that tax refunds were permitted only by statute because the government is immune from suit by its citizens. (*Nichols v. United States* (1868) 74 U.S. 122, 125.) More precisely, the Court held that, "The allowing [of] a suit at all, was an act of beneficence on the part of the government." (*Id.* at 127.) Relying on its previous decision in *Elliott v. Swartwout* (1836) 35 U.S. (10 Pet.) 137, the Court observed:

If the duties demanded of Nicholl & Co. had been paid under protest, their payment, in the sense of the law, would have been compulsory, but as they were paid without protest it was a voluntary payment, doubtless made and received in mutual mistake of the law; but in such a case, as was decided





in *Elliott v. Swartwout*, no action will lie to recover back the money. And so this court has repeatedly held.

It is clear, therefore, that the appellants are without remedy, unless a new liability has been imposed on the government by the act creating the Court of Claims. [Fns. omitted]

(*Nichols v. United States, supra*, 74 U.S. at p. 128.)

Accordingly, a tax refund action brought pursuant to Revenue and Taxation Code section 19382, is not based on an implied contract theory. (See *Nichols v. United States, supra*, 74 U.S. at p. 129 [“[T]here is no such thing as an implied promise to pay against the positive command of a statute.”].) Thus, and as set forth in the petition, Code of Civil Procedure section 592 provides no right for a jury trial for tax refund suits as they are neither actions “for the recovery of specific, real or personal property,” nor actions for damages or for injuries. (Petition at p. 7.) Contrary to respondent’s assertion, there is no basis for inferring that the Legislature intended to grant the right to a jury trial for a tax refund action.



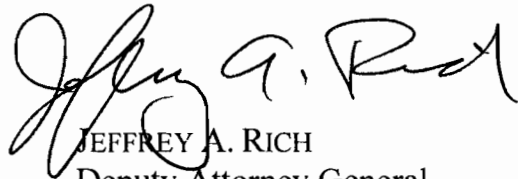
**IV. CONCLUSION**

The FTB submits that it has demonstrated that review of the opinion below is necessary to settle an important question of law. The FTB respectfully requests that its petition for review be granted.

Dated: October 30, 2009

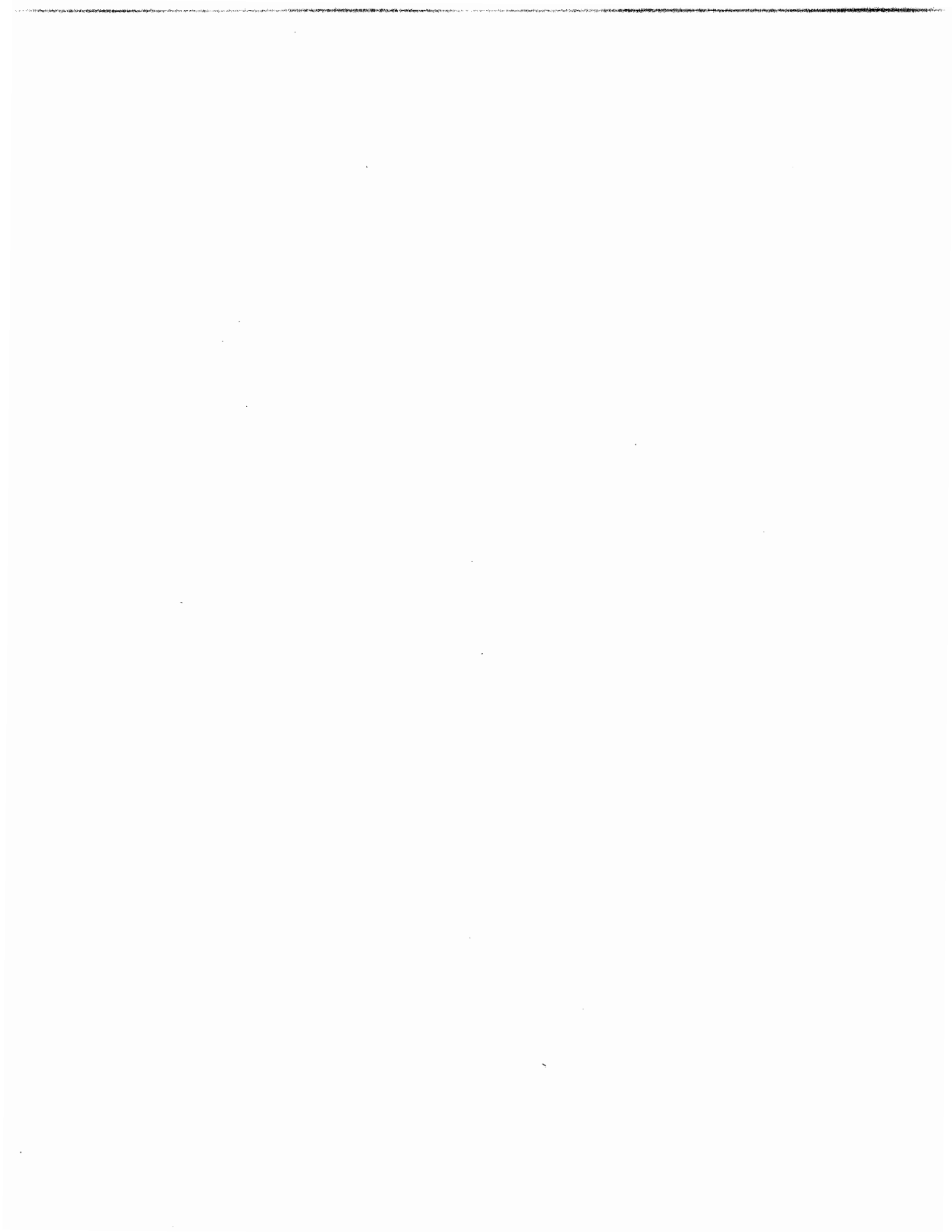
Respectfully submitted,

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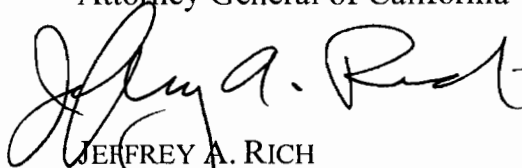


**CERTIFICATE OF COMPLIANCE**

I certify that the attached Petition for Review uses a 13 point Times New Roman font and contains 1,619 words.

Dated: October 30, 2009

EDMUND G. BROWN JR.  
Attorney General of California

A handwritten signature in black ink, appearing to read "Jeffrey A. Rich", is written over the printed name and title of the signatory.

JEFFREY A. RICH  
Deputy Attorney General  
*Attorneys for Petitioner*  
*Franchise Tax Board*

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**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: **Tom Gonzales, as Personal Representative of the Estate of Thomas J. Gonzales II v. Franchise Tax Board**

SF County Superior Court No.: **CGC-06-454297**;  
California Court of Appeal, First Appellate Dist., Div. Five No.: **A122723**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On November 2, 2009, I served the attached **REPLY TO OPPOSITION TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight Courier**, addressed as follows:

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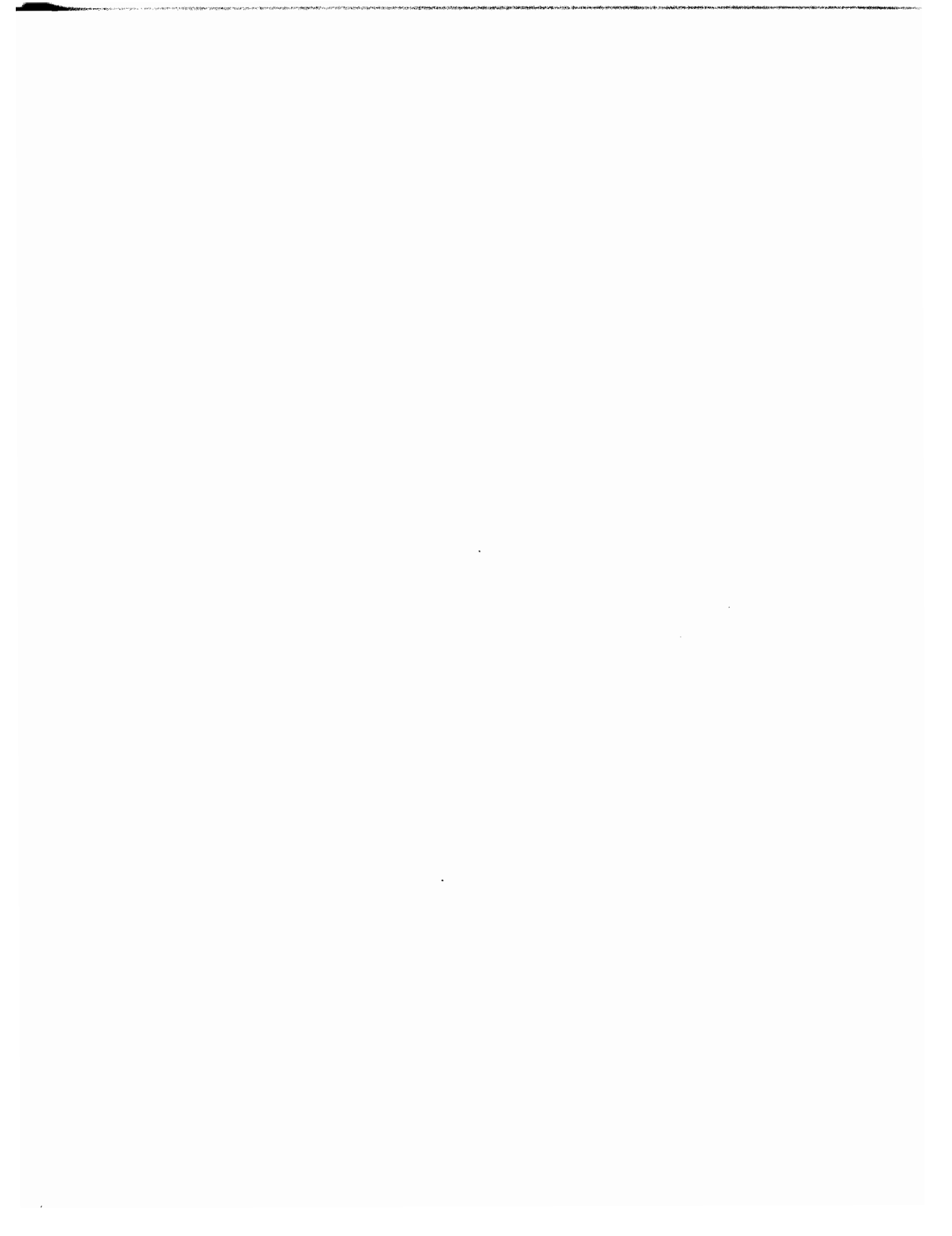
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 2, 2009, at Sacramento, California.

Constance A. Ward  
\_\_\_\_\_  
Declarant

*Constance A. Ward*  
\_\_\_\_\_  
Signature









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