IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRANCHISE TAX BOARD, Petitioner, vs. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent, TOM GONZALES, as Personal Representative of the Estate of Thomas J. Gonzales, II, Real Party in Interest and Respondent.	Case No. S176943

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

RESPONDENT AND REAL PARTY IN INTEREST'S ANSWER BRIEF ON THE MERITS

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STATEMENT

Respondent and Real Party in Interest Tom Gonzales, as Personal Representative for the Estate of Thomas J. Gonzales, II ("the Estate") hereby opposes and answers Petitioner Franchise Tax Board's ("FTB") Opening Brief on the Merits.[1] The Court of Appeal, First Appellate District, Division Five, unanimous decision in *Franchise Tax Board v. The Superior Court of the City and County of San Francisco (Gonzales)*[2] denied in part the Franchise Tax Board's writ of mandate and/or prohibition.

1. Article I, section 16 of the California Constitution provides, "Trial by jury is an inviolate right and shall be secured to all, but in a civil case three-fourths of the jury may render a verdict. . . ." This constitutional provision preserves and protects the right to a jury trial as it existed at common law. This Court, in the seminal case *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300, affirmed that "the constitutional right to a jury trial is not to be narrowly

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[1] In its Petition for Review, the FTB argued that the Court of Appeal's decision would result in a fundamental shift in the strategies of the parties in tax refund actions and would impose higher costs upon the state because of an increase in the number of jury trials. Recognizing that there is nothing in the record that would support these assertions, the FTB's Opening Brief on the Merits appears to have abandoned these arguments, and we therefore do not address them. However, to the extent this Court was prompted to grant review on the basis of these arguments, the Court may now wish to reconsider its grant of review.

[2] The Court of Appeal's opinion was published at 177 Cal.App.4th 36. However, pursuant to California Rules of Court, Rule 8.1105(e), the opinion can no longer be considered as published because this Court has granted review. Therefore, all citations to the opinion will be to the opinion as attached to the FTB's Petition for Review "Opn. at p.__."

construed. It is not limited to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise."

2. In this state income tax refund suit, the taxpayer, Thomas J. Gonzales, II, claimed a capital loss from an investment for the taxable year 2000. In 2004, the Estate of Thomas J. Gonzales, II[3] paid in excess of $15 million to the State of California pursuant to the California Voluntary Compliance Initiative (VCI) for taxes allegedly owed for the 2000 investment.

In making application under the VCI, the Estate explicitly reserved the right to seek a refund. Accordingly, in July 2006, the Estate filed a complaint, pursuant to California Revenue and Taxation Code sections 19382 and 19385, seeking a refund of the entire $15 plus million on the ground that the taxpayer was entitled to the capital loss claimed on his California income tax return.[4] In a November 2006 joint case management conference statement, the Estate demanded a jury trial. In May 2008, the FTB moved to strike the Estate's jury demand. By order dated July 22, 2008, the Superior Court (Hon. John K. Stewart) denied the FTB's motion to strike after considering the parties' briefs and oral argument and "based on the analysis in *United States v. New Mexico* (10th Cir. 1981) 642 F.2d 397,

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[3] The taxpayer, Thomas J. Gonzales, II died in December 2001. The executor of his estate is his father, Tom Gonzales, the Real Party in Interest and Respondent in this proceeding.

[4] The FTB later filed a cross-complaint seeking to recover from the Estate a penalty of almost $2.5 million. The Estate contests the merits of imposing the asserted penalty but acknowledges that its right to a jury trial does not extend to the FTB's cross-complaint for collection of the penalty.

finding that a jury trial in tax cases is rooted in the common law prior to 1791." (*Tom Gonzales, as Personal Representative of the Estate of Thomas J. Gonzales, II v. Franchise Tax Board* (Super. Ct. San Francisco County, July 22, 2008 Order, No. CGC-06-454297)

3. The FTB sought review of the Superior Court's denial of its motion to strike the jury demand in the Court of Appeal for the First Appellate District. After extensive briefing and oral argument, the Court of Appeal unanimously affirmed the decision of the Superior Court that the Estate is entitled to a jury trial in this tax refund suit.

4. The Court of Appeal reached its decision after undertaking a detailed historical analysis of tax refund actions. As a result, the Court of Appeal upheld the Estate's jury trial demand on the ground that there was a right to a jury trial in refund actions against tax collectors under the common law of 1850 when the California Constitution was adopted. Relying upon this Court's decision in *Chevrolet Coupe, supra,* (37 Cal.2d at p. 300.), the Court of Appeal concluded that "Gonzales's tax refund action 'is the type of action which was cognizable in a common-law court, and triable by a jury.'" (Opn. at p. 14.)

QUESTION PRESENTED

Whether the two courts below correctly held that under article I, section 16 of the California Constitution and the decisions of this Court, a taxpayer who sues the Franchise Tax Board for a refund of state income taxes paid under protest has the right to a trial by jury.

SUMMARY OF ARGUMENT

Almost sixty years ago, this Court, in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, held that the owner of a vehicle was entitled to a jury trial in a forfeiture proceeding challenging the state's seizure of that vehicle. That decision has been cited with approval by this Court and the various courts of appeal up to the present day. In upholding the vehicle owner's right to a jury trial, this Court concluded that a jury trial must be granted as a matter of Constitutional right where the gist of the action is legal, where the action in reality is cognizable at law. Just as the vehicle owner sought to recover his property, so too does the Estate in this case seek to recover taxes that it paid to the state. In both cases, the gist of the action is unquestionably legal insofar as both plaintiffs seek a money judgment against the state.

After a meticulous examination of the common-law history that existed as of the time California entered the Union in 1850, the Court of Appeal correctly concluded that tax refund actions against tax collectors were cognizable at common law and were tried before juries. Since the gist of such a tax refund action is legal under *Chevrolet Coupe*, the taxpayer in this case is Constitutionally entitled to have its case tried before a jury.

The Franchise Tax Board concedes as much with respect to the common law history. However, it contends that taxpayers were not entitled to a jury trial to recover taxes at common law if their payment was voluntary. But, as the Court of Appeal correctly held, the taxpayer's payment of the tax in question in this case

was not voluntary because it was accompanied by a reservation of appeal rights to bring a refund action against the state. It is long been settled that "a payment is not voluntary if there is any declaration made to the collector of an intention to prosecute him to recover back the money." *Elliott v. Swartwout* (1836) 35 U.S. 137, 153.

Nor is the Franchise Tax Board on any stronger ground in arguing that the statutory nature of the modern tax refund action forecloses the taxpayer's right to a jury trial. The provisions of the Revenue and Taxation Code that authorize a tax refund action must be read against the right guaranteed by Article I, Section 16 of the California Constitution which provides that "trial by jury is an inviolate right and shall be secured to all, but in a civil case, three-fourths of the jury may render a verdict. . . ." Therefore, the constitutional right to a jury trial cannot be circumscribed by the subsequently-enacted statutory authorization for tax refund suits. As this Court made clear, "a Constitutional right to a jury trial is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise." (*Chevrolet Coupe, supra* at p. 300.)

Finally, there is no merit to the Franchise Tax Board's argument that this tax refund action is analogous to a special proceeding which was either not recognized at common law or for which the common law explicitly denied the right to a jury trial. Such an analogy falls wide of the mark because a tax refund action is not a special proceeding. The historical evidence demonstrates that the

common law recognized the right to bring a tax refund action against a tax collector before the jury. Hence, the Estate in this tax refund suit is entitled to a jury trial under the California Constitution. The decisions of the two courts below upholding this right should be affirmed.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL APPLIES TO TAX REFUND ACTIONS BECAUSE THE GIST OF A TAX REFUND ACTION IS LEGAL

The issue before the Court in this case fits squarely within this Court's holding in *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283 (hereinafter *Chevrolet Coupe*), which has been cited with approval by this Court at least eleven times and followed by the various Courts of Appeal at least seven times since it was decided almost sixty years ago.[5] In *Chevrolet Coupe*, which the FTB fails to cite in its brief, the State of California seized a vehicle from its owner under a

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[5] *See, e.g., McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal. 3d 348, 379; *Crouchman v. Superior Court* (1988) 45 Cal. 3d 1167, 1173-1174; *Lyons v. Wickhorst* (1986) 42 Cal. 3d 911, 925; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal. 3d 359, 375; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 8; *McComb v. Commission on Judicial Performance* (1977) 19 Cal. 3d Spec. Trib. Supp. 1, 10; *People v. Collins* (1976) 17 Cal. 3d 687, 692; *People v. Amor* (1974) 12 Cal. 3d 20, 31; *People v. One 1953 Buick 2-Door* (1962) 57 Cal. 2d 358, 364; *People v. One 1953 Ford Victoria* (1957) 48 Cal. 2d 595, 598; *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 Cal. 2d 613, 615; *People v. Bhakta* (Cal. App. 2d Dist. 2008) 162 Cal. App. 4th 973, 978; *Ceriale v. Superior Court* (Cal. App. 2d Dist. 1996) 48 Cal. App. 4th 1629, 1634; *Arciero Ranches v. Meza* (Cal. App. 5th Dist. 1993) 17 Cal. App. 4th 114, 123; *Beasley v. Wells Fargo Bank* (Cal. App. 1st Dist. 1991) 235 Cal. App. 3d 1383, 1396; *County of Sutter v. Davis* (Cal. App. 3d Dist. 1991) 234 Cal. App. 3d 319, 322; *Hastings v. Matlock* (Cal. App. 6th Dist. 1985) 171 Cal. App. 3d 826, 835; *In re Javier A.* (Cal. App. 2d Dist. 1984) 159 Cal. App. 3d 913, 930.

modern forfeiture statute. The vehicle's owner demanded a jury trial in the forfeiture proceeding, even though the forfeiture statute did not explicitly provide for the right to a jury trial. This Court, after reviewing the common law, upheld the vehicle owner's right to a jury trial. The Court rejected, among others, the arguments that 1) the vehicle owner's rights were purely statutory because the proceeding was brought under a modern statute, 2) California should not affirm the right to a jury in the forfeiture proceeding because other states had denied jury trials in similar actions, 3) California should not affirm the right to a jury in the forfeiture proceeding because the equivalent federal right does not permit jury trials, and 4) other California decisions stating that forfeiture proceedings were equitable in nature controlled the gist of the action. (37 Cal.2d at 299-303.) In this case, the FTB advances these time-worn arguments, which must be rejected in keeping with the Court's holding in *Chevrolet Coupe*: 1) the existence of a modern statutory tax refund action, as discussed below, does not obviate the need to evaluate the right to a jury trial under the common law; and 2) the decisions of other states in this area, particularly those without thorough analysis of the common-law right at issue, need not be followed by this Court.[6]

[6] The FTB cites a number of cases from other states for the proposition that there is no common-law right to a jury trial in tax cases. The cases cited do not thoroughly analyze the issue, but rely primarily on dicta from *Wickwire v. Reinecke* (1927) 275 U.S. 101. But this Court in *Chevrolet Coupe* has already rejected the applicability of decisions of other state courts in construing the California Constitution.

In addition to the striking parallels to this case noted above, two essential points emerge from the Court's ruling in *Chevrolet Coupe* case. First, when it comes to the vindication of the constitutional right to a jury trial, artificial labels are to be disregarded. Hence, calling an action a special proceeding which is equitable in nature cannot extinguish the constitutional right to a jury trial. As this Court observed, "If this could be done, the Legislature, by providing new remedies and new judgments and decrees in form equitable, could in all cases dispense with jury trials, and thus defeat the provision of the Constitution . . . . In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case – the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law" (*ibid.* at p. 299).

Second, the fact that the forfeiture statute was enacted after the California Constitution was adopted does not mean that a forfeiture proceeding is not subject to the right to a jury trial. As this Court emphasized, "The constitutional right to a jury trial is not to be narrowly construed. It is not limited strictly to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise" (*Chevrolet Coupe, supra,* at p. 300).

The Court of Appeal, relying on this Court's decisions in *Chevrolet Coupe* and *C&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1 (hereinafter *C&K Engineering*), summarized the law regarding the constitutional

right to a jury trial under Article I, section 16 of the California Constitution by explaining that the right to trial by jury is secured to all as it existed at common law in 1850. As of that point in time, a jury trial was generally available as a matter of right in a civil action at law, but not in equity. (Opn. at p. 3-5.) In deference to this Court's analytical framework in *C&K Engineering*, the Court of Appeal noted that "the critical inquiry is whether the cause of action at issue in the present case is analogous to an action cognizable in the common law courts in 1850. ""'If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law.'""" (Opn. at p. 4 (quoting *C & K Contractors, supra,* 23 Cal.3d at p. 9. (quoting *Chevrolet Coupe*)) (internal citations omitted) emphasis in original.) After reviewing the facts, the Court of Appeal concluded that "[t]he 'gist' of Gonzales's tax refund action is a legal, rather than equitable, claim." (Opn. at p. 5.)

The FTB does not dispute that the Estate is entitled to a jury trial under the well-established "gist of the action" test. (Petitioner's Opening Brief on the Merits ("FTB's Brief") at p. 15.) Rather, the FTB argues that the "gist of the action" test is irrelevant because the right for a taxpayer to bring a tax refund action is provided for by statute. (*Id.*) In support of its argument the FTB cites

Crouchman v. Superior Court (1988) 45 Cal.3d 1167. In *Crouchman*, this Court considered whether an individual had a right to a jury trial in a small claims proceeding. But unlike tax refund actions against tax collectors, for which a taxpayer had the right to a jury trial at common law, there was never a common-law right to a jury trial in small claims proceedings. (45 Cal.3d at 1175-1177.) In *Crouchman*, the question was whether a modern statute by silence can create the right to a jury trial where such a right was explicitly denied at common law. Here, there is no denial of the right to jury trials at common law in tax refund actions. Quite to the contrary, as the Court of Appeal correctly concluded, the historical analysis demonstrates that taxpayers had the right to a jury trial against tax collectors at common law. (See Opn. at p. 6 (distinguishing *Crouchman* from the instant case.) Therefore, *Crouchman* is not relevant to the analysis because that case involved circumstances where there was no right to a trial by jury at common law.

Contrary to the FTB's further argument (FTB's Brief at p. 15-16.), *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606 (Opn. at p. 19.) fully supports the decision of the Court of Appeal. There, the court in *Jefferson* upheld plaintiff's right to a jury trial in a medical malpractice and fraud claim notwithstanding the fact that there was no tort claim presentation requirement statute in 1850. As the court saw the matter, the gist of the action was legal. Indeed, the Court of Appeal concluded that "Gonzales's claim for a jury is even

stronger because of the history of common law tax refund actions against collectors." (Opn. at p. 19.)

There is accordingly no basis for the FTB's argument that *Jefferson* is inapposite because "Gonzales' right to bring his statutory refund action for recovery of tax voluntarily paid was first granted by statute in 1893 in derogation of common law." This argument fails on three separate grounds: First, a taxpayer could bring a tax refund action against tax collectors prior to 1893; second, the Estate paid the taxes involuntarily; and third, this Court held in *Chevrolet Coupe* case that "the constitutional right to a jury trial is not to be narrowly construed. It is not limited to those cases in which it existed before the adoption of the Constitution but is extended to cases of like nature as may afterwards arise" (37 Cal.2d at 300).

II. MODERN CALIFORNIA TAX REFUND ACTIONS ARE ANALOGOUS TO COMMON-LAW TAX REFUND ACTIONS AGAINST TAX COLLECTORS AND ACTIONS FOR MONEY HAD AND RECEIVED IN WHICH TAXPAYERS WERE ENTITLED TO JURY TRIALS.

At common law, doctrines, such as the right of taxpayers to bring tax refund actions against tax collectors, were "'devised by the courts . . . to do justice to taxpayers who, at one time, could not directly sue the government to recover wrongful exactions by its officers.'" (Opn. at p. 6-7 (quoting *Hammond-Knowlton v. United States* (2d Cir. 1941) 121 F.2d 192, 194.) The FTB has conceded that "under common law aggrieved taxpayers were entitled to bring legal actions

against tax collectors for recovery of involuntarily paid taxes and, in those cases, were entitled to jury trials." (FTB's Brief at p. 17.)

The Court of Appeal properly analogized the instant case to actions for money had and received, particularly those against tax collectors. (Opn. at p. 7.) Employing the same analysis as the Tenth Circuit in *United States v. New Mexico* (10th Cir. 1981) 642 F.2d 397, the Court of Appeal concluded that at common law taxpayers had the right to bring tax refund actions tried to a jury against tax collectors. In the modern era, the tax collectors of yesteryear have given way to tax authorities such as the Franchise Tax Board. But the identity of the particular representative of the State is of no consequence. Thus, by analogy, the Estate is entitled to a jury trial in its tax refund action against the FTB. (Opn. at p. 7-14.)

III. THE VOLUNTARY PAYMENT DOCTRINE DOES NOT APPLY TO THE ESTATE'S TAX REFUND ACTION.

The FTB's primary argument is that while taxpayers have a right to a jury trial for involuntary payments, there is no such right with respect to voluntary payments because a refund of voluntarily paid taxes is only available by statute. The Court of Appeal carefully considered and rejected this argument. (Opn. at p. 15-16.) For the reasons that follow, this Court should also reject this argument.

First, the distinction between voluntary and involuntary payments has limited applicability in the modern era where taxes are collected by the state rather than individual tax collectors. Case law indicates that voluntariness relates to the ability of the party attempting to collect a tax to legally compel payment by

seizure or threat of seizure of the taxpayer's property. (*See, e.g., Dear v. Varnum* (1889) 80 Cal. 86, 89-90.) In *Southern Service Company, Ltd. v. Los Angeles County* (1940) 15 Cal.2d 1, this Court affirmed that "illegal taxes voluntarily paid may not be recovered by the taxpayer in the absence of a statute permitting a refund thereof; and in the absence of such statute only illegal taxes paid under duress, coercion or compulsion are considered to have been involuntarily paid and therefore recoverable." (15 Cal.2d at 7. (internal citations omitted)) Payment to a tax collector who is acting on an invalid statute or beyond the scope of the statute is voluntary because in such a case the taxpayer is not obligated to pay. (*See, e.g., Wills v. Austin* (1878) 53 Cal. 152, 178-180.) In sum, the resources of the state to collect taxes make virtually every payment of taxes legally compelled and therefore, by common-law standards, involuntary.

At the very least, the distinction between voluntary and involuntary is a matter of degree and not of kind. For example, in the context of this case, the facts establish that the taxpayer's payment was entirely involuntary as a practical matter. Had the taxpayer not paid the taxes, there is no question that he would have been subject to a substantial assessment and forced collection of tax, interest, and possible penalties. The taxpayer's notice at the time of his tax payment that he was reserving his appeal rights put the Franchise Tax Board squarely on notice that he was making the payment under compulsion and protest as a prelude to bringing the equivalent of an action for money had and received, *i.e.*, the lineal descendant of the common law writ of assumpsit in which the claimant had an

unquestioned right to a jury trial. As the Supreme Court stated in *Elliott v. Swartwout* (1836) 35 U.S. 137, 156, in addressing a suit for overpayment of customs duties, "Lord Kenyon observed [in *Irving v. Wilson* (1791) 4 Term Rep. 485], that the revenue laws ought not to be made the means of oppressing the subject; that the seizure was illegal; that the defendants took the money under circumstances which could by no possibility justify them; and, therefore, this could not be called a voluntary payment."

Second, the Court of Appeal correctly concluded (Opn. at p. 15.) that the FTB's assertion that the Estate's payment was voluntary "reflects a misunderstanding of the concept [of voluntariness]." At the time the Estate paid the tax, the Estate notified the FTB unequivocally that it was reserving its right to bring a refund action against the state, thereby paying under protest. (Opn. at p. 15-16.) In these circumstances, the Court of Appeal properly invoked the teaching of the United States Supreme Court that "a payment is not voluntary if there is 'any declaration made to the collector of an intention to prosecute him to recover back the money.'" (Opn. at p. 16 (quoting *Elliott v. Swartwout* (1836) 35 U.S. 137, 153.)) In *Elliott*, the Supreme Court held that "where, at the time of payment, notice is given to the collector that the duties are charged too high, and that the party paying, so paid to get possession of his goods; and accompanied by a declaration to the collector, that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury," the payment was not voluntary, and the tax collector was liable to suit before a jury

trial for a refund of the tax payment. (35 U.S. at 156-158.)[7] Here, the Estate's payment was made under the duress of collection and the possible assessment of additional penalties. Moreover, prepayment adjudication was not available to the Estate. Thus, even assuming *arguendo* that Gonzales' payment were deemed to be voluntary (an assumption which is contrary to the facts), the common law rationale for denying trials in cases of voluntary payments would not apply.

Third, the case law confirms that the Estate's tax payment was involuntary. Under one line of cases, any tax paid under protest is involuntary. (*Bucknall v. Story* (1873) 46 Cal. 589, 598 (citing *Guy* v. *Washburn* (1863) 23 Cal. 111 et al.)) Under a second line of cases, payment is involuntary when made under protest in situations of duress or coercion. (*McMillan* v. *Richards* (1858) 9 Cal. 365, 417.) For there to be duress or coercion the collecting party must possess or appear to possess the power to exact payment and the paying party must have no relief from that power other than payment. (*Bucknall v. Story* (1873) 46 Cal. 589, 598-599 (quoting *Brumagin* v. *Tillinghast* (1861) 18 Cal. 265.)) As this Court explained in *Bucknall* in 1873,

> a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of

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[7] *See also Lamborn v. County Commissioners* (1877) 97 U.S. 181, 185-186 (explaining that the reason a taxpayer has no judicial recourse for a voluntary payment is that "[h]ad the plaintiff desired to litigate the question, he could have done so without paying the money."); *United States v. California* (1993) 507 U.S. 746, 751 (holding payments made under protest or with notice of intent to bring suit for refund are recoverable as money had and received).

> the party from detention, or *when the other party is armed with apparent authority to seize upon either*, and the payment is made to prevent it.

(*Bucknall v. Story* (1873) 46 Cal. 589, 599 (quoting *Mays v. Cincinnati* (1853) 1 Ohio St. 268) (emphasis added).) The state's tax collection power arms it with the authority to seize property to satisfy a tax liability. By the terms of the compliance initiative under which the Estate paid the alleged tax liability, failure to participate could result in assessment of the tax, substantial penalties, and possibly criminal charges. Payment by the Estate was the only method available for avoiding these draconian consequences. Therefore, the Estate's tax payment was involuntary in the fullest sense of the word.

IV. THE STATUTORY NATURE OF THE ESTATE'S MODERN TAX REFUND ACTION IS IRRELEVANT IN DETERMINING WHETHER OR NOT THE ESTATE HAS THE RIGHT TO A JURY TRIAL IN THIS CASE.

A. Whether the Estate's Right to Bring a Tax Refund Action is Statutory or Not is Irrelevant to the Question Whether the Estate's Right to a Jury Trial in a Tax Refund Action is Preserved by the California Constitution.

The FTB improperly characterizes the Estate's right to bring its tax refund as purely statutory. (FTB's Brief at p. 8-11.) While the Estate's brought the tax refund action under the pertinent provisions of the Revenue and Taxation Code, the enactment of those provisions is subject to the rights granted by the California Constitution. Thus, the question whether the Estate has a right to a jury trial in the tax refund action requires a historical analysis of analogous common-law actions and the gist of the action. (See *supra,* Points I, III.) The Estate's tax refund action

was brought pursuant to California Revenue and Taxation Code sections 19382 and 19385, both of which are silent as to whether there is a right to a jury trial in such actions.[8] Therefore, as the Court of Appeal recognized, the "purely historical question" is presented whether the right to a jury trial in a tax refund action was preserved by Article I, Section 16 of the California Constitution. (*People* v. *One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287.) As a historical matter, as discussed above and conceded by the FTB, the right to a jury trial in a tax refund action for taxes involuntarily paid is preserved by the California Constitution. (Opn. at p. 7-14.)

In *Southern Service Company, Ltd. v. Los Angeles County* (1940) 15 Cal.2d 1, 11, cited by the FTB (FTB's Brief at pp. 8-9.) for the proposition that the right to a refund of taxes is purely statutory, this Court expressly noted that its analysis did not apply to "the common-law right to a refund of taxes involuntarily paid." (15 Cal.2d at 12.) Therefore, the FTB's contention would only be relevant if the Estate had paid the taxes in question voluntarily, which it did not. (*See* Point II, *supra*.)

The FTB's discussion of *Southern Service* focuses on this Court's holding that the taxpayer's right to a refund of taxes paid pursuant to Political Code section 3804 was statutory. This concept is further explained in *Spurrier v Neumiller*

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[8] The Court of Appeal properly found that the doctrine of sovereign immunity did not defeat the Estate's right to a jury trial because by enacting a statutory right to bring a tax refund action, the state had consented to such suits being brought against it. (Opn. at pp. 16-23.)

(1918) 37 Cal. App. 683, 691, on which this Court relied in *Southern Service*, in which the Court explained that the power to tax is statutory, so the right to a refund of taxes paid pursuant to statute is necessarily statutory. For that reason, in *Aalywyn's Law Institute v. City and County of San Francisco* (1919) 39 Cal.App. 414, cited by the FTB (FTB's Brief at p. 8.), the court stated that a tax refund action brought pursuant to statute is not a common-law action. But this line of argument is irrelevant to the question before this Court. Of course, the Estate brought its tax refund action pursuant to statute, Revenue and Taxation Code §§ 19382, 19385, but the statutory nature of the modern-day tax refund action is not relevant in analyzing whether the common-law right to a jury trial in a tax refund action was preserved by the California Constitution. Modern statutes have replaced common-law actions. But, as this Court made clear in *Chevrolet Coupe*, the common-law actions are relevant for the purpose of determining whether the Estate's right to a jury trial was preserved by the California Constitution.

The FTB discusses the enactment in 1893 of statutes authorizing taxpayers to 1) sue the state, rather than the tax collector, for a refund of taxes, and 2) sue for the refund of voluntary payments. (FTB's Brief at p. 6-8.) This expansion of the common-law right to bring a tax refund action against tax collectors, as described by the FTB, "relieve[d] taxpayers from the harshness of the application of the Voluntary Payment Doctrine" and made the law better suited to "'this more enlightened age.'" (*Id.* at 8 (quoting *Hellman v. City of Los Angeles* (1905) 147 Cal. 653, 654-655.)) However, the modern statutory scheme, while relevant to the

Estate's present-day tax refund suit, has no relevance to the question whether the Estate has the constitutional right to a jury trial. As we have discussed above, the prescribed constitutional analysis requires an inquiry whether the gist of the Estate's tax refund action is legal, and whether the Estate's tax refund action is analogous to a common-law action in which an individual had the right to a jury trial in 1850. Here, the gist of the action is legal, and the tax refund action is analogous to the common-law tax refund action against tax collectors. Therefore, the Estate has the right to a jury trial.

B. The Estate has a Right to a Jury Trial Because a Tax Refund Action is Not a Special Proceeding.

The Estate's tax refund action is a civil action, not a special proceeding, as defined by California Code of Civil Procedure § 22:

> An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

(*See, also, Cornette v. Department of Transportation* (2001) 25 Cal.4th 63, 75-76.) Actions other than those listed in California Code of Civil Procedure § 22 are special proceedings. (California Code of Civil Procedure § 23) The Estate's tax refund action is an ordinary proceeding in a court of justice, the Superior Court of California for the County of San Francisco. The refund action is for the enforcement of the Estate's right to a refund of taxes illegally and involuntarily

paid and the redress of the wrong of the state requiring the payment of such tax, but failing to refund the amounts illegally collected.

The FTB attempts to analogize the Estate's tax refund action to a variety of special proceedings which were either not recognized at common law or for which the common law explicitly denied the right to a jury trial. (FTB's Brief at p. 4, 11-14.) But such analogies are misplaced because a tax refund action is not a special proceeding, and because the common law recognized the right to bring a refund action against a tax collector before a jury. As described by the Court of Appeal, "It is not critical whether a particular right of action existed in 1850; the critical inquiry is whether the current case is of the same '"nature"' or '"class"' as one which existed at law in 1850." (Opn. at p. 4 (citing this Court's opinion in *Chevrolet Coupe,* 37 Cal.2d at pp. 299-300 and *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 613-614.))

In sum, this Court should reaffirm that "[t]he right to a trial by jury is fundamental and 'should be zealously guarded by the courts.' [Citations.] 'In case of doubt . . ., the issue should be resolved in favor of preserving a litigant's right to trial by jury.'" (Opn. at p. 4-5 (citations omitted).)

CONCLUSION

For the reasons stated, the decision of the Court of Appeal should be affirmed in its entirety.

Dated: April 5, 2010

Respectfully submitted,

MARTIN A. SCHAINBAUM
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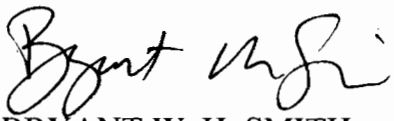

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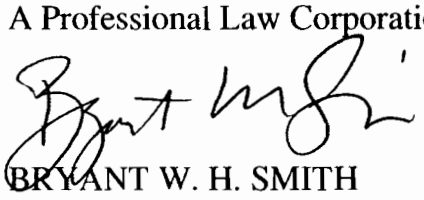
CERTIFICATE OF COMPLIANCE

I certify that the above Respondent and Real Party in Interest's Answer Brief on the Merits uses 13-point Times New Roman font and contains 6,553 words.

Dated: April 5, 2010

Respectfully submitted,

MARTIN A. SCHAINBAUM
A Professional Law Corporation



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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**

San Francisco Superior Court No.: **CGC-06-454297**;
California Court of Appeal, First Appellate Dist., Div. Five, No.: **A122723**
California Supreme Court: **S176943**

I declare:

I am employed in at Martin A. Schainbaum, A Professional Law Corporation, 351 California Street, San Francisco, California 94104-2406. I am 18 years of age and older and not a party to this matter. My business address is: 351 California Street, Suite 800, San Francisco, California 94104-2406.

On April 5, 2010, I served the attached **RESPONDENT AND REAL PARTY IN INTEREST'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with **Federal Express Courier Service**, addressed as follows:

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Deputy Attorney General
Department of Justice
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Attn: Judge John K. Stewart
400 McAllister Street
San Francisco, CA 94102
(via U.S. Mail)

Court of Appeal, First District
350 McAllister Street
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 5, 2010, at San Francisco, California.

Cheryl M. Wong, Declarant