

# SUPREME COURT 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**

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

**MAY 13 2010**

**Real Party in Interest and  
Respondent.**

**Frederick K. Ohlrich Clerk**

**Deputy**

California Court of Appeal, First Appellate District, Division Five,

Case No. A122723

San Francisco County Superior Court

Case No. CGC-06-454297

The Honorable John K. Stewart, Judge

### **PETITIONER'S REPLY BRIEF ON THE MERITS**

EDMUND G. BROWN JR.  
Attorney General of California  
DAVID S. CHANEY  
Chief Assistant Attorney General  
GORDON BURNS  
Deputy State Solicitor General  
PAUL GIFFORD  
Senior Assistant Attorney General  
WILLIAM L. CARTER  
Supervising Deputy Attorney General  
JEFFREY A. RICH  
Deputy Attorney General  
State Bar No. 108589  
1300 I Street, Suite 1300, P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: (916) 324-5154  
Fax: (916) 327-2247  
Email: Jeffrey.Rich@doj.ca.gov  
*Attorneys for Petitioner Franchise Tax Board*



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Petitioner Franchise Tax Board (“FTB”) submits its reply brief on the merits in response to the answer brief on the merits of real party in interest and respondent Tom Gonzales (“Gonzales”), as personal representative of the estate of Thomas J. Gonzales, II (deceased).

### **SUMMARY OF ARGUMENT**

Rather than addressing the points and authorities offered by the FTB in its opening brief on the merits (“FTB’s brief”), Gonzales’ answer brief on the merits simply restates the Court of Appeal’s legal analysis and authorities. However, as argued in the FTB’s brief, the court erred in overlooking the fact that Gonzales’ right to bring his tax refund action is a right created by statute in derogation of common law. Because of this fundamental error the court erroneously: (i) concluded that common law suits against tax collectors are analogous to modern statutory tax refund actions; and (ii) applied the gist of the action test.

In sum, Gonzales has failed to offer any new or additional arguments refuting that: (i) his statutory tax refund action takes the place of a common law tax refund as a matter of legislative grace; (ii) the gist of the action test is not applicable in this case; and (iii) there is no statute granting Gonzales the right to a jury trial. The FTB respectfully submits that Gonzales’ failure to offer any such arguments stems from the fact that there are no authorities which would permit making such arguments.

### **ARGUMENT**

#### **I. GONZALES FAILS TO ADDRESS THE PIVOTAL POINT FOR THE RIGHT TO JURY TRIAL ANALYSIS IN THIS CASE: NAMELY, THAT HIS RIGHT TO SUE IS A RIGHT UNKNOWN AT COMMON LAW**

The parties and the court below all agree that the proper analysis for the right to a jury trial turns on whether that right existed at common law in 1850 when the California Constitution was first adopted. (*Cornette v. Dept.*





*of Transportation* (2001) 26 Cal.4th 63, 75-76.) As discussed at length in the FTB's brief, Gonzales' right to bring his tax refund action pursuant to Revenue and Taxation Code section 19382 (hereinafter, section 19382), is a right unknown at common law. Specifically, under common law there was no action for a tax refund against the sovereign for taxes voluntarily paid. Accordingly, Gonzales would not have had the right to bring his statutory tax refund action under the common law of 1850 because no such right then existed. (FTB's brief at pp. 5-8.)

However, Gonzales fails to offer any argument to refute the proposition that his section 19382 refund action is a right unknown at common law. More precisely, Gonzales fails to offer any argument refuting that: (i) under the common law of England, aggrieved taxpayers were entitled to bring actions at law against tax collectors for recovery of taxes, but only if the taxes were not paid voluntarily (FTB's brief at p. 5); (ii) under the voluntary payment doctrine followed in California and most other states, it is settled that taxes freely and voluntarily paid may not be recovered by a taxpayer in the absence of a statute permitting the refund thereof, and that this is so even if the taxes are illegally levied or collected (*ibid.*); (iii) in 1893, the Legislature abrogated common law in two respects with regard to tax refund actions – taxpayers were authorized to sue the state for taxes voluntarily paid (FTB's brief at p. 8); and (iv) Gonzales' section 19382 refund action takes the place of a common law refund action (*ibid.*).

Rather than offering argument to counter these points, Gonzales resorts to mischaracterizing the FTB's argument:

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 . . . at p. 15.) Rather, the FTB argues that the 'gist of the action' test is



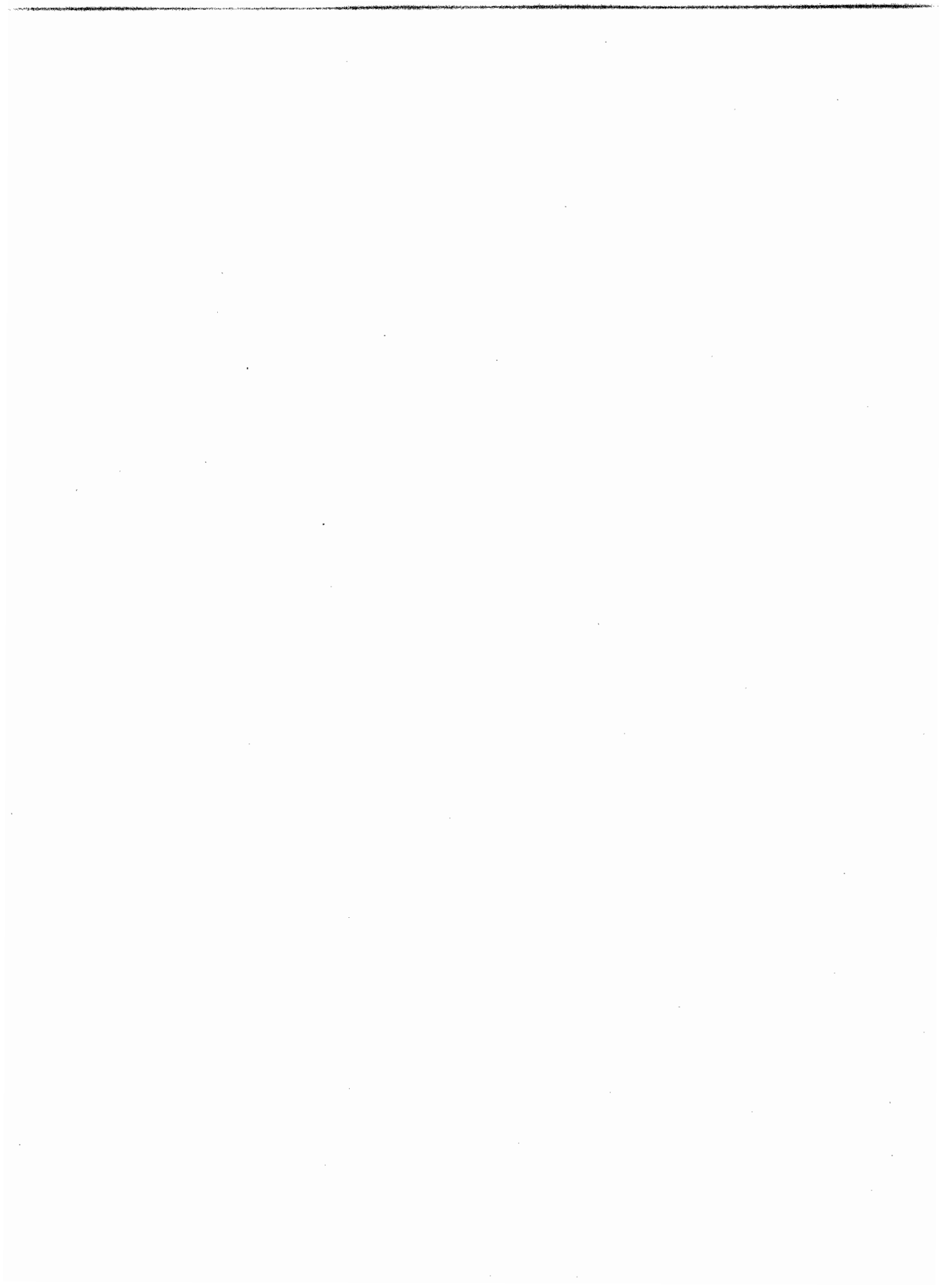
irrelevant because the right for a taxpayer to bring a tax refund action is provided for by statute. (*Id.*)

(Gonzales' answer brief on the merits at p. 9.)

The FTB contends that there is no right to a jury trial in this case 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. (FTB's brief at pp. 15-16.) Accordingly, the decisions relied upon by the Court of Appeal and Gonzales, including *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 Cal.2d 613, are inapposite. None of these decisions involve a lawsuit, as in this case, predicated on a right created by statute in derogation of common law. Contrary to Gonzales' unsupported assertions, the gist of the action test is not applicable in this case because his section 19382 refund action is a right unknown at common law.

**II. BECAUSE MODERN CALIFORNIA STATUTORY TAX REFUND ACTIONS ARE IN DEROGATION OF COMMON LAW THEY ARE NOT ANALOGOUS TO COMMON LAW ACTIONS AGAINST TAX COLLECTORS FOR THE RECOVERY OF INVOLUNTARY TAX PAYMENTS**

Gonzales has neither refuted the proposition that his section 19382 refund action is a right created by statute in derogation of common law nor offered any authorities which hold that an action predicated on a right created by statute in derogation of common law is analogous to a common law action.



**III. THIS CASE IS NOT A COMMON LAW ACTION AND, THEREFORE, WHETHER GONZALES' TAX PAYMENT IS INVOLUNTARY IS IRRELEVANT TO THE RIGHT TO JURY TRIAL ANALYSIS**

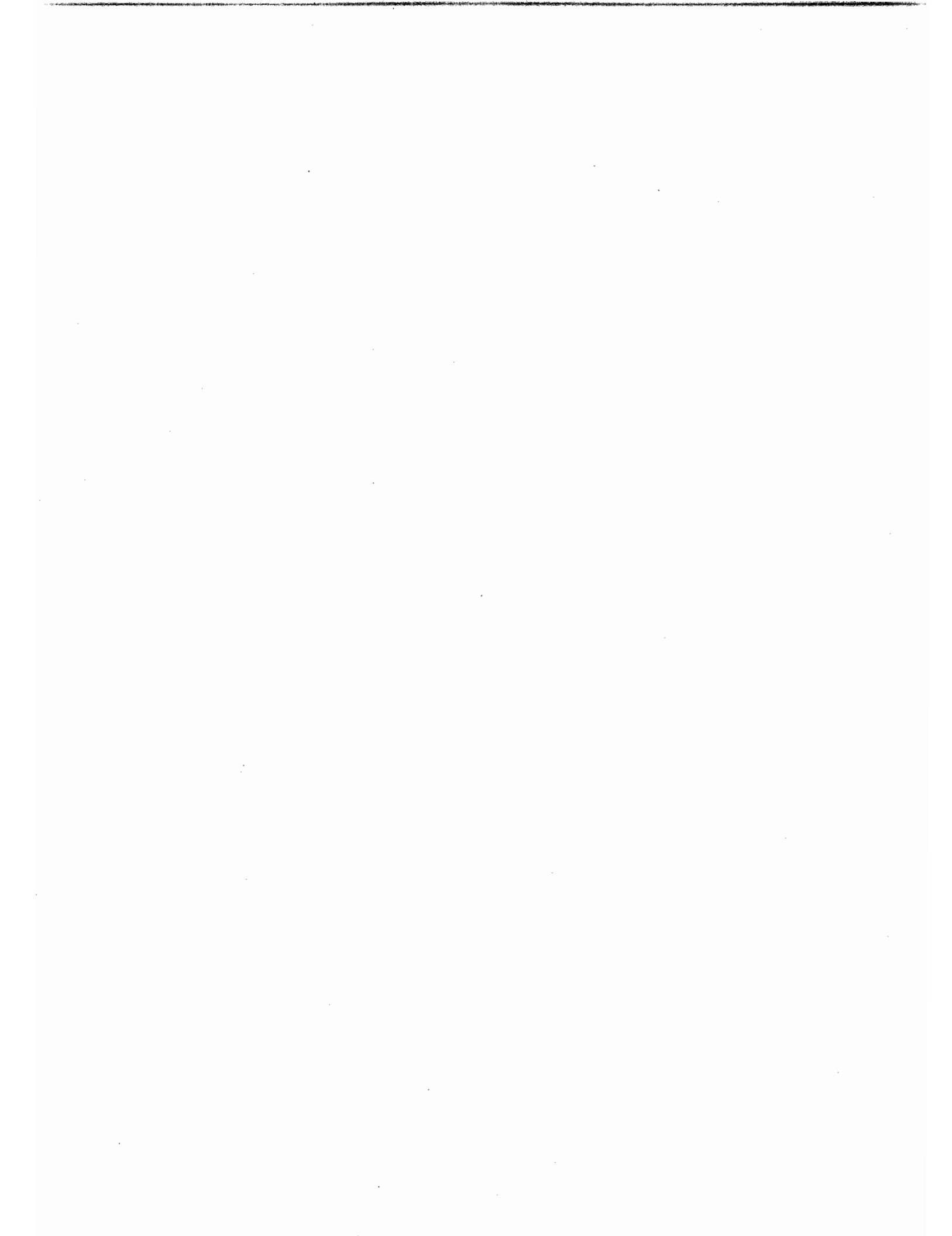
The issue before this Court is whether Gonzales is entitled to a trial by jury in this action which is brought pursuant to section 19382. The nature of the tax payment at issue -- involuntary versus voluntary -- is neither procedurally nor substantively relevant in this case. Gonzales has not brought nor could he bring a common law action against the FTB for a tax refund. (See FTB's brief at p. 16, fn. 10.) Gonzales has not shown otherwise.

**IV. THE STATUTORY NATURE OF THIS ACTION IS PIVOTAL TO THE RIGHT TO JURY TRIAL ANALYSIS BECAUSE GONZALES' RIGHT TO SUE DID NOT EXIST AT COMMON LAW AND NO STATUTE GRANTS GONZALES THE RIGHT TO A JURY TRIAL**

Gonzales' right to bring his tax refund action is a right created by statute in derogation of common law and no statute grants Gonzales the right to a jury trial.<sup>1</sup> Gonzales has failed to distinguish this case with the examples of similar statutory actions -- actions created by statute granting rights unknown at common law without the grant of the right to jury trial -- cited in the FTB's opening brief. (See FTB's brief at pp. 11-12.)

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<sup>1</sup> Gonzales again resorts to mischaracterizing the FTB's contentions by stating: "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 the California Constitution. (Opn. at p. 7-14.)" (Gonzales' answer brief on the merits at p. 17 [emphasis added].) The FTB simply stated in its opening brief that it "does not dispute that under common law aggrieved taxpayers were entitled to bring legal actions against tax collectors for the recovery of involuntarily paid taxes and, in those cases, were entitled to jury trials." (FTB's brief at p. 16.) The FTB does not concede that Gonzales is entitled to a jury trial under any set of facts or legal theory.



For example, Gonzales has failed to distinguish *Rankin v. Frebank Company* (1975) 47 Cal.App.3d 75, wherein a jury trial was denied to shareholders bringing a corporate involuntary dissolution proceeding. In *Rankin*, as in this case, the subject cause of action was based upon a new right created by statute: “Since in the absence of a statute the California right to trial by jury extends only to those cases triable by a jury at common law as it existed in 1850, and since the courts *could not dissolve a corporation on petition of a minority shareholder prior to 1931* [citation], it is clear that the right to trial by jury does not extend to an involuntary dissolution proceeding.” (*Id.* at p. 92 [emphasis added].)

In sum, Gonzales is not entitled to a jury trial for his statutory tax refund action because his right to bring that action is unknown to the common law of 1850 and no California statute grants him the right to a jury trial for that action.





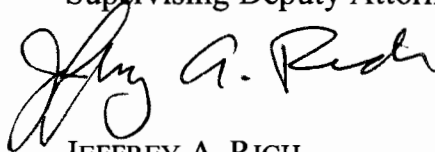
## CONCLUSION

For the reasons stated, this Court should reverse the Court of Appeal and hold that Gonzales is not entitled to a jury trial for his tax refund suit pursuant to section 19382.

Dated: May 16 2010

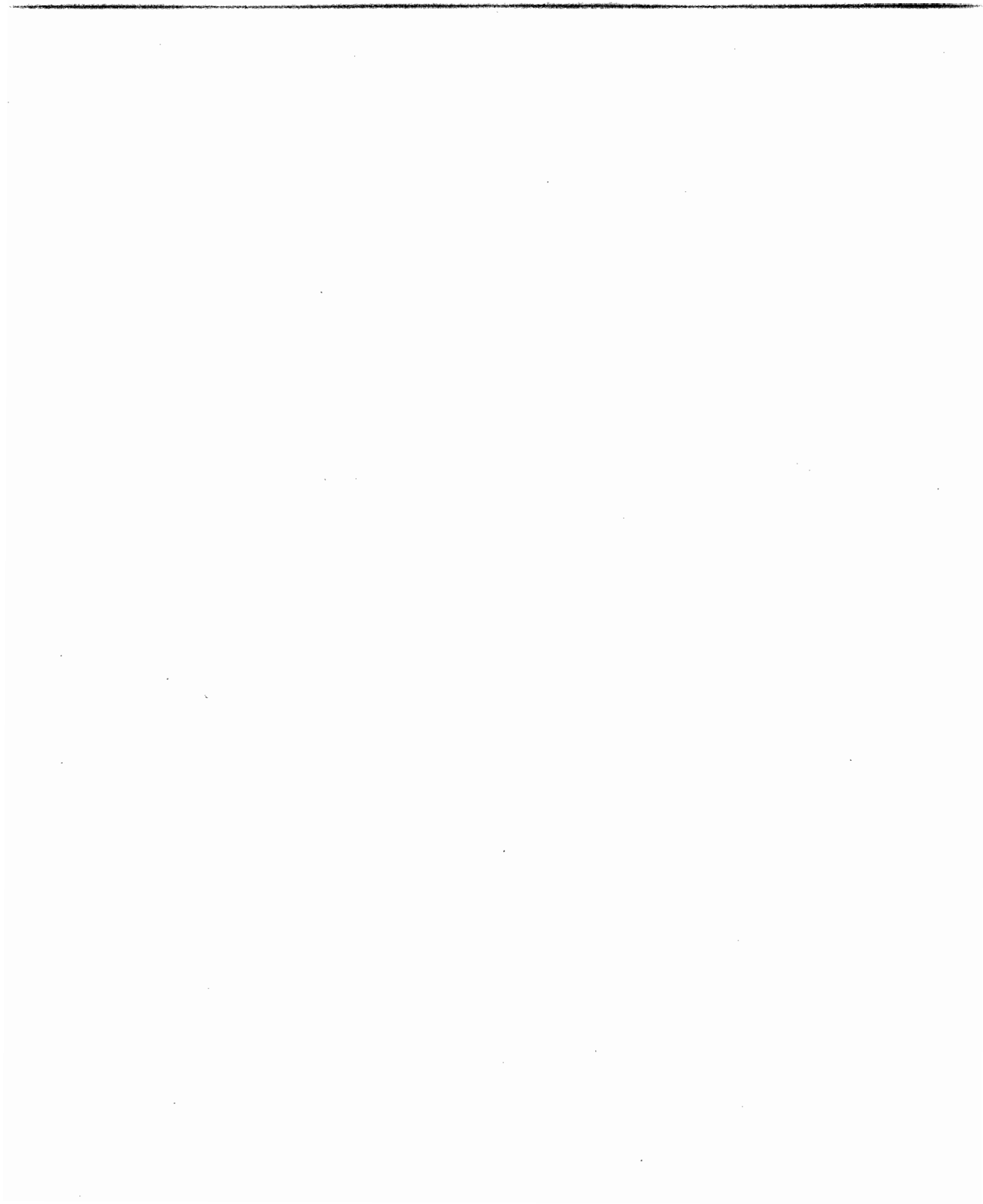
Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
DAVID S. CHANEY  
Chief Assistant Attorney General  
GORDON BURNS  
Deputy State Solicitor General  
PAUL GIFFORD  
Senior Assistant Attorney General  
WILLIAM L. CARTER  
Supervising Deputy Attorney General



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

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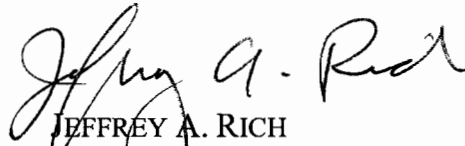


**CERTIFICATE OF COMPLIANCE**

I certify that the attached Petitioner's Reply Brief on the Merits uses a 13 point Times New Roman font and contains 1,838 words.

Dated: May 10 2010

EDMUND G. BROWN JR.  
Attorney General of California

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

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**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

**Case Name: Franchise Tax Board v. The Superior Court of the City and County of San Francisco**

**Tom Gonzales, as Personal Representative, etc. (Real Party in Interest and Respondent)**

**Supreme Court of the State of California Case No. S176943**

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 May 10, 2010, I served the attached **PETITIONER'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight Courier**, addressed as follows:

Martin A. Schainbaum, Esq.  
Martin A. Schainbaum, PLC  
351 California Street, Suite 800  
San Francisco, CA 94104  
*Attorneys for Respondent*

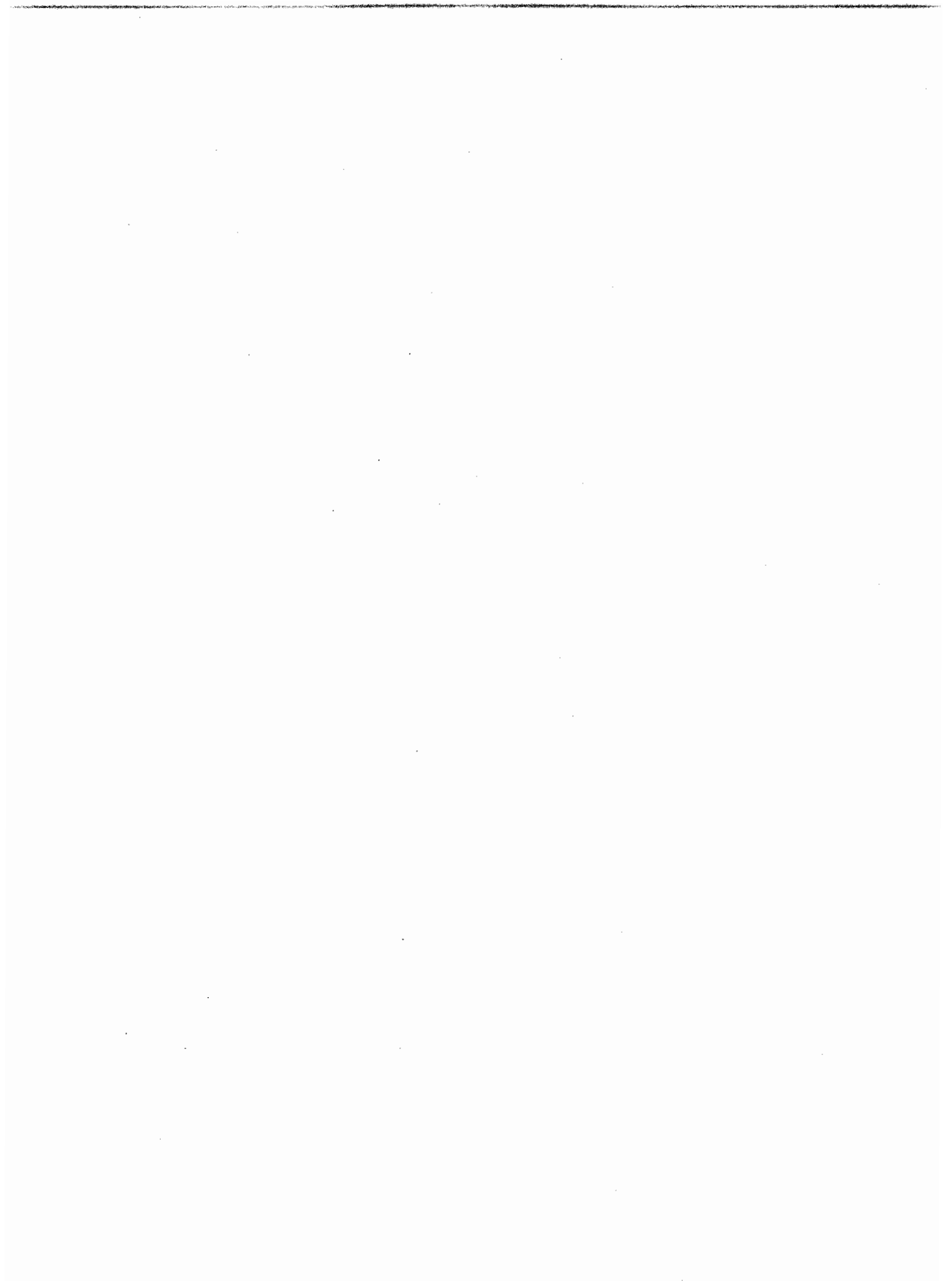
Court of Appeal, First District  
350 McAllister Street  
San Francisco, CA 94102-3600  
*(Sent via U.S. Mail only)*

San Francisco County Superior Court  
400 McAllister Street,  
San Francisco, CA 94102  
*(Sent via U.S. Mail only)*

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 May 10 2010, at Sacramento, California.

\_\_\_\_\_  
Lisa J. Talani  
Declarant

*Lisa J. Talani*  
\_\_\_\_\_  
Signature







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