STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

HODGSON RUSS LLP

Petitioner,

Hon. Timothy J. Walker
Index No.: 2014000097

Hybrid proceeding/action for judgment Pursuant to Articles 78 and 30 of the CPLR and 42 U.S.C. § 1983

v.

MINNESOTA DEPARTMENT OF REVENUE

MYRON FRANS, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE

Respondents.

MEMORANDUM IN SUPPORT OF HODGSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO MINNESOTA REVENUE'S MOTION TO DISMISS

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Introduction

Petitioner, Hodgson Russ, LLP ("Hodgson") submits this memorandum in support of its motion for partial summary judgment and in opposition to the motion to dismiss filed by Respondents Minnesota Department of Revenue and Myron Frans (collectively, "Revenue").

Preliminary Statement

This case concerns Revenue's constitutionally impermissible assertion of its income tax jurisdiction over Hodgson based on nothing more than Hodgson's receipt of fees reflected on Forms 1099 carrying a payor address in Minnesota. Revenue's nexus determination against Hodgson violates the Interstate Commerce and Due Process clauses of the U.S. Constitution, and Hodgson is entitled to partial summary judgment on its claims seeking declaratory, injunctive, and other relief.[1]

Argument

A party seeking summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law.[2] The moving party does not have to disprove every "remotely possible state of facts" on which the opposing party might succeed;[3] and a court has no duty to "ferret out speculative issues" of fact if none exist.[4]

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1 Hodgson's showing in support of its own motion for summary judgment requires the denial of Revenue's motion to dismiss.

2 *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 320 (2009); *see also* N.Y. C.P.L.R. § 3212 (McKinney's 2014) (stating that summary judgment is appropriate where the proof sufficiently establishes that no genuine issues of fact exist such that judgment is warranted as a matter of law).

3 *Ferluckaj,* 12 N.Y. 3d at 320 (holding that plaintiff's "theorizing" was insufficient to defeat defendant's motion for summary judgment).

4 *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974) ("Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law.").

Once the moving party has made its *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.[5] "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment.[6]

"When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing."[7] As discussed more fully below, Hodgson's claims raise pure issues of law for which it is entitled to summary judgment.

I. HODGSON IS ENTITLED TO SUMMARY JUDGMENT ON ITS FIRST CAUSE OF ACTION FOR DECLARATORY JUDGMENT

"CPLR 3001 is . . . a remedial provision the primary purpose of which is to stabilize legal relations and eliminate uncertainty as to the scope and content of present or prospective obligations."[8] A declaratory judgment action is "appropriate when the application of

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5 *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

6 *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 967 (1988) (citation omitted).

7 *Goodwin v. Cirque du Soleil, Inc.*, 2012 N.Y. Misc. LEXIS 2368, at *4 (Sup. Ct. N.Y. Cnty. May 14, 2012) (citing *Hindes v. Weisz*, 303 A.D.2d 459 (2d Dep't 2003)).

8 WEINSTEIN, KORN, MILLER, New York Civil Practice, § 3001.02 at 30-10, 2d ed. (LexisNexis 2014); *see also Brown v. N.Y.S. Tax Comm'n*, 199 Misc. 349 (1950), *aff'd*, 279 A.D. 837, *aff'd*, 304 N.Y. 651 (1952) ("The general purpose of a declaratory judgment is to quiet and stabilize uncertain or disputed jural relations either as to present or prospective obligations, and no limitation has been placed or attempted to be placed upon its use."); *Socony-Vacuum Oil Comp. v. City of New York*, 247 A.D. 163, 166 (1st Dep't 1936) (stating same in an action for declaratory judgment and injunctive relief); *Morgenthau v. Dist. Atty. of N.Y. Cnty.*, 59 N.Y.2d 143, 147 (1983) ("[D]eclaratory relief . . . is not an extraordinary remedy. Instead, a declaratory judgment 'is a remedy *sui generis* and escapes both the substantive objections and procedural limitations of special writs and extraordinary remedies. * * * * In keeping with the remedy's nonextraordinary nature . . . the court has a broader power to grant declaratory judgment than it does with prohibition.").

a statute to a given case is challenged[.]"[9]

In the tax context, "[a]n action for a declaratory judgment may be maintained, despite the provisions of a taxing statute providing that the methods of judicial review prescribed therein shall be exclusive, where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional, or where the tax laws are inapplicable to the taxpayer."[10] Indeed, New York caselaw makes clear that "[a] declaratory judgment action is the proper vehicle to test the jurisdiction of . . . taxing authorities."[11] And a party need not pursue an

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9 *Namro Holding Corp. v. New York*, 17 A.D.2d 431, 434-35 (1st Dep't 1962) (stating that "[declaratory judgment] is . . . appropriate when the application of a statute to a given case is challenged[,]" and noting that "[t]he availability of the administrative remedy of an appeal to the Board of Standards and Appeals does not preclude this action challenging the application of the statute and the rules to the facts of this case") (citation omitted); *see also Dun & Bradstreet v. City of New York*, 276 N.Y. 198, 206 (1937) (citing *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234, 239 (1942)).

10 *Nat'l Steel Corp. v. New York*, 1 Misc. 2d 1012, 1013 (Sup. Ct. N.Y. Cnty. 1953) (citing *Richfield Oil Corp.*, 287 N.Y. at 239; *see also Nat'l Steel Corp.*, 1 Misc. 2d at 1013-16 (denying tax authority's motion to dismiss complaint and granting plaintiff's motion for summary judgment which challenged the "constitutional power of the defendants to assess, collect or enforce the payment of the tax in question," rejecting tax authority's exhaustion argument, and declaring, as a matter of law, that the tax imposed on plaintiff constituted an impermissible and invalid "attempt by the city to tax the privilege of soliciting interstate business," which "constitute[d] a violation of the commerce clause of the United States Constitution," and was thus invalid as to the plaintiff); *see also People ex rel. Erie R. Co. v. State Tax Com.*, 246 N.Y. 322, 326-27 (1927) ("The Commission erroneously determined the existence of facts essential to its jurisdiction and, therefore, its acts in assessing property exempt from assessment were void.").

11 *Troy Towers Redevelop. Co. v. City of Troy*, 51 A.D.2d 173, 175-76 (3d Dep't 1976) (citing *Dun & Bradstreet*, 276 N.Y. 198; *People ex rel. Erie R.R. Co.*, 246 N.Y. 322; *Matter of City of New York [Woodhaven Blvd.]*, 260 A.D. 659 (2d Dep't 1940)) (noting that "an assessment upon property that is exempt from taxation is a nullity, void from its inception"); *see also Dun & Bradstreet*, 276 N.Y. at 204 ("It is elementary that taxing statutes when of doubtful validity or effect must be construed in favor of the taxpayers.") (reversing the appellate division and affirming the trial court's decision denying City's motion to dismiss and holding that declaratory judgment was the appropriate remedy); *see also id.*, 276 N.Y. at 206 ("If taxing officers act without jurisdiction, their acts are illegal and void. In such a case, certiorari is not an adequate remedy even if a proper one."); *Hotel Armstrong, Inc. v. Temp. State Hous. Rent Comm'n*, 11 A.D.2d 395, 402 (1st Dep't 1960) ("Since constitutionality of the statute was involved, the remedy of declaratory judgment was a particularly appropriate one and plaintiff is not confined to the statutory administrative procedure and the review provided by article 78 of the Civil Practice Act.").

"administrative remedy" — thus consenting to an administrative agency's jurisdiction — in order to contest the very jurisdiction it challenges.[12]

A. There Are No Disputed Issues Of Fact Regarding The Basis For Revenue's Unconstitutional Nexus Determination

Revenue claims that there are "unresolved issues of fact" that somehow preclude this Court from granting declaratory relief. *See* MR Memo. at 3, 6, 7. Revenue ties this argument to its very recent (and convenient) characterization of its nexus determination as one that is "initial" or "preliminary," and part of an ongoing "investigation." *See, e.g.,* MR Memo. at 3, 8, 10, 11. But there is no reason for this Court to credit Revenue's characterization. It isn't accurate.[13] Revenue's March 25 letter to Hodgson spells out exactly what Revenue is requiring of Hodgson and why:

> *A* corporation or ***partnership is required to file a Minnesota franchise tax return for every taxable year in which it transacts business within Minnesota.*** According to information available to this office, your firm has been conducting business in our state, but has not filed any Minnesota franchise tax returns.

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12 *Niagara Mohawk Power Corp. v. City School Dist.*, 59 N.Y.2d 262, 271 (1983) ("[I]t is inconsistent to insist that the taxpayer pursue an administrative remedy, thereby impliedly recognizing the jurisdiction of the district, at the same time it challenges the legality of the district's action.") (citation omitted); *see also First Nat'l City Bank v. New York Fin. Admin.*, 36 N.Y.2d 87, 92-93 (1975) ("When a tax statute, however, is alleged to be unconstitutional, by its terms or application, or where the statute is attacked as wholly inapplicable, it may be challenged in judicial proceedings other than those prescribed by the statute as 'exclusive'; the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it."); *see also Yonkers Raceway, Inc., v. City of Yonkers*, 66 Misc. 2d 589, 592-93 (Sup. Ct. Westchester Cnty. 1971) (rejecting City's argument that plaintiff was required to exhaust administrative remedies, denying City's motion to dismiss, granting petitioner's motion for summary judgment, declaring certain of the petitioner's revenues untaxable, and further declaring that the City comptroller had no authority to levy a tax on the income in dispute); *New York Bus Tours, Inc. v. City of New York*, 111 Misc. 2d 10 (Sup. Ct. Bronx Cnty. 1981) (rejecting defendants' exhaustion argument and noting that the petitioner's Article 78 proceeding was properly commenced where the petitioner sought to "prohibit respondent from exceeding its jurisdiction by applying the sales tax law to petitioner's operation").

13 While only disputed issues of material fact are sufficient to defeat a motion for summary judgment, Hodgson notes that for purposes of Revenue's own motion, the allegations in the complaint must be accepted as true. *See, e.g., Sikora Realty Corp. v. Gillroy*, 37 Misc. 2d 285 (Sup. Ct. Queens Cnty. 1954) ("Since this is a motion to dismiss the complaint, [the plaintiff's allegations] are deemed to have been admitted for the purpose of the motion.").

* * * *

> We are aware that federal forms 1099's have been issued to your firm, showing that your firm has provided services to Minnesota clients who have received services within Minnesota for the tax years of 12/31/2004 forward.
>
> We now request that Minnesota Corporation or Partnership tax returns be submitted for 12/31/2009 – 12/31/2012. Please carefully review the revenue received from all Minnesota companies ***and remember that once nexus to Minnesota has been determined, as it has with your company***, all Minnesota property, payroll and sales must be apportioned to Minnesota.[14]

There is no genuine dispute as to the existence of, or the basis for, Revenue's nexus determination.[15] Revenue's statement to Hodgson in demanding Hodgson to file Minnesota tax returns is that nexus "has been determined," and that the basis for that determination is the "federal forms 1099's" issued to Hodgson.[16] For the reasons discussed in Section III. below, the mere issuance of federal Forms 1099 by Minnesota payors is insufficient to create constitutional nexus between Hodgson and Minnesota, and there are no genuinely

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[14] *See* Affirmation of Christopher L. Doyle, dated November 21, 2014 ("Doyle Aff."), Ex. 7 (March 25, 2014 letter from Minnesota Revenue to Hodgson) (emphasis added); *see also id.*, Ex. 9 (May 7, 2014 email from Minnesota Revenue to Hodgson: "[A]nd remember that once nexus to Minnesota has been determined, ***as it has with [Hodgson]***, all Minnesota property, payroll and sales must be apportioned to Minnesota. ***We claim jurisdiction*** on all Minnesota sales, revenue received, fees assessed, etc.") (emphasis added); MR Memo. at 2 (admitting that Revenue's May 7, 2014 email was intended to "explain[ ] the basis of Minnesota Revenue's nexus determination")

[15] *Zuckerman v. New York City Trans. Auth.*, 49 N.Y.2d 557, 562 (1980) ("We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . . ."); *BGC Partners, Inc. v Refco Sec., LLC*, 35 Misc. 3d 1210(A), at *4-5 (Sup. Ct. N.Y. Cnty. 2012) ("Genuine issues of material fact that preclude summary judgment are '[o]nly disputes over facts that might affect the outcome of the suit under the governing law.' The party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue of material fact for trial.") (internal citations omitted).

[16] "Prior to the commencement of this litigation, ***the only evidence available to Minnesota Revenue were the forms 1099s filed by Petitioner's Minnesota clients***, which indicated that petitioner provided services and billed those Minnesota clients at those mailing addresses." MR Memo. at 7 (emphasis added).

disputed issues of fact precluding this Court from granting the summary relief that Hodgson seeks.

B. Minnesota's Administrative Tribunals Have No Authority And Thus Are Not Competent To Adjudicate The Unconstitutionality of Revenue's Nexus Determination

Revenue argues that "[t]here is no necessity for this Court to entertain [Hodgson's] request for declaratory relief as Minnesota law makes conventional ***forms of relief*** readily available to [Hodgson]." MR Memo. at 4; *see also id.* at 6. It then goes on to argue that because there is an administrative process for Hodgson to challenge Revenue's nexus determination in Minnesota, Hodgson's first cause of action should be dismissed. *Id.* at 3.

There are three fundamental and fatal deficiencies in Revenue's argument. First, Revenue's argument clearly confuses the concepts of available "relief" with available "forums." Revenue goes on-and-on about Minnesota's administrative process, and then wrongly concludes that the existence of this process alone shows that Hodgson has "conventional ***forms of relief*** readily available to [it]." MR Memo. at 4.[17] Nowhere does Revenue claim that its administrative tribunal is capable of adjudicating issues concerning the constitutionality of Revenue's nexus determination. Nor could it. Administrative agencies are not competent to

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[17] For the reasons discussed in this brief, Hodgson disagrees that it has "conventional forms of relief" available to it. *See* §§ I.B. and III, *infra*. But even if Revenue's claim were true, the New York Court of Appeals has made clear that "[t]he mere existence of other adequate remedies . . . does not require dismissal [of a party's request for declaratory relief]." *Morgenthau v. Dist. Atty. of N.Y. Cnty.*, 59 N.Y.2d 143, 148 (1983) (stating further that "[w]e have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination, the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by [the predecessor statutes to CPLR 3001]") (alterations in original) (citation omitted).

decide matters concerning the constitutionality of the laws and regulations they oversee and enforce.[18]

Second, it is not true that Hodgson has access to the "conventional forms of relief" that Revenue suggests are beckoning for Hodgson in Minnesota. Minnesota's statutory law is pretty straightforward on this point: "[a] foreign limited partnership transacting business in [Minnesota] ***may not maintain an action or proceeding in [Minnesota]*** unless it has a certificate of authority to transact business in the state."[19] Hodgson does not maintain a certificate of authority in Minnesota, and it is not otherwise authorized to do business there.[20] Thus, even assuming Revenue's invitation to fully litigate the issue of constitutional nexus in Minnesota had any appeal (which it does not), the courthouse doors of Minnesota are closed to Hodgson.

Third, the entire predicate for Revenue's "all-of-this-is-unnecessary" argument is a red-herring. Revenue's position is that Hodgson has the ability to challenge Revenue's nexus determination provided it either files the very tax returns that it disputes having any obligation to

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18 *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978) (stating that the exhaustion doctrine is "not an inflexible one[,]" and is "subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile[.]"); *Hurlbut v. Whalen*, 58 A.D.2d 311, 317 (4th Dep't 1977) (holding that the "exhaustion of whatever administrative remedies were open to [the plaintiff] would have been futile since the administrative agency lacked both the power and competence to pass on the constitutionality of its own actions and procedures") (citing *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974) ("Federal agencies like the Board 'have neither the power nor the competence to pass on the constitutionality of administrative or legislative action.'"); *Matter of Smith v. Vann*, 16 Misc. 3d 1132(A), 1132A, at *6 (Sup. Ct. Clinton Cnty. 2007) ("[I]t is clear that the exhaustion rule need not be followed where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power. This exception to the exhaustion requirement is necessitated by the fact that administrative agencies are not in [a] position to pass upon the constitutionality of legislative or regulatory enactments."); *see also In re McCannel*, 301 N.W.2d 910, 919 (Minn. 1980) ("As a general rule, administrative agencies lack the power to declare legislation unconstitutional. Instead, these issues must be raised in a court of the judiciary.").

19 *See* Minn. Stat. § 321.0907(b) (2014).

20 *See* Doyle Aff. ¶ 16.

file, or allows Revenue to do the honors.[21] In essence, Revenue's argument is that if Hodgson would just comply with Revenue's nexus determination by filing tax returns for 2009-2012, the jurisdictional dispute that Hodgson has placed before this Court would not need to be adjudicated. Of course, the same would be true if Revenue would just agree that its basis for asserting constitutional nexus over Hodgson is illegitimate and wrong (which it is).

That juxtaposition is at the very heart of the parties' dispute — a dispute that is unquestionably ripe for adjudication here.[22] Declaratory relief is appropriate to deal with precisely this sort of jural impasse[23] — particularly where, as here, this Court is the ***only*** tribunal that is ***both*** capable of ***and*** competent to render a decision on the constitutional issue which Hodgson has raised. For the reasons discussed above, and those below in Sections II. and III., Hodgson is entitled to summary judgment on its first, second, and third causes of action, and a declaration that Revenue's nexus determination is unconstitutional.[24]

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21 "Minnesota statutes provide for both administrative and judicial review of any order of the Minnesota Commissioner of Revenue. Petitioner may file a return as . . . Minnesota Revenue requested." MR Memo. at 4. "If Petitioner refuses to file a return, Minnesota Revenue may file a return (Commissioner Filed Return or CFR) on the Petitioner's behalf or issue an Order for Assessment based on the information available to Minnesota Revenue." MR Memo. at 4.

22 *Booth v. City of New York*, 268 A.D. 502, 506 (1st Dep't 1944), *aff'd*, 296 N.Y. 573 (1946) (reversing trial court; granting petitioner's request for declaratory judgment on the pleadings; and finding that petitioner was not required to await an assessment and challenge same through a certiorari proceeding, and further that petitioner was not required to utilize the "exclusive remedies" articulated under the City's administrative code "under circumstances [in which] the taxing authority is on the very face of the threatened action exceeding the powers given it by the enabling act"); *see also Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003) (noting, in the Article 78 context, that whether agency action is final and ripe for review depends on whether the agency's determination "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process[,]" and finding that the agency's determination which required petitioner to file a draft environmental impact statement imposed a sufficient obligation on petitioner to give rise to its Article 78 request for prohibition) (citing *Matter of Essex Cnty. v. Zagata*, 91 N.Y.2d 447 (1998)).

23 *See* WEINSTEIN, KORN, MILLER, New York Civil Practice, § 3001.02 at 30-10, 2d ed. (LexisNexis 2014); *see also Brown*, 199 Misc. 349, *aff'd*, 279 A.D. 837, *aff'd*, 304 N.Y. 651.

24 None of the cases cited by Revenue compel a different conclusion, as none of them involve a constitutional challenge like the one that Hodgson has rightly placed before this Court to determine. *See, e.g., Xerox Corp. v. Dep't of Tax. & Fin. of the State of N.Y.*, 140 A.D.2d 945 (4th Dep't 1988) (no

II. HODGSON HAS PROPERLY CHALLENGED REVENUE'S NEXUS DETERMINATION UNDER ARTICLE 78 ON THE GROUNDS THAT IT IS ARBITRARY AND CAPRICIOUS, AFFECTED BY AN ERROR OF LAW, AND IN EXCESS OF REVENUE'S JURISDICTION

A. Hodgson's Request For Article 78 Relief Is Appropriate And Should Be Granted

Should this Court determine that more than its broad Article 30 powers are necessary to adjudicate the parties' dispute, Article 78 provides an adequate mechanism for the Court to find that Revenue's assertion of tax jurisdiction over Hodgson based on the mere issuance of federal Forms 1099 was arbitrary and capricious, and thus null and void. Instead of addressing the merits of Hodgson's Article 78 claim, or the appropriateness of the relief that Hodgson seeks under it (when properly characterized), Revenue opts to take the Court on a detour to discuss writs of prohibition in the context of ongoing "investigations." Once headed down this path, Revenue concludes that Hodgson's request for prohibition is improper.

There is a twofold problem with Revenue's argument-by-misdirection, however. First, Hodgson's second cause of action clearly states, in part, that in issuing a "determination of nexus between Hodgson and Minnesota under Minnesota Statute 290.015, Respondents have acted both in excess of their jurisdiction, and in an arbitrary and capricious manner." Doyle Aff., Ex. 2 at 9, ¶ 39 (Verified Petition).[25] These particular allegations are ***not*** in the nature of a writ of prohibition, but rather a mandamus to review.

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constitutional issue raised, factual questions existed as to nature and extent of Xerox's ownership of stock in another company, and Xerox had previously commenced an as yet unconcluded administrative proceeding with the state tax department); *Allstate Ins. Co. v. Tax Comm'n of New York*, 115 A.D.2d 831 (3d Dep't 1985) (no constitutional issue raised and factual questions existed as to the relationship between petitioning taxpayers and the deductible nature of certain receipts which precluded the court from resolving the issue as a "pure matter of law"); *Kallenberg Meat Prods. v. O'Cleireacain*, 209 A.D.2d 381 (2d Dep't 1994) (constitutionality of city tax commissioner's conduct not challenged, and unresolved issues of fact existed as to relationship between the plaintiff, the managing entity, and the city).

[25] "More specifically, Respondents' actions are arbitrary and capricious in that they have established no reasonable or legitimate basis for the nexus determination reached by Revenue; and, accordingly, the

> CPLR 7803 distinguishes between a proceeding to review 'whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence' (CPLR 7803(4)), on the one hand, and ***a proceeding to review 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion'*** (CPLR 7803(3)), on the other hand. The distinction reflects the difference between the common-law writ of certiorari to review, where the court must determine the 'substantiality of the evidence', and the common-law ***writ of mandamus to review***, in which the Court must determine 'the rationality of the administrative act.'[26]

"To the extent that [an Article 78 petitioner] seeks to annul [a] determination made . . . without there having been any hearing directed by law, the relief sought is in the nature of mandamus to review, and the only question is whether the [administrative entity's] determination was irrational, arbitrary, or capricious."[27] In this context, the Court of Appeals has spoken on the appropriate scope of review:

> A reviewing court, in dealing with a determination which an administrative agency alone is authorized to make, ***must judge the propriety of such action solely by the grounds invoked by the agency.*** If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.[28]

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request that Hodgson file tax returns for the tax years ended December 31, 2009 through December 31, 2012 exceeds Respondents' jurisdiction." *See* Doyle Aff., Ex. 2 at 9, ¶ 40 (Verified Petition).

26 *Poster v. Strough*, 299 A.D.2d 127, 142 (2d Dep't 2002) (internal citations omitted) (emphasis added).

27 *Poster*, 299 A.D.2d at 141; *see also New York Bus Tours, Inc.*, 111 Misc. 2d at *17 (rejecting defendants' exhaustion argument and stating that "[p]laintiffs need not await determination of their administrative remedies when as herein the constitutionality of a tax law and its application past, present and future is in issue").

28 *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991) (granting petition and annulling Board's determination as arbitrary and capricious, and stating that "[w]e perceive of no reason why the settled rule which limits judicial review of the determination of an administrative agency in certiorari proceedings to judging 'the propriety of such [determination] solely by the grounds invoked by the agency' should not apply equally to mandamus to review proceedings") (citation omitted).

The Article 78 device of a petition for mandamus to review thus allows a court to review an administrative, rather than a quasi-judicial, determination of a government agency, and requires the reviewing court to do so on the particular basis offered by the agency which issued the determination.[29] That is precisely what Hodgson has asked the Court to do here. Hodgson's second cause of action asks the Court, among other things, to review and annul Revenue's determination of nexus; and Article 78 is a proper procedural mechanism for bringing this dispute.[30]

The second problem with Revenue's argument is that it is incorrect about the purported limitations on this Court's ability to issue a prohibition writ in instances where administrative agencies act in a quasi-judicial capacity[31] — as they do when they make

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29 *Scherbyn*, 77 N.Y.2d at 757; *Matter of Joralemon Realty NY, LLC v. State of N.Y. Div. of Hous. & Cmty. Renewal*, 102 A.D.3d 965, 967 (2d Dep't 2013); *see also Town of Riverhead v. Cnty. of Suffolk*, 78 A.D.3d 1165, 1166 (2d Dep't 2010) (stating that a proceeding which requires the petitioner to convince the court that actions taken "'represented an irrational construction of the governing statutes . . . is plainly encompassed within the grounds for mandamus to review set forth in CPLR 7803(3)'") (quoting *N.Y.C. Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994)); *Matter of King v. Kay*, 39 Misc. 3d 995, 997 (Sup. Ct. Suffolk Cnty. 2013) ("A determination remains purely administrative when it involves an exercise of judgment or discretion in the absence of a trial-type hearing.") (citing *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005) (annulling decision suspending petitioner's driver's license)).

30 *See* Doyle Aff., Ex. 2 at 9 ¶ 41 (Verified Petition) ("As such, Hodgson requests a judgment: (a) annulling Respondents' determination of Hodgson's purported nexus to Minnesota; (b) enjoining and prohibiting Respondents from asserting through the issuance of notices or assessments or in any other medium that Hodgson is subject to tax in Minnesota for years prior to 2013; (c) granting Hodgson such other and further relief to which it is entitled under CPLR § 7806; and (d) restitution/damages for lost attorney time, out-of-pocket expenses, and other costs and disbursements incurred by Hodgson to prosecute its claims and/or defend against Respondents' 'determination' of nexus, for which it demands judgment.").

31 "[A] petitioner seeking a writ of prohibition must demonstrate that: (1) a body or officer is acting in a judicial or quasi-judicial capacity[;] (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction[;] and (3) petitioner has a clear legal right to the relief requested." *Matter of Garner v. N.Y.S. Dep't of Corr. Servs.*, 10 N.Y.3d 358, 361-62 (2008). While a court is permitted to examine the "gravity" of the harm, a showing of irreparable harm by the writ's proponent is not a necessary predicate to its issuance. *Id.*, 10 N.Y.3d at 361 (noting several factors that a court can consider in issuing this discretionary writ, including the "gravity of the harm that would result to petitioner, the availability of another adequate remedy to correct that harm, and whether prohibition would provide a more complete and effective remedy if [other] remedies are potentially available"); *see also Gordon*, 100 N.Y.2d at 245 (finding that a town board "acted outside the scope of its authority when it decided to conduct its own SEQRA review and issued a positive declaration[,]" and prohibiting further action by the

determinations about their own jurisdiction to act.[32] A pair of Court of Appeals decisions are instructive on this point.

In *Erie Railroad Co. v. State Tax Comm'n*, 246 N.Y. 322 (1927), the petitioner sought to collaterally attack the Tax Commission's assertion of jurisdiction, and thus to void the assessments it had received. The Court of Appeals upheld the petition, noting that the Commission had wrongly "determined the existence of facts essential to its jurisdiction." *Id.*, 246 N.Y. at 326. In reaching this conclusion, the Court reaffirmed its earlier holding in *Elmhurst Fire Co. v. New York*, 213 N.Y. 87, 90-91 (1914), in which it stated:

> In making the determination [as to their jurisdiction, tax assessors] ***act judicially*** and within the sphere of their duty, ***but their decision is not conclusive as to their*** jurisdiction. They were officers clothed by statute with limited powers, and their decision on a question determinative of their authority is not final and may be attacked collaterally. When a statute, as in this case, leaves to the assessing officers questions of a jurisdictional character it is well settled that their decision does not preclude parties aggrieved from resorting to judicial remedies. When their authority depends upon the existence of some fact, which they erroneously determine to exist, their acts pursuant to it are void.

The authority cited by Revenue in its own motion shows that the prohibition writ is unquestionably available where public officers act in a quasi-judicial capacity.[33] As the Court

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board because "[e]ven if the Board ultimately granted [petitioners] variances, petitioners would have already spent the time and money to prepare the DEIS ***and would have no available remedy for the unnecessary and unauthorized expenditures***") (emphasis added).

[32] *See also Niagara Mohawk Power Corp.*, 59 N.Y.2d at 269 ("When the taxing authority exceeds its power, however, the taxpayer may challenge its levy collaterally in a plenary action. It need not meet statutory conditions precedent or follow the procedures set forth in the Real Property Tax Law because the assessment is void. In such case, a legal issue is critical, the power to tax not the facts underlying the tax, and thus there is little need for the taxing authority to investigate or to attempt to adjust the claim. This jurisdictional issue, as in most legal proceedings, may be raised collaterally without regard to the normal procedures or the necessity of complying with conditions precedent.").

[33] *See* MR Memo. at 9 (citing *McGinley v. Hynes*, 51 N.Y.2d 116, 125 (1980), in which the Court of Appeals distinguished between the quasi-judicial and executive functions of public prosecutors, and noting that its

of Appeals' teachings above make clear, when public officers make determinations as to their jurisdiction to act, they do so in a quasi-judicial capacity.

Hodgson commenced this Article 78 proceeding, in part, to prohibit Revenue from subjecting Hodgson to its tax jurisdiction based on an unconstitutional determination that nexus exists with Minnesota — and to save itself the time, expense, resources, and efforts of challenging a later tax assessment wrongfully predicated on Revenue's constitutionally impermissible determination. New York courts have recognized that these are appropriate motives for invoking the prohibition writ under Article 78.[34]

Frankly, Revenue's own letters and sheer common sense dictate the conclusion that in reaching its incorrect determination that Hodgson has nexus with Minnesota based purely on the issuance of federal Forms 1099, Revenue necessarily made a judicial or quasi-judicial determination.[35] In its March 25, 2014 letter, and then again in its May 7, 2014 email, Revenue

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decision "does not in any way conflict with prior cases in which we have recognized the availability of prohibition as a means to prevent a public prosecutor from acting in excess of his authority").

[34] *In re Estate of Haas*, 33 A.D.2d 1, 8 (4th Dep't 1969) ("It is 'far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed.'"); *see also Matter of Flynn v. State Ethics Comm'n*, 208 A.D.2d 91, 93-94 (3d Dep't 1995), *aff'd*, 87 N.Y.2d 199 (1995) (holding that "administrative agencies, as creatures of statute, are without power to exercise any jurisdiction beyond that conferred by statute . . ." and determining that a writ of prohibition was the proper remedy, rather than to force petitioner to wait for an appeal after spending time and money on the extra-jurisdictional proceeding); *Carey v. Kitson*, 93 A.D.2d 50 (2d Dep't 1983) (holding that even though the error could be corrected on appeal, a writ of prohibition was proper because the claim "challenges the legality of the 'entire action or proceeding'" and because failure to grant the writ would subject defendant to submit to further unlawful prosecution); *see also New York Bus Tours, Inc.*, 111 Misc. 2d at *14 (holding that petitioner "can properly maintain [an] Article 78 proceeding" where it looks to "prohibit respondent from exceeding its jurisdiction by applying the sales tax law to petitioner's operation[,]" and granting petitioner summary judgment).

[35] *See Matter of Livingston Parkway Ass'n, Inc. v. Town of Amherst Zoning Bd. of Apps.*, 114 A.D.3d 1219, 1220 (4th Dep't 2014) (evaluating petition for writ of prohibition concerning a town zoning board's legal interpretation that a zoning condition was no longer enforceable); *Roschelle v. Nyquist*, 61 A.D.2d 1073 (3d Dep't 1978) (deciding a petition for a writ of prohibition against the Commissioner of Education, and evaluating the Commissioner's quasi-judicial actions in interpreting and applying the pertinent law); *Rottkamp v. Young*, 21 A.D.2d 373, 376 (2d Dep't 1964) (holding that a building inspector's determination of permits is quasi-judicial in character because it necessarily involves the construction of the zoning ordinance and a consideration of the facts before him); *Matter of Stop BHOD*, 22 Misc. 3d 1136(A) (Sup.

quotes Minnesota law, cites authorities, and purports to offer legal justification for its nexus determination on the basis of "modern dormant commerce clause jurisprudence."[36] It does this while ultimately concluding that Hodgson has nexus with Minnesota, and must file tax returns for 2009-2012 because Revenue "claim[s] jurisdiction on all Minnesota sales, revenue received, fees assessed, etc." Doyle Aff., Ex. 7. It is difficult to imagine what that determination (and the corresponding assertion of jurisdiction) is, if it isn't, at least, "quasi-judicial" in nature as New York courts have recognized.[37]

Hodgson's request for relief under Article 78 — under both the mandamus to review and the writ of prohibition standards — is appropriate.[38] And as discussed in Section III. below, Hodgson has shown a clear right to the relief it seeks on this motion because Revenue's nexus determination is unconstitutional as a matter of law, and it should not be permitted to exercise jurisdiction over Hodgson on such a basis.

Ct., Kings Cnty. 2009) (holding that an agency official, like the State Comptroller, has been found to be acting in a quasi-judicial capacity when he performs his audit functions, which involves the power to hear, examine, allow or reject claims for monies allegedly owed and to seek recovery of monies allegedly improperly paid).

36 Doyle Aff., Ex. 9 (May 7, 2014 email from Minnesota Revenue to Hodgson reaffirming its March 25, 2014 nexus determination).

37 To the extent that Revenue repeats its arguments concerning the purported availability of adequate alternative legal remedies in addressing Hodgson's Article 78 cause of action, the arguments articulated above in Section I.B. and below in Section III., address and refute Revenue's position here as well.

38 *Matter of Garner*, 10 N.Y.3d at 361 (citing N.Y. C.P.L.R. § 7803(3) ("[A] petition seeking Article 78 relief in the nature of prohibition should be granted upon a showing that a 'body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.'")); *see also Gordon*, 100 N.Y.2d at 245 (noting that "the mere assertion of jurisdiction alone was not the actual, concrete harm that was inflicted upon petitioners. Rather, the harm was the issuance of the positive declaration directing petitioners to prepare a [draft environmental impact statement], involving the expenditure of time and resources . . . ."); *Scherbyn*, 77 N.Y.2d at 757-58 ("In a mandamus to review proceeding, however, no quasi-judicial hearing is required; the petitioner need only be given an opportunity 'to be heard' and to submit whatever evidence he or she chooses and the agency may consider whatever evidence is at hand, whether obtained through a hearing or otherwise.").

III. HODGSON IS ENTITLED TO SUMMARY JUDGMENT ON ITS NEW YORK AND FEDERAL LAW CLAIMS, AND A DECLARATION THAT REVENUE'S NEXUS DETERMINATION IS UNCONSTITUTIONAL

In order to prevail on a claim against a governmental instrumentality under section 1983 based on acts of a public official, a plaintiff is required to prove: (1) an action taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the instrumentality caused the constitutional injury.[39]

A. Revenue's Actions Were Taken Under Color Of Law, And Reflect Minnesota's Official Policy

Revenue's action in determining that Hodgson has constitutional nexus with Minnesota was indisputably taken under color of law. In addition, Revenue's correspondence to Hodgson makes clear that its determination reflects a policy "initiative" adopted by Minnesota which it is employing against firms like Hodgson.[40]

B. Revenue's Determination Of Nexus With Hodgson Premised Solely Upon Payor Addresses Listed On Federal Forms 1099 Is Unconstitutional

Prior to the commencement of these proceedings, and before Revenue issued its final nexus determination, Revenue failed to demonstrate that Hodgson had institutional nexus with Minnesota — a burden which fell squarely on Revenue to prove. Revenue's arguments on its motion reflect a fundamental misunderstanding of both the separate and distinct rules

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39 *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978)). While articulated in the context of Hodgson's Section 1983 claim, the arguments in Section III.B. fully support Hodgson's requests for relief in its state law claims under Articles 30 and 78 of the CPLR.

40 *See* Doyle Aff., Ex. 9 (May 7, 2014 email from Davidson to Doyle referring to and providing Hodgson with a form agreement Minnesota Revenue has been offering to other law firms "in regards to this initiative" and noting that "[y]our firm is one of many law firms contacted by the Minnesota Department of Revenue"); *see also id.*, Ex. 3 ¶ 12 (Verified Answer) (referring "the Court to the email itself for the meaning and import thereof").

pertaining to the different types of nexus that come into play when a tax authority's jurisdiction is challenged, and the reasons why this Court should grant Hodgson's request for summary judgment while simultaneously denying Revenue's motion to dismiss.

Revenue attempts to place a "heavy" burden of proof on Hodgson, requiring Hodgson to show by some phantom standard of evidence that Revenue's nexus determination was unconstitutional. MR Memo. at 15. Citing cases that deal exclusively with transactional and income nexus, Revenue belies either its misunderstanding of the constitutional nexus at issue in this matter, or attempts to sway this Court into believing that Hodgson's road to success on the merits is more difficult than the law requires — both equally troubling outcomes.[41]

A detailed analysis of the transactional nexus of Hodgson's local counsel services with Minnesota, and the differences between institutional and transactional or income nexus, is

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[41] Revenue cites *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983) as support for its argument that Hodgson "has the distinct burden of showing by clear and cogent evidence that [the state tax] results in extraterritorial values being taxed" in order to prove that Revenue's nexus determination is unconstitutional. MR Memo. at 15. Revenue's reliance on *Container Corp. of Am.* is both misplaced and wrong. The Supreme Court's decision in *Container Corp. of Am.* addressed the taxpayer's burden in the context of a ***transactional*** nexus dispute, and whether extraterritorial values (value earned outside the taxing state's borders) were being subject to California tax. The decision did not involve the type of institutional nexus challenge that Hodgson raises here, because Container Corp. had institutional nexus with the taxing state, California. Indeed, the California appeals court flatly stated that "[Container Corp.] is subject to [CA] corporate franchise taxes on its activities in California," 117 Ca. App. 3d 988, 991, and the Supreme Court stated that "[Container Corp.] is [] doing business in California and elsewhere", and thus substantial nexus between the entity and California was not in dispute. The primary issue in *Container Corp.* was not whether Container Corp. was at all subject to California's franchise tax jurisdiction, premised on a finding of substantial nexus — like the issue in this matter — but instead whether California's franchise tax apportionment regime unconstitutionally taxed value that extended beyond California's borders. Revenue also cites *Allied-Signal v. Comm'r of Fin.*, 79 N.Y.2d 73 (1991), for the proposition that Hodgson has a "heavy burden" in this matter. *Allied-Signal*, like *Container Corp.*, is similarly inapposite, as it is a case related to income and transaction nexus, and not substantial nexus between a state and a foreign institution. A predecessor company to Allied-Signal (Bendix) maintained an office and did business in New York City ("Bendix's activities in New York City were limited to those conducted by its International Group--one of its divisions--whose sole function was the development of business abroad."), even though its corporate headquarters were in Michigan. Given this presence in New York, the issue of whether or not Allied-Signal could be subject to New York City tax jurisdiction was not in question. Instead, the issue was related to New York City's nexus with the disputed income, and related unitary business principles. No such burden of proof exists in this case, where Revenue is the party seeking to attach jurisdiction over Hodgson, and the transactional nexus related to any income received by Hodgson is not yet in dispute.

beyond the scope of this memorandum of law.[42] Suffice it to say that Hodgson understands that receipts for services performed in New York for companies using Minnesota addresses on federal Forms 1099 lack transactional or income nexus with the state of Minnesota, which would render the imposition of Revenue's franchise tax on any related income Hodgson received unconstitutional.[43] But that is not the focus of this matter. The focus, rather, is on Revenue's unconstitutional finding of ***institutional*** nexus with Hodgson.[44] Institutional nexus exists between an out-of-state business or individual — the institution — and a tax authority, when the tax authority has proven a sufficient connection between the out-of-state business and the forum to satisfy both the Commerce and Due Process Clauses of the United States Constitution.[45] This

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42 The Supreme Court has ruled that a business with substantial institutional nexus with a state may only be taxed by that state on income and transactions with an appropriate connection to the taxing state. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436-37 (1980) (The commerce clause standard articulated in *Complete Auto* (discussed fully below) applies to a state's attempted taxation of income earned in interstate commerce, in addition to the requirement that "[f]or a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise"). In transactional nexus cases, the nexus question revolves around the business's income subject to taxation, not whether the tax authority has jurisdiction over the business to subject it to its franchise tax. A showing of transactional nexus for taxation purposes may be achieved by direct tracing (allocation) or by formula (apportionment), which requires businesses to apportion income, and pay tax thereon, if the transactions generating income have a direct connection with the taxing jurisdiction. *Container Corp. of America*, 463 U.S. at 164 (citing *Asarco, Inc. v. Idaho*, 458 U.S. 307 (1982)) ("Under both the Due Process and the Commerce Clause of the Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its borders.'").

43 While Revenue's tax statutes attributing income to Minnesota — specifically, Minn. Stat. 290.015 and 290.191 — are an affront to the Commerce Clause rules applicable to transactional or income nexus (at least as applied to Hodgson), transactional or income nexus is not the central issue in this case. The fundamental legal issue here is whether Revenue's basis for asserting that Hodgson has "substantial nexus" with Minnesota under the rules applicable to determining institutional nexus is constitutionally repugnant. Without institutional nexus, Revenue cannot subject Hodgson — or any of its income producing transactions — to its franchise tax and cannot compel Hodgson to file Minnesota tax returns.

44 Revenue's correspondence to Hodgson prior to the commencement of this litigation admits that it must carry the burden of showing institutional nexus: "Minnesota must prove Commerce Clause Nexus with Hodgson Russ LLP in applying the [test for Commerce Clause nexus] to Hodgson Russ' activity." *See* Doyle Aff., Ex. 9 (Revenue's May 7, 2014 email to Hodgson purportedly describing the legal basis and supporting authority for Revenue's nexus "determination," which acknowledges that it is Revenue's burden to prove substantial nexus with Hodgson).

45 *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

connection is commonly referred to as "substantial nexus," and if it does not exist, any assertion of jurisdiction by the tax authority violates the United States Constitution.[46] In other words, the institutional (or substantial) nexus doctrine requires Revenue to first show a substantial connection between Hodgson and Minnesota ***before*** Hodgson can be subject to Revenue's tax jurisdiction and be required to file Minnesota tax returns.

Revenue has utterly failed to establish institutional nexus with Hodgson. Notwithstanding the fact that Revenue's memorandum in support of its Motion to Dismiss plainly admits this fact ("The Factual Record Must be Further Developed to Determine Whether Petitioner had a Sufficient Nexus with Minnesota" and "Petitioner has, at best, raised a factual issue as to whether it had a sufficient nexus with Minnesota."),[47] Revenue's nexus determinations which preceded this legal action were premised on a single, discrete, fact, which is not in dispute: Hodgson's receipt of income for legal services performed outside of Minnesota for companies reporting a Minnesota mailing address on federal Forms 1099.[48] This fact, and this fact alone, created the basis for Revenue's determination of institutional nexus with Hodgson.[49]

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46 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (The Supreme Court has generally upheld commerce cause challenges to state tax authority if the tax is: (1) applied to activity that has substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state).

47 MR Memo. at 18.

48 *See* Doyle Aff., Exs. 7, 9; *Compare* Doyle Aff., Ex. 2 ¶¶ 26-27 (Verified Petition) *with id.*, Ex. 3 ¶¶ 26-27 (Verified Answer) (admitting, among other things, that "Revenue has not performed an audit of Hodgson other than to identify that certain businesses with mailing addresses in Minnesota submitted Forms 1099 to Hodgson"); *see also* MR Memo. at 7 ("Prior to the commencement of this litigation, ***the only evidence available to Minnesota Revenue were the forms 1099s filed by Petitioner's Minnesota clients*** which indicated that petitioner provided services and billed those Minnesota clients at those mailing addresses.") (emphasis added).

49 *See supra* n.48; *see also* MR Memo. at 19.

Revenue's basis for finding substantial nexus with Hodgson outstrips every single case decided to date in the Supreme Court — the final arbiter of constitutional substantial nexus cases — and every case dealing with substantial nexus issues in a persuasive state court. Indeed, Revenue can cite to zero analogous authority to support its finding of institutional nexus with Hodgson. The state court cases Revenue does cite are easily distinguishable, as discussed below, and so far afield from the facts of this matter they hardly warrant mention.

If this Court allows Revenue's patently unconstitutional determination of institutional nexus with Hodgson to stand, it will grant its imprimatur to a determination of substantial nexus based on a business's connections with a taxing state that are more tangential, and more amorphous, than the connections in cases where substantial nexus was found ***not to exist*** by the United States Supreme Court and sister state courts.[50] The time-tested provisions of the United States Constitution are not always clear, but based upon interpretive authority produced by our courts and a plain reading of the Commerce and Due Process clauses,[51] one rule is clear: A determination of institutional nexus based solely upon the address used on Forms 1099 issued to an out-of-state business is a violation of the United States Constitution, and fails to establish substantial nexus between a tax authority and an out-of-state business.

The address listed on Forms 1099 issued to an out-of-state business can never, alone, form the basis for substantial nexus between a taxing jurisdiction and an out-of-state

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50 *Quill Corp.*, 504 U.S. at 314-18 (Commerce Clause substantial nexus could be established in order for North Dakota to subject an out-of-state business to its use tax requirements only with physical presence, even where the mail order company solicited business through catalogues, advertisements, telephone calls, etc., in North Dakota and generated annual revenues from North Dakota customers of approximately $1,000,000); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 832, 839, 842 (Tenn. Ct. App. 1999) (finding that the bank at issue did not have substantial nexus to Tennessee even though it had over 11,000 cardholders in Tennessee, its parent company had several J.C. Penney retail stores in Tennessee, and engaged in significant mail-solicitation in Tennessee).

51 U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1.

business, and because there is no dispute regarding the fact which resulted in Revenue's contested nexus determination, Hodgson is entitled to summary judgment on its first, second, and third causes of action, and a declaration that Revenue's nexus determination is unconstitutional.

1. Hodgson must have some material presence in Minnesota before substantial nexus will arise

Moving beyond the threshold issue that Hodgson is entitled to summary judgment on — *i.e.*, that Revenue's nexus determination was unconstitutional and lacked substantial nexus — separate questions of law exist regarding the proper standard for establishing substantial nexus in line with the United States Constitution. The "physical presence" standard — which requires non-*de minimis* contacts with the taxing state — is a standard that has been regularly applied by the Supreme Court to determine when and if institutional nexus exists.[52]

Requiring a foreign taxpayer to have physical presence in the state seeking to impose its tax provides a minimum, necessary, threshold before a state, or any other tax authority, can subject the out-of-state taxpayer to its tax jurisdiction.[53] Requiring physical presence for substantial nexus in the franchise and income tax arena is appropriate from a tax policy perspective, because just as it has with sales tax and out-of-state businesses, it will act as a warranted hedge against state imposition of any type of tax on foreign businesses entering the

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[52] *Quill Corp.*, 504 U.S. 298; *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 758 (1967) (nexus could be established with an out-of-state mail order retailer for Illinois use tax purposes only with physical presence); *Tyler Pipe v. Washington*, 483 U.S. 232 (1987) (local independent contractor sales agents, acting on behalf of the taxpayer to establish and maintain an economic market in Washington, established nexus for purposes of Washington's wholesale tax); *Scripto v. Carson*, 362 U.S. 207, 208-10 (1960) (Georgia company could constitutionally be subject to Florida's use tax requirements based primarily on the presence of 10 wholesalers in Florida actively soliciting sales on behalf of the company in Florida).

[53] *National Bellas Hess, Inc.*, 386 U.S. at 758; *Quill Corp.*, 504 U.S. at 314-18.

stream of interstate commerce. Physical presence has also been found to be the overriding institutional nexus standard by at least one state appeals court.[54]

Revenue argues that Hodgson's "physical presence" is not required to establish substantial nexus under the Commerce Clause for income-type taxes, where services are "received in Minnesota." MR Memo. at 16. A physical-presence standard makes a great deal of sense and is well-supported by Supreme Court jurisprudence. Hodgson asks this Court to declare that physical presence is required for a state to establish nexus over an out-of-state business. In lieu of that, Hodgson asks this Court to determine that, at the very least, some material presence — even a material intangible presence — is required before substantial nexus is satisfied, and a state can impose its tax jurisdiction over a foreign business. As we have detailed above, receipt of Forms 1099 from payors using a Minnesota address, without more, does not and cannot constitute a material presence by Hodgson of any type in Minnesota.

Despite Revenue's assertions to the contrary, physical presence should be the standard applied in this case before Revenue is able to constitutionally establish substantial nexus with Hodgson. Short of physical presence — the boundaries of which are defined by Supreme Court jurisprudence — substantial nexus will not exist. Inasmuch as the receipt of Forms 1099 from Minnesota addresses does not in any way demonstrate the existence of a physical presence, Revenue's nexus determination which is solely predicated on that fact must fail.

Even if this Court finds that something less than physical presence is the appropriate standard to establish substantial nexus, Hodgson's receipt of federal Forms 1099, standing alone, does not create substantial nexus in Minnesota. Revenue's basis for its nexus

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[54] *J.C. Penney Nat'l Bank*, 19 S.W.3d at 839, 842.

determination with Hodgson — the issuance of Forms 1099 by payors using Minnesota mailing addresses — can never establish the basis for Hodgson's substantial nexus with Minnesota, because standing alone it does not indicate Hodgson having ***any*** presence suitable to establish substantial nexus in Minnesota. In its memorandum in support of its motion to dismiss, Revenue refers to the "issue of what constitutes a sufficient nexus" as a "developing area of law,"[55] while also taking the rigid position that Revenue's determination of substantial nexus based on the Forms 1099 alone was proper, when it said:

> The Commissioner reasonably relied on the 1099s when requesting Petitioner file a Minnesota return. The 1099s are issued from companies within Minnesota. Petitioner does not dispute that it provided services to the companies that issued 1099s.... but without further evidence, Petitioner cannot meet its burden of proving it does not have a sufficient nexus with Minnesota.

MR Memo. at 19.

Why Revenue casts the debate surrounding sufficient nexus as a moving target is for reasons unknown. The Supreme Court of the United States — the only competent court to establish national precedent regarding substantial nexus — has not granted certiorari and issued a decision related to institutional Commerce Clause substantial nexus since 1992.[56] It appears that Revenue casts substantial nexus in a sketchy light not to assist the Court in its quest to determine the constitutionality of Revenue's action, but instead to blur the clear boundaries of substantial nexus, and to squeeze its remarkably unconstitutional action into a line of cases that, while controversial, were premised on far greater connections leading to substantial nexus than those Revenue established with Hodgson.

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55 MR Memo. at 15.

56 *Quill Corp.*, 504 U.S. 298.

Revenue's cited authority is not factually on point with the current matter. In *KFC Corp. v. Iowa Department of Revenue*,[57] the taxpayer licensed extensive intellectual property rights in Iowa, which generated income from the operation of KFC restaurants by independent franchisees. The Iowa Supreme Court determined that, given KFC's relationship with its franchisees and its extensive licensing of intellectual property used in Iowa, the physical presence test prescribed by the United States Supreme Court had been met. The court's discussion of economic nexus principles simply bolstered its initial conclusion.[58] In fact, the Iowa Supreme Court offered words of caution when straying from the physical presence standard:

> In both *Bellas Hess* and *Quill* . . . the Supreme Court reversed judgments of state supreme courts that expansively applied the 'substantial nexus test' of *Complete Auto* through an economic impact analysis. Further, it might be argued that state supreme courts are inherently more sympathetic to robust taxing powers of states than is the United States Supreme Court.[59]

Here, Revenue cites two separate cases in support of its economic nexus position, both of which relate to the same taxpayer: banking giant MBNA. In two states, first in West Virginia,[60] and later in Indiana,[61] two state courts found that MBNA's "economic presence" was so significant and substantial that it warranted a finding of substantial nexus.

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57 792 N.W.2d 308 (Iowa 2010).

58 *Id.* at 322, 324 ("On the precise issue of whether licensing of intangibles for use in a state that produces income within a state for an out-of-state corporation is subject to income tax, the weight of state authority is that it does, either on the ground that physical presence has been satisfied or that the physical presence requirement does not apply outside the context of sales or use taxes.... As a result, we conclude that the Supreme Court would likely find intangibles owned by KFC, but utilized in a fast-food business by its franchisees that are firmly anchored within the state, would be regarded as having a sufficient connection to Iowa to amount to the functional equivalent of 'physical presence' under *Quill*.").

59 *Id.*

60 *Tax Comm'r of State v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006).

But in the Indiana case, MBNA stipulated to the fact that it "regularly engages in transactions with customers in Indiana that involve intangible property...result[ing] in receipts flowing to [MBNA] from within Indiana."[62] In addition to this fact, and amongst other connections discussed in the decision, MBNA was also prosecuting a non-*de minimis* number of debt collection matters in Indiana state courts.[63] Similarly, in West Virginia, the court noted that "MBNA continuously and systematically engaged in direct mail and telephone solicitation and promotion in West Virginia. Further, in tax year 1998, MBNA had significant gross receipts attributable to West Virginia customers in the amount of $8,419,431.00, and in tax year 1999, MBNA had significant gross receipts attributable to its West Virginia customers in the amount of $10,163,788.00."[64]

The facts in Revenue's cited authority are either: (1) inapposite to the present matter (*KFC*, in which the court found appropriate physical presence or a proxy for physical presence, and the court also found the presence of significant intangible property in the state); or (2) so remarkably distinguishable from the current matter — where Hodgson has received only a trickle of income reported on Forms 1099 by companies using a Minnesota mailing address — that the cited MBNA cases have zero persuasive value. *KFC* is arguably favorable to Hodgson, as the Iowa Supreme Court fought hard to establish a physical link between the out-of-state taxpayer and Iowa, so that it could assure itself that it was not running afoul of the Commerce Clause.[65] This court could rely on precedential authority in *Complete Auto*, *Bellas Hess*, *Tyler*

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61 *MBNA Am. Bank, N.A. & Affiliates v. Indiana Dep't of State Revenue* , 895 N.E.2d 140 (Ind. Tax 2008).

62 895 N.E.2d at 141.

63 *Id.* at 144.

64 640 S.E.2d at 235-36.

65 792 N.W.2d at 322, 324.

Pipe, and, importantly, *Quill*, to continue recognizing the physical presence standard before "substantial nexus" is established. To take an alternate course — moving beyond a physical presence standard — as the dissent in the West Virginia *MBNA* case noted, the court must go it alone, because "[t]here is no precedential support whatsoever for the conclusions reached by the majority decision [regarding substantial nexus based on targeted economic presence]. None. None at the state level. None at the federal level."[66]

Even in those few cases that have found nexus without actual physical presence, discussed above, the courts have relied upon the pervasiveness of the taxpayer's connections as a proxy for physical presence. The widespread in-state use of intangible property,[67] the significant remote out-of-state solicitation of in-state customers (via the Internet, mail, or otherwise), and/or the receipt of very large amounts of in-state revenue by an out-of-state business related to such activities have been found to be a proxy for physical presence in a few cases. But none of those factors are present here. Nor were such factors relied upon by Revenue in reaching its unconstitutional nexus determination.

The West Virginia Supreme Court is no proxy for the decisions of the Supreme Court of the United States, which have consistently required or acknowledged the importance of a physical presence in institutional nexus cases since *Bellas Hess* and *Complete Auto*, and it is by no means the final arbiter of the Commerce Clause. Perhaps finding "substantial nexus" based on economic presence is less offensive when the target is an out-of-state bank or fast food giant, directly soliciting business, employing intellectual property, and reaping massive revenues in a third state, even if the entities do not have a direct physical presence (like the taxpayers in some

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66 640 S.E.2d at 237.

67 *KFC Corp.*, 792 N.W.2d at 323-25.

of the cases cited by Revenue). But where, as here, the target is a mid-sized law firm, that has no attorneys or professionals licensed to practice in Minnesota, no facilities or offices in Minnesota, no intellectual property employed in Minnesota, solicits no business from Minnesota companies or individuals, and received only a modest amount of income from companies that used a Minnesota mailing address on federal Forms 1099 over the course of a 9-year period, application of an economic presence standard to find "substantial nexus" would not only violate the Commerce and the Due Process Clauses of the United States Constitution, it would far exceed any published decision on the topic in the wake of the Supreme Court's articulation of the "substantial nexus" standard in *Complete Auto*.[68]

We ask this Court to declare that physical presence is required for a state to establish nexus over an out-of-state business. In lieu of that, the Court should rule that some material presence (even if the presence is not physical) is required for Revenue to establish institutional substantial nexus with Hodgson. If the Court does not agree, or fails to rule directly on this matter, however, Hodgson should still be provided the declaratory, injunctive, and Section 1983 and 1988 relief it has requested based on Revenue's patently unconstitutional nexus determination, detailed above. Revenue asks the Court to let Hodgson's "substantive connections [ ] govern in determining whether [Hodgson] had a sufficient nexus with Minnesota." MR Memo. at 18. Under any theory of "economic presence"-based nexus, where a taxpayer does not have the requisite physical presence in the foreign state, the receipt of Forms 1099 does not, and cannot, form the basis for "substantial nexus" with Revenue. As noted above, Hodgson maintains no physical presence in Minnesota, does not solicit business in Minnesota, does not license or employ intellectual property in Minnesota, and only received an

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[68] *Complete Auto Transit, Inc.*, 430 U.S. at 279.

extremely modest amount of income from clients with Minnesota addresses for services performed outside of Minnesota. Hodgson cannot, under either the physical presence, or even the most expansive economic presence substantial nexus standard, be found to have institutional nexus with Revenue based merely on its receipt of federal Forms 1099. Critically, whether or not this Court rules on the issue of what level of connection Hodgson must have with Revenue before Revenue can establish substantial nexus with Hodgson, Hodgson is still entitled to summary judgment on its first, second, and third causes of action, and is entitled to a declaration that Revenue's determination of nexus based on nothing more than the federal Forms 1099 is unconstitutional.

2. Revenue agrees that it has not proven that Hodgson has "Substantial Nexus" with Minnesota

Hodgson mentioned this point above, but it is worth reiterating here: Revenue admits in its memorandum in support of its motion to dismiss that it has failed to establish substantial nexus with Hodgson. Revenue's discussion of the "economic presence" jurisprudence concludes with the following sentence: "Petitioner's substantive connections should govern in determining whether Petitioner had a sufficient nexus with Minnesota." MR Memo. at 18. In Revenue's next statement, Section III–subheading B, Revenue notes: "The Factual Record Must be Further Developed to Determine Whether Petitioner had a Sufficient Nexus with Minnesota." Through its filing, Revenue outwardly acknowledges that it did not meet its burden to establish substantial nexus with Hodgson prior to issuing its nexus determination, subjecting Hodgson to its tax jurisdiction.[69]

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[69] Revenue, in two separate writings, issued a determination to Hodgson claiming Hodgson had substantial nexus with Minnesota, and demanding that Hodgson file Minnesota tax returns. On March 25, 2014, in a letter made attention to the Hodgson Russ "Controller," Revenue alleged that "[Hodgson] has been conducting business in our state, but has not filed any Minnesota franchise tax returns....[R]emember that once nexus to Minnesota has been determined, as it has with your company, all Minnesota property,

Other than its demand for tax returns, Revenue never requested additional information bearing on the substantial nexus issue from Hodgson prior to the initiation of this action, nor did Revenue demand that Hodgson meet some phantom burden with regards to Revenue's bogus determination that Hodgson had substantial nexus with Minnesota. Instead, Revenue openly — and accurately — acknowledged that it "must prove Commerce Clause Nexus with Hodgson Russ LLP," again citing the occasional receipt of income reported on federal Forms 1099 from companies using a Minnesota mailing address — and nothing else.[70] In an attempt to have this matter dismissed, and potentially confined to the favorable and comfortable jurisdiction of the Minnesota tax appeals system, Revenue attempts to raise — again, for the first time — an issue of fact related to whether it has met its own burden of proving substantial nexus with Hodgson. Up until to this point, Revenue was comfortable that the entirely unfounded and unprecedented issuance of Forms 1099 for legal services performed out-of-state satisfied the Commerce Clause "substantial nexus" requirement. *See* MR Memo. at 19. Now, apparently, Revenue is second-guessing the sufficiency of the basis for its cavalier determination.

On the central issue of the propriety of Revenue's assertion of nexus based on nothing more than the federal Forms 1099, there is no issue of fact: it is undisputed that Revenue based its nexus determination on Hodgson's receipt of an inconsequential amount of revenue from clients who use a Minnesota mailing address when filing federal Forms 1099 over a 9-year period. Based on this, Hodgson does not have, under any conception of the doctrine,

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payroll and sales must be apportioned to Minnesota." Doyle Aff., Ex. 7. Then again, in an email dated May 7, 2014, after a detailed response and defense from Hodgson on the nexus issue, Minnesota Revenue agent Sheila Davidson stated "[R]emember that once nexus to Minnesota has been determined, as it has with your client's company...." Doyle Aff., Ex 9.

70 Doyle Aff., Ex. 9.

substantial nexus with Minnesota which would allow Revenue to subject Hodgson to its franchise tax. The nexus question is decided under the United States Constitution, not the Minnesota revenue code. Hodgson has shown that the Forms 1099 in question, standing alone, do not create substantial nexus with Minnesota, and Revenue has not proven anything to the contrary. Hodgson is thus entitled to summary judgment on its first, second, and third causes of action, and a declaration that Revenue's nexus determination, on that basis, is unconstitutional.

C. Revenue's Actions Have Caused Hodgson Damages Cognizable Under Section 1983

Damage awards under Section 1983 are "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."[71] Generally, three types of damages are awardable for Section 1983 violations: actual or compensatory damages,[72] nominal damages, and punitive damages.[73] A plaintiff prevailing on its Section 1983 claim is entitled to "compensatory damages[, which] may include . . . out-of-pocket loss and other monetary harms[.]"[74] By contrast, where a party establishes a constitutional violation but has "not shown injury sufficient

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71 *Owen v. Independence*, 445 U.S. 622, 651, *reh. den.*, 446 U.S. 993 (1980) (stating further that "[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights") (internal citation omitted).

72 *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986).

73 *Memphis Cmty. Sch. Dist.*, 477 U.S. at 306 n.9; *see also Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.").

74 *Memphis Cmty. Sch. Dist.*, 477 U.S. at 307.

to warrant an award of compensatory damages, [that party] is entitled to an award of at least nominal damages as a matter of law."[75]

Hodgson has undeniably sustained out-of-pocket losses, including lost attorney time and expenditures, in having been forced to contest Revenue's unconstitutional nexus determination in this action.[76] In addition, given its showing above that Revenue's nexus determination violates the Due Process and Commerce Clauses of the United States Constitution — and thus Hodgson's right to be free from the unconstitutional application of Minnesota Revenue's tax authority — Hodgson is at least entitled to an award of nominal damages. The remedial purpose of the statute — and the Supreme Court's recognition that damages in Section 1983 actions are "a vital component . . . for vindicating cherished constitutional guarantees"[77] — compel awards in Hodgson's favor for its compensatory, or at the very least, nominal damages.

IV. HODGSON WILL SUSTAIN IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION, AND HODGSON DOES NOT HAVE AN ADEQUATE LEGAL REMEDY

Revenue argues that irreparable injury has not been shown here because "[t]his litigation is entirely premised on petitioner's belief that 'the cost . . . to challenge nexus in Minnesota would be prohibitive and disproportionate compared to the actual amount of tax allegedly due[,]" which Revenue claims "could readily be compensated with monetary relief."

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75 *Robinson v. Cattaraugus Cnty.*, 147 F.3d 153, 162 (2d Cir. 1998) (citing *Carey*, 435 U.S. at 266-67).

76 *See* Doyle Aff. ¶ 27; *see also id.*, Ex. 2 ¶ 37 ("In addition, as a result of Minnesota's illegal actions and strong-arm tactics, Hodgson has been damaged and forced to incur lost attorney time, out-of-pocket expenses, and other costs to prosecute this action and/or defend against Respondents' wrongful "determination" of nexus, for which it demands judgment."); *Gordon v. Rush*, 100 N.Y.2d 236, 243 (2003) ("[The] mere assertion of jurisdiction alone was not the actual, concrete harm that was inflicted upon petitioners. Rather, the harm was the issuance of the positive declaration directing petitioners to prepare a [draft environmental impact statement,] involving the expenditure of time and resources[.]").

77 *Owen*, 445 U.S. at 651.

MR Memo. at 12-13.[78] In pointing-up the supposed adequacy of Hodgson's legal remedy in Minnesota, Revenue time-and-again points to three Minnesota statutes, and asserts that "Minnesota law provides that [Hodgson] can potentially recover its fees and costs if it prevails in appeals to either the Tax Court or Supreme Court." MR Memo. at 13 (citing Minn. Stat. §§ 271.19, 15.471, 15.472); *see also id.* at 3, 6, 8.

But a review of the statutory sections cited by Revenue shows that Hodgson could never take advantage of the "relief" they offer. Minn. Stat. § 15.472(a) states that "[i]f a prevailing ***party*** . . . shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust." The problem is the term "party," which as defined by Minn. Stat. § 15.471(6) specifically excludes businesses or partnerships whose annual revenues "exceed $7,000,000 at the time the civil action was filed or the contested case proceeding was initiated." Hodgson's revenues exceed the $7,000,000 definitional ceiling on "parties" capable of invoking the benefits of the cost and fee recovery mechanism touted by Revenue. *See* Doyle Aff. ¶ 26. The irretrievable commitment of resources to fighting this dispute in Minnesota is, by any definition, irreparable injury; and Hodgson simply does not have an adequate remedy at law in Minnesota.[79]

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78 The irreparable injury showing that Hodgson makes here is only relevant to that aspect of its claim for an injunction. As noted above, the Article 78 relief in the nature of a prohibition writ does not require such a showing. *See Matter of Garner v. N.Y.S. Dep't of Corr. Servs.*, 10 N.Y.3d 358, 361-62 (2008) ("[A] petitioner seeking a writ of prohibition must demonstrate that: (1) a body or officer is acting in a judicial or quasi-judicial capacity[;] (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction[;] and (3) petitioner has a clear legal right to the relief requested."); *see also Gordon*, 100 N.Y.2d at 245 (finding that a town board "acted outside the scope of its authority when it decided to conduct its own SEQRA review and issued a positive declaration[,]" and prohibiting further action by the board).

79 Revenue also fails to disclose that, even assuming these sections applied to Hodgson, which they do not, Hodgson would not only need to "prevail," but that it would have to show that Minnesota's position had no "reasonable basis in law ***and*** fact based on the totality of the circumstances before and during the

More important, Hodgson's claim clearly involves more than just the fear of having to bear the cost and expense of litigating this dispute in Minnesota. Although Revenue appears uncomfortable with it, Hodgson has asserted (and shown) that the basis for Revenue's Nexus determination violates the United States Constitution, and the rights and protections afforded to Hodgson thereunder. *See* section III., *supra*. The right to be free from the obligations imposed by government agencies acting in excess of their jurisdiction is both actionable and capable of being enjoined.[80] Revenue's unconstitutional assertion of its tax jurisdiction over Hodgson on the singular basis of 1099 filings with the IRS is sufficient irreparable injury for this Court to enjoin Revenue from further acting in excess of its jurisdiction.

V. MINNESOTA REVENUE HAS NOT CARRIED ITS HEAVY BURDEN IN SEEKING DISMISSAL ON *FORUM NON CONVENIENS* GROUNDS

Plaintiff's choice of forum is entitled to significant deference.[81] Dismissal on *forum non conveniens* grounds is, therefore, the exception in New York, not the rule.[82] Indeed,

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litigation or contested case proceeding." Minn. Stat. § 15.471(8) (emphasis added); *see also* Minn. Stat. § 15.472(a). While Hodgson believes that Revenue's position is unreasonable on both fronts, it is certainly not a given (assuming it prevails), that Hodgson would be able to convince a Minnesota court or a Minnesota administrative law judge that the position of the state's tax department had no reasonable basis in law and fact.

80 *See Horner v. State*, 107 A.D.2d 64, 65-66 (3d Dep't 1985) (affirming the trial court's grant of an injunction restraining a government agency, *i.e.*, a state tax department, from taking any action against the plaintiff who had alleged the agency had acted in excess of its jurisdiction, holding that "[w]ithout the injunction, the status quo would be upset"); *Empire State Bldg. Co. v. New York State Dep't of Tax. & Fin.*, 150 Misc. 2d 747, 751 (Sup. Ct. N.Y. Cnty. 1990) (granting taxpayer's request for an injunction to restrain the Department of Taxation and Finance from acting in excess of its jurisdiction); *New York Bus Tours, Inc. v. City of New York*, 111 Misc. 2d 10, 17-18 (Sup. Ct. Bronx Cnty. 1981) (declaring defendant violated the constitution in assessing a tax against plaintiff and enjoining defendant from assessing the tax); *see, e.g., Time Square Books v. City of Rochester*, 223 A.D.2d 270, 278 (4th Dep't 1996) (noting that an infringement of a constitutionally protected right "unquestionably constitutes irreparable injury") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

81 *Goodwin v. Cirque du Soleil, Inc.*, 2012 N.Y. Misc. LEXIS 2368, at *4 (Sup. Ct. N.Y. Cnty. May 14, 2012) ("The plaintiff's choice of forum is entitled to great deference.").

while CPLR 327(a) provides a mechanism for transferring matters where jurisdiction exists but which otherwise lack "substantial nexus" to New York, the burden falls "squarely on the defendants" to make this showing; and it is a "heavy burden [to] demonstrat[e] that the forum chosen by [the plaintiff] is an inappropriate one."[83] "Unless the balance is "strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[84]

To determine whether substantial nexus exists, New York courts balance the following factors: "(1) the residency of the parties, (2) whether 'the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction', (3) the location of relevant witnesses and documents, (4) the applicability of foreign law, and (5) the availability of an alternative forum."[85] No one factor is dispositive.[86]

Here, despite citing the Court of Appeals' decision in *Pahlavi*, Revenue does not even bother to discuss all of the factors relevant to its request to transfer Hodgson's case on *forum non conveniens* grounds. The fact that Revenue has skipped the first three factors is at least a tacit acknowledgement that all of those factors favor Hodgson's choice of a New York forum — which, of course, they do. Hodgson is a resident of New York, the transactions giving

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82 *Aozora Bank, Ltd. v Morgan Stanley & Co. Inc.*, 2014 N.Y. Misc. LEXIS 3614, at *18 (Sup. Ct. N.Y. Cnty. Aug. 5, 2014) (citation omitted).

83 *Id.* at *14-15 (citing *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 74 (1984)) (alterations in the original).

84 *Goodwin*, 2012 N.Y. Misc. LEXIS 2368, at *5 (citing *Waterways Ltd. v. Barclays Bank*, 174 A.D.2d 324, 327 (1st Dep't 2006)).

85 *Aozora Bank, Ltd.*, 2014 N.Y. Misc. LEXIS 3614, at *15 (citing *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984)).

86 *Pahlavi*, 62 N.Y.2d at 479.

rise to the parties' dispute occurred here (not a foreign jurisdiction), and all of the books, records, and witnesses that are relevant to this dispute are located here.[87]

Moreover, in its eagerness to jump to the fourth factor — applicability of foreign law — Revenue ignores a very fundamental truth of Hodgson's case: the Court need not construe Minnesota law at all. Nor has Hodgson asked it to do so. The issue presented, rather, is whether the mere issuance of 1099s by entities that happen to have Minnesota addresses is a proper constitutional basis for Revenue to conclude that Hodgson has nexus with Minnesota and must — on that basis alone — file Minnesota tax returns. Hodgson has not asked for a declaration on the applicability of Minnesota law. Revenue has already determined that its law applies, how it applies, and that Hodgson has nexus with Minnesota. So what Hodgson asks for here is a declaration that Revenue is applying its law in an unconstitutional manner.

A close reading of Revenue's *forum non conveniens* argument also makes clear that it does not actually claim that the fifth *Pahlavi* factor favors its position either — *i.e.*, that there is an alternative forum available to adjudicate the precise dispute that Hodgson has raised in this proceeding. The reason for this is simple: there isn't one. Short of seeking authorization to do business in Minnesota (thus making itself subject to Minnesota's taxing jurisdiction), Hodgson does not have access to Minnesota's courts.[88] Revenue repeatedly points to Minnesota statutes which apparently provide a mechanism for Minnesota taxpayers to dispute taxes paid or owed ***once they have filed tax returns*** in the state. MR Memo. at 29; *see also id.* at 19, 25-26. But this misses the point. Hodgson's complaint seeks a declaration that Revenue has

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87 *See, e.g.*, Doyle Aff., Ex. 2 ¶¶ 14-17 (Verified Petition).

88 *See* Minn. Stat. § 321.0907(b) (2014) ("A foreign limited partnership transacting business in this state may not maintain an action or proceeding in this state unless it has a certificate of authority to transact business in this state.").

unconstitutionally asserted its tax jurisdiction over Hodgson, and thus a declaration that Hodgson does not have to file tax returns at all. Revenue simply cannot argue that Minnesota offers an alternative forum for Hodgson to litigate this dispute. So the fifth *Pahlavi* factor favors Hodgson's chosen forum as well.

Finally, Revenue attempts to appeal to the Court's equities by arguing that "[t]he constitutionality of [Minnesota's] law should be initially assessed by the Minnesota courts[,]" and further by claiming that it has not "projected itself into New York." MR Memo. at 29.

Neither of these arguments should give the Court more than momentary pause. First, even assuming Hodgson had access to Minnesota's courts (which it does not), there is no reason to credit Revenue's naked assertion that the constitutionality of its law, as applied to a New York resident, is better suited for a Minnesota court to adjudicate. Indeed, Revenue's statement that the "initial[] assess[ment]" should come from Minnesota makes clear that Minnesota courts have not yet addressed the constitutional issues raised by Hodgson here. So even if it were true that this Court would need to look to Minnesota jurisprudence for guidance on constitutional issues (which it does not), that jurisprudence is non-existent. Moreover, Revenue's position that New York's courts are not as equipped to handle questions concerning the constitutionality of sister states' laws as applied to New York residents is simply incorrect. New York courts are absolutely capable of adjudicating such questions when applied to New York residents.[89] And Revenue has given this Court no legitimate reason to think that it is incapable of determining the constitutionality of a law on an "as applied" basis to Hodgson in this particular instance.

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[89] *See, e.g., Freedman v. Poirier*, 134 Misc. 253 (Sup. Ct. N.Y. Cnty. 1929), *aff'd as unconstitutional*, 227 A.D. 320 (1st Dep't 1929) (holding a Connecticut statute regarding service of process to be unconstitutional).

Second, putting aside its terse and unsupported protestation to the contrary, Revenue clearly ***has*** projected itself into New York. *See* MR Memo. at 29. If Revenue truly felt that its contacts with New York were insufficient, it would have articulated jurisdictional arguments supporting its request for dismissal — something it has not done.[90] The reality is that Revenue's presence in New York is far greater than Hodgson's presence in Minnesota and Revenue has not shown why Minnesota is any more convenient a forum in which to litigate this dispute. Revenue apparently feels it is enough to say that Minnesota should not have to come into a sister state's courts to defend its actions. This might have a ring of truth if it weren't for the simple fact that Revenue's actions are directed into the State of New York, at a New York resident business.

Given the deference owing to Hodgson's choice of forum, the heavy burden that Revenue has failed to shoulder on its motion, and the clear showing above that the *Pahlavi* factors actually weigh in favor of keeping this case in New York, Revenue's *forum non conveniens* arguments should be rejected.

VI. THE COURT SHOULD REFUSE REVENUE'S REQUEST FOR IMMUNITY ON COMITY GROUNDS

The doctrine of "comity is not a mandate, but rather a voluntary decision to defer to the policy of another state."[91] "It does not of its own force compel a particular course of

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[90] *See, e.g., Humitech Dev. Corp. v. Comu*, 16 Misc. 3d 1109(A), 1109(A) (Sup. Ct. N.Y. Cnty. 2007) ("The doctrine of forum non conveniens is employed, at the discretion of the court, to dismiss actions which, '***although jurisdictionally sound***, would be better adjudicated elsewhere.'") (emphasis added) (citing *Pahlavi*, 62 N.Y.2d at 479); *see id.* (rejecting defendant's motion to dismiss on *forum non conveniens* grounds).

[91] *Deutsche Bank Sec. Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 73 (2006); *see also Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 580 (1980) ("The doctrine of comity 'is not a rule of law, but one of practice, convenience and expediency.'") (internal citation omitted).

action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another."[92]

New York has a "recognized interest in maintaining and fostering its undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world."[93] As articulated by the Court of Appeals in *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*:

> ***New York's interest in protecting its residents*** as well as its preeminence as a commercial and financial capital, ***[gives rise to] 'a very strong policy*** of assuring ready access to a forum for redress of injuries arising out of transactions spawned here.' Indeed, the ability to access a local forum applying a well-established, commercially sophisticated body of law is certainly as important to New York businesses as are our extensive financial and communications resources.[94]

"New York's interest in providing a convenient forum is least subject to challenge when a transaction is centered here."[95]

Revenue acknowledges the controlling decisions of the Court of Appeals in *Ehrlich-Bober* and *Deutsche Bank*, but argues that this case fits into the hypothetical situation described by the Court in which "a less compelling New York policy" might yield to a "more fundamental governmental interest of another jurisdiction." MR Memo. at 21.

As an initial matter, this is not the "less compelling New York policy" situation alluded to by the Court of Appeals in *Ehrlich-Bober* and *Deutsche Bank*. On the contrary, the

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92 *Ehrlich-Bober & Co.*, 49 N.Y.2d at 580.

93 *Id.*, 49 N.Y.2d at 581.

94 7 N.Y.3d at 73 (emphasis added) (internal citation omitted); *see also Ehrlich-Bober & Co.*, 49 N.Y.2d at 581 ("That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here. Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.").

95 *Ehrlich-Bober & Co.*, 49 N.Y.2d at 581.

exact same ("very strong") policy interests identified by the Court of Appeals in both cases are directly implicated here: Hodgson is a New York resident looking to the courts of its home state, and principal place of legal practice, for a forum to be heard and the protections offered by a "known, stable, and commercially sophisticated body of law."[96]

In fact, Revenue's request is essentially no different than the situations confronting the Court of Appeals in *Ehrlich-Bober* and *Deutsche Bank*. Revenue is merely asking this Court to dismiss Hodgson's petition as a matter of "administrative convenience,"[97] something the Court of Appeals has specifically rejected now not once, but twice:

> We continue to hold that where, as here, a lawsuit arises from a commercial transaction in which another state, or its agent, has knowingly projected itself into New York to take advantage of our financial markets, New York courts should not dismiss the action as a matter of comity.[98]

Moreover, Revenue's argument is premised upon a false dichotomy. This case only implicates Minnesota's "governmental interest" in taxation by virtue of Revenue's extra-jurisdictional application of Minnesota's tax laws in violation of the Commerce and Due Process clauses of the United States Constitution. New York has no obligation — under comity principles or otherwise — to bow to Revenue's alleged policy interest in applying its tax laws in an unconstitutional manner.[99] This is particularly true where, as shown above, Hodgson has no adequate alternative forum or legal remedy at its disposal. *See* §§ I.B., III., *supra*.

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96 *Id.*

97 MR Memo. at 25-26 (stating (albeit wrongly), that "Petitioner has a plain, speedy and efficient remedy under Minnesota law").

98 *Deutsche Bank Sec., Inc.*, 7 N.Y.3d at 73.

99 Revenue is also incorrect when it suggests that Hodgson has asked this Court to declare Minnesota's statute unconstitutional. *See* MR Memo. at 23. This argument proves too much. Hodgson has merely asked the Court to declare unconstitutional Minnesota Revenue's assertion of its tax jurisdiction over

Finally, Revenue is incorrect when it states that there is no material conflict between the policies of Minnesota and New York. The purported support for this argument is drawn from certain parallels between the administrative procedures for tax matters in New York and Minnesota. MR Memo. at 25-26. Revenue fails to point to a single provision of New York law hinting at any alignment with Minnesota's effort to impose its constitutionally impermissible jurisdictional reach over New York residents like Hodgson based on the mere issuance of federal Forms 1099. *See id.*

It fails to do this because there is obvious conflict between Revenue's position and New York's stated policy interests. Hodgson, a New York resident, has asserted (and shown) that Revenue's nexus determination, which is based purely on the issuance of federal Forms 1099 by certain Minnesota payors, is constitutionally impermissible. *See* § III., *supra.* To the extent that Revenue asserts that it should be allowed to proceed against Hodgson in this manner, and that the Court should endorse Minnesota's "governmental interest" in doing so by dismissing Hodgson's petition, then Minnesota's policy is at loggerheads with New York's "very strong" interest in protecting its residents and providing them a forum in which to litigate disputes which arise out of New York commercial transactions. The Court of Appeals' admonishment in that instance is clear: "[New York's] policy prevails in case of conflict."[100]

There is no basis in reason or law for the Court to grant Revenue's request for immunity on comity grounds.

Hodgson on the sole basis of its receipt of federal Forms1099 — *i.e.*, declaring Revenue's nexus determination on such basis unconstitutional, not the statute itself.

100 *Ehrlich-Bober & Co.*, 49 N.Y.2d at 580.

Conclusion

For the reasons discussed above, Hodgson's motion for partial summary judgment should be granted, and Revenue's motion to dismiss should be denied.

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