No. 02-42

In the

Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT HYATT, *et al.*

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Nevada

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS GILBERT HYATT, ET AL.

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QUESTION PRESENTED

Does the Constitution's Full Faith and Credit Clause (Art. IV § 1) require a state to apply another state's substantive law, when the other state is pursuing a "core sovereign function," even when doing so contravenes the forum state's policies?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief *amicus curiae* in support of Respondent.[1] Consent to file this brief was obtained from all parties, and has been lodged with the clerk of the Court.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning federalism, the scope of the Commerce Clause, and the constitutionality of various provisions of federal law. For example, PLF participated as *amicus curiae* before this Court in *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995); and is appearing as *amicus curiae* before the Court this term in, *inter alia*, *Nevada v. Hibbs*, No. 01-1368, *cert. granted*, 122 S. Ct. 2618 (2002).

This case raises a significant and fundamental question of law about the extent to which the Constitution limits a state's

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

authority to set its own policies even if they differ from those of other states. PLF seeks to augment Respondents' arguments by further elucidating the original meaning of the Full Faith and Credit Clause of the Constitution (art. IV, § 1 (hereafter "the Clause")). Such an examination has importance beyond the facts of this case, since the Court is likely to be called upon to apply the Clause, in areas ranging from homosexual marriage to assisted suicide laws. PLF believes its public policy perspective and litigation experience dealing with the constitutional principles of federalism will provide this Court with a broader historical and policy viewpoint than that presented by the parties, and that this will aid the Court in resolving this case.

STATEMENT OF THE CASE

At the heart of this case is the question, whether a state can protect its citizens from intentional torts committed within its borders by agents of another state, where the tortfeasor state has statutorily immunized its agents from liability for their tortious conduct?

Petitioner, the California Franchise Tax Board ("California"), began an investigation to establish that Respondent Gilbert Hyatt's change of residence to Nevada was fraudulent, and therefore he owed California income tax. Mr. Hyatt alleges that, in the course of that investigation, California agents entered Nevada, and committed several intentional and negligent torts. For example, the agents questioned Mr. Hyatt's friends, neighbors, employees, customers of stores where he shopped, and even his trash collector, divulging personal details and false information about Mr. Hyatt. App. to Pet. for Cert. at 55-56. He further alleges that California officials threatened to reveal personal financial information about Mr. Hyatt if he did not agree to settle California's case, and informed Mr. Hyatt's business contacts that he was under investigation, which interfered with his software licensing business. *Id.* at 68.

California assessed Mr. Hyatt not only for the taxes they claimed he owed, but added a $9 million "fraud penalty" apparently in an attempt to induce him to settle. *Id.* at 60-61.

Mr. Hyatt sued California in Nevada state court, alleging a number of intentional torts and one negligent act. California argued that California law (Cal. Gov't Code § 860.2) provides its agents with absolute immunity from suit, and that Nevada courts were obligated, as a matter of full faith and credit, to apply this statutory immunity to bar Mr. Hyatt's suit. The Nevada Supreme Court, however, held that the Clause did not require Nevada courts to apply such immunity, and also that principles of interstate comity did not require Nevada courts to apply such immunity for intentional torts, since doing so would contravene Nevada state policy. However, over a dissent, the court below did apply the immunity for negligent torts under principles of comity. *Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court of Nevada*, No. 35549, 2002 Nev. LEXIS 57 (Nev. April 4, 2002).

SUMMARY OF ARGUMENT

The Constitution does not require Nevada to apply California law within Nevada's borders. Nevada has a legitimate interest in preventing and prosecuting torts within its boundaries and, therefore has sufficient contact with the case under *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), to justify it in applying its own law. California agents went to Mr. Hyatt's Nevada home, went to stores where he shopped, interviewed Nevada residents about him, and allegedly committed a number of intentional and negligent torts in Nevada. The concerns brought forth by the dissenters in *Nevada v. Hall*, 440 U.S. 410 (1979), and which were addressed by footnote 24 of that opinion—namely, that one state ought not to be liable to suit in another state for actions within its own boundaries—are not raised here, since California agents were acting within Nevada's boundaries.

California asks this Court to adopt an "effects rule," under which Nevada would be required to apply California law when failing to do so would "interfere[] with [California]'s capacity to fulfill its own core sovereign responsibilities." Petitioner's Brief at 13. This "effects rule" is too vague, gives unwarranted power to federal courts, and is inconsistent with the original meaning of the Clause. Moreover, it would infringe on the sovereignty of the states and further confuse case law interpreting the Clause.

Although California argues that its proposed "effects rule" is consistent with the original meaning of the Clause, a review of the Clause's history shows precisely the opposite. The Framers of the Clause did not interpret it to require one state to apply the laws of other states, but only that state courts must admit other states' judgments and statutes as *prima facie* evidence—though not conclusive evidence—of the existence and validity of such judgments. This understanding of the Clause was applied under the Articles of Confederation (which contained a nearly identical clause). The Constitution modifies this only by giving Congress exclusive authority to determine the effect that states must give to other states' judgments and public acts. When, as here, Congress has failed to do so, states are free to determine on principles of comity what effect to give foreign judgments or statutes. This allows states to pursue their own policies even if they differ from those of other states and is therefore consistent with the Constitution's purpose of giving federal authority to Congress, without disparaging state sovereignty.

Respect for Nevada's sovereignty requires that it be free to decide when to apply another state's laws. California's interpretation of the Clause would undermine state sovereignty, encourage friction between the states, and lead to what this Court has called an "absurd" constitutional rule. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

ARGUMENT

I

NEVADA HAS SUFFICIENT CONTACTS WITH THIS CASE THAT IT NEED NOT APPLY CALIFORNIA'S IMMUNITY STATUTE

A. Nevada Has Sufficient "Contacts" with This Case to Permit Its Use of Its Own Law

Modern Full Faith and Credit jurisprudence requires a state to apply the law from another jurisdiction only if the forum state has "insignificant contact with the parties and the occurrence or transaction," to justify applying its own laws. *Allstate*, 449 U.S. at 310.

Allstate therefore establishes a presumption in favor of allowing a forum state to apply its own law. In *Allstate*, although the decedent was a resident of Wisconsin, he was a member of Minnesota's workforce, commuted to work in Minnesota, *id.* at 313-14, and his insurance company was present and doing business in Minnesota, *id.* at 317. This was held to be a "significant aggregation of contacts" with Minnesota to allow Minnesota courts to apply Minnesota law.

Likewise, Nevada has sufficient contacts with the case at bar to justify it in applying its own law. Nevada has a legitimate, if not compelling, state interest in preventing intentional torts committed against its residents. In this case, Mr. Hyatt was a member of Nevada's workforce and actually resided in Nevada. California chose to send agents into Nevada to conduct its investigation. It therefore ought not to be surprised that the conduct of those agents is judged by Nevada law. *Cf. id.* at 317-18. Nor should it be able to use federal authority to enforce California laws within Nevada's boundaries. *Id.* at 308.

Mr. Hyatt alleges, inter alia, the tort of invasion of privacy. The right to be let alone is " 'the right most valued by civilized men.' " *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). It is the province of state law to protect this right. *Id.* at 717 n.24 (citing *Katz v. United States*, 389 U.S. 347, 350-51 (1967)). Nevada's laws against sifting through a person's garbage, disclosing personal information to third parties despite promises not to do so, and similar outrageous practices, embody the legitimate state interest of protecting its residents. *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987) ("States have 'a significant interest in redressing injuries that actually occur within the State.' This traditional interest of the affected State . . . is protected by providing for application of the affected State's own tort laws in suits against the source State's [tortfeasors]." (Quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).) *See also Carroll v. Lanza*, 349 U.S. 408, 413 (1955) ("The State where the tort occurs certainly has a concern in the problems following the wake of the injury. . . . A State that legislates concerning them is exercising traditional powers of sovereignty.").

B. Any Possible Exception in *Hall* Does Not Apply Here

Although California concedes that Nevada's contacts with the case would satisfy the *Allstate* requirements, *see* Pet. Br. for Pet. of Writ of Cert. at 6, California asks this Court to adopt a new standard, requiring a forum state to apply the laws of another state where doing so is necessary to protect the other state's pursuit of sovereign responsibilities. California bases its argument on a footnote of *Nevada v. Hall*, 440 U.S. at 424 n.24.

In *Hall*, a Nevada agent injured some California residents in a traffic accident in California. The Nevada employee was driving a car owned by Nevada and was on official business. The California residents sued for damages, but Nevada argued

that a Nevada statute limited the amount of recoverable damages to $25,000. California law recognized no such limitation, but Nevada argued that the Full Faith and Credit Clause required California to apply the limitation. This Court held that the Clause "does not require a State to apply another State's law in violation of its own legitimate public policy," *id.* at 422, and therefore California was not constitutionally required to apply the damages limitation. In footnote 24, this Court noted that the case "pose[d] no substantial threat to our constitutional system of cooperative federalism," and that a different analysis might apply where a case "interfere[d] with Nevada's capacity to fulfill its own sovereign responsibilities."

Footnote 24 was written to address the point raised by the dissenting opinion which was concerned with the majority's refusal to fix sovereign immunity on a constitutional basis. *See id*. at 427 (Blackmun, Rehnquist, JJ., Burger, C.J., dissenting); *id.* at 432 (Rehnquist, J., and Burger, C.J., dissenting). Justice Blackmun (joined by Justice Rehnquist and Chief Justice Burger) conceded that a state's sovereignty ends at the state line, *id*. at 428, but worried that, since the majority did not limit its decision to those grounds, "Nevada's amenability to suit in California is not conditioned on its agent's having committed a tortious act *in California*." *Id.* (emphasis added). This created a risk that "State A . . . [might] be sued by an individual in the courts of State B on any cause of action . . . " *id.* at 428-29, including cases arising within State A's boundaries. Justice Rehnquist and Chief Justice Burger echoed these concerns in their dissent. *See id.* at 443 ("The federal system . . . is built on notions of state parity.")

This review shows that the dissents were not concerned primarily with protecting one state's immunity for acts committed in another state. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. Rev. 485, 584 (2001); William D. Torchiana, *Choice of Law and The Multistate Class: Forum Interests in Matters Distant*, 134 U. Pa. L. Rev.

913, 918 (1986). Instead, their concern, addressed by footnote 24 of the majority opinion, was that *Hall* might be interpreted as allowing courts of one state to hear a suit against a second state for actions occurring within the second state's own borders—a situation not presented in this case. This is why, in his concurring opinion in *Allstate*, Justice Stevens explained that the reservation in *Hall*'s footnote 24 was meant to apply when one state "unjustifiably infring[ed] upon the *legitimate* interests of another State." 449 U.S. at 323 (Stevens, J., concurring) (emphasis added). That a state might be sued without its consent for acts undertaken within its own jurisdiction gives rise to more extreme sovereignty considerations than are implicated in this case, where California was acting within Nevada's sovereign territory.

Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), supports this interpretation of *Hall*. In that case, Arlington County, Virginia, argued that the Clause required the District of Columbia to apply Virginia's statutory immunity for police officers. An officer had committed a negligent tort while pursuing a suspect in the District, and Arlington County argued that under *Hall*'s footnote 24, the District was required to apply Virginia law because the officers were engaged in the sovereign function of pursuing criminals. The court rejected this argument. Arlington's interests in law enforcement "weaken—and will yield to other interests—when it acts outside Virginia's borders." *Id.* at 1358. Thus the situation in *Biscoe* was "wholly different from one in which a Virginia county has acted *within its borders*, or those of the state, and is sued in the courts of a sister state." *Id.*

Footnote 24 of *Hall* was intended to protect a state's right to act within its *own* borders. Since the Arlington officers were acting outside of Virginia, any possible exception created by footnote 24 was inapplicable. Likewise here, California's agents were acting outside of the boundaries of California.

Nevada's exercise of jurisdiction is therefore neither intrusive nor unreasonable. The policy concerns which gave rise to footnote 24 are not implicated when one state is enforcing its tort law on those acting within its borders, even when defendants happen to be agents of another state. *See also Struebin v. State*, 322 N.W.2d 84, 86 (Iowa), *cert. denied*, 459 U.S. 1087 (1982).

II

THE FULL FAITH AND CREDIT CLAUSE WAS NOT WRITTEN TO REQUIRE ONE STATE TO APPLY THE LAWS OF ANOTHER STATE

"This Court has regularly relied on traditional and subsisting practice in determining the constitutionally permissible authority of courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 n.2 (1988). A review of the original meaning of the Full Faith and Credit Clause is therefore in order. But, contrary to California's superficial analysis, Pet. Br. at 20-24, the Clause was not written to mandate the application of one state's law in the courts of another state and does not support California's proposed "effects rule."

A. The Terms "Full Faith and Credit" Originally Referred to State Courts Admitting into Evidence Judgments or Statutes from Other State Courts

At the time of the American Revolution, the terms "faith" and "credit" had been used as terms of art in the law of evidence for over two centuries.[2] *See further* Ralph U. Whitten,

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[2] *See, e.g., Caudrey's Case*, 5 Co. Rep. 1a, 7a, 77 Eng. Rep. 1, 9 (K.E.L. 1595); *Bunting v. Lepingwell*, 4 Co. Rep. 29a, 76 Eng. Rep. 950, 952 (K.B. 1585); *Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1, 4-6 (K.B. 1778); *Robinson v. Bland*, 1 Black. 256, 257, 96 Eng. Rep. 141 (K.B. 1760) ("Foreign decrees are received here, not as *res judicatae*, but as evidence of the custom and law of the country.") *See also* Noah Webster, *A Compendious Dictionary of the English*

(continued...)

The Original Understanding of The Full Faith And Credit Clause and the Defense of Marriage Act, 32 Creighton L. Rev. 255, 265-66 (1998); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (Part I), 14 Creighton L. Rev. 499 (1981); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 Mich. L. Rev. 33, 44 (1957).

Specifically, the terms "faith" and "credit" were used in cases involving the applicability of judgments from other jurisdictions. At common law, judgments from domestic courts were considered binding and valid and could not be attacked in subsequent proceedings brought in the same jurisdiction. Foreign judgments, by contrast, could be attacked. The important question, therefore, was whether, in an American colony's courts, judgments rendered in England, or in another colony, were "foreign" or "domestic." Prior to the American Revolution, the colonies adopted different answers to this question, which naturally led to complications for creditors. *See generally* 3 Joseph Story, *Commentaries on the Constitution* § 1307 (3d ed. 1858).

In 1777, to remedy this and similar problems, the Continental Congress formed a committee to amend the Articles of Confederation. Among the amendments they recommended was one which read,

> full faith and credit shall be given in each of the States to the Records, Acts, and Judicial Proceedings of the Courts and Magistrates of every other State, and that an Action of Debt may lie in the Court of

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[2] (...continued)
Language 71 (1806) ("Credit: to believe, admit, trust, set off, honor." *Id.* at 112: "Faith: belief, fidelity, honesty, truth, promise.")

> Law in any State for the Recovery of a Debt due on Judgment of any Court in any other State . . . .

9 *Journals of the Continental Congress* 887 (Nov. 11, 1777). The Clause was adopted with some changes, *id.* at 895-96, finally reading simply, "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Articles of Confederation, art. IV, § 3. This is nearly identical to the Clause as it appears today in Article IV of the Constitution.

California's interpretation is also inconsistent with the history of the Articles of Confederation. The Articles created an unstable and decentralized union, which the Federal Convention had to make "more perfect." *Yet the Clause was already part of the Articles.* If, as California argues, the Clause required state courts to apply the laws of other states, then the union created by the Articles would have been much stronger. But under the Articles, no such requirement was imposed, because that would have infringed on state sovereignty.

B. The Full Faith and Credit Clause in the Articles of Confederation Was Interpreted Only as an Evidentiary Requirement

The Full Faith and Credit Clause in the Articles of Confederation was never interpreted as requiring one state to apply the laws of other states. Decisions rendered under the Articles routinely explained that the Clause only required courts to admit out-of-state judgments as evidence—and not conclusive evidence—of their own existence and validity. For instance, in *James v. Allen*, 1 Dall. (1 U.S.) 188, 191-92 (Pa. 1786), the common pleas court of Philadelphia noted that the Clause did not mean that "every order of a foreign Court . . . or any local laws of that country . . . can have the effect of restraining us from proceeding according to our own laws here

. . . . [O]therwise executions might issue in one State upon the judgments given in another . . . .” Instead, the Clause was

“chiefly intended to oblige each State to receive the records of another as full evidence of such Acts and judicial proceedings.” *Id.*

Similarly, in *Phelps v. Holker*, 1 Dall. (1 U.S.) 261 (Pa. 1788), the Pennsylvania Supreme Court held that the Clause did not prevent Pennsylvania courts from inquiring into the validity of a judgment rendered in Massachusetts. Attorney Jared Ingersoll argued that the Clause was intended to “place the States upon a different footing with respect to each other, than with respect to foreign nations.” Since the Clause was intended “to form a stronger cement” between the states, Ingersoll argued that Pennsylvania Courts were required to accept Massachusetts judgments as conclusive and binding. *Id.* But the Court rejected this argument: “The articles of Confederation must not be construed to work such evident mischief and injustice, as are contained in the doctrine, urged for the Plaintiff.” *Id.* at 264 (Opinion of McKean, J.).

The court was more explicit in *Millar v. Hall*, 1 Dall. (1 U.S.) 229 (Pa. 1788). “[T]he laws of a particular country,” wrote Justice McKean, “have in themselves no extra-territorial force, no coercive operation” *Id.* at 231. Under principles of comity, foreign judgments might “acquire an influence and obligation, and, in many instances, become conclusive throughout the world.” *Id.* at 232. But these principles were based on a “mutual conviency policy, the consent of nations, and the general principles of justice,” *Id.* at 232. The Full Faith and Credit Clause of the Articles of Confederation was not interpreted as *requiring* one state to apply the laws of another state in its own courts.

C. The 1787 Constitution Vested Congress Alone the Authority to Prescribe the Effect of a Sister State's Law in a Forum State

The Philadelphia Convention took up the Clause on August 29, 1787. The Committee of Detail had reported a clause with minor differences in wording from the Clause in the Articles of Confederation, and Delegate Hugh Williamson moved "to substitute . . . the words of the Articles of Confederation," since he "did not understand" the changes. 2 *Records of The Federal Convention* 447 (M. Farrand ed. 1911). Others explained that "[j]udgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency, &c." *Id.* James Madison suggested expanding the Clause "to provide for the *execution* of Judgments in other states," *id.* at 448, but Edmund Randolph immediately objected that "there was no instance of one nation executing judgments of the Courts of another nation," and Madison's proposal failed. *Id.* This exchange reveals that the framers saw the Clause as imposing nothing more than the comity principles of the Articles of Confederation (with the minor addition of "Acts of insolvency"). In other words, the Clause did not require one state to give binding effect to judgments or laws of other states; in fact the Convention explicitly rejected such a proposal.

When the Convention took up the provision again, on September 3, James Wilson recommended giving Congress authority to "*declare the effect*" that one state's judgments would have in other states, because otherwise, "the provision would amount to nothing more than what now takes place among all Independent Nations." *Id.* at 488. Thus Wilson saw the Clause, which at this point was identical to the Clause in the Articles of Confederation, as requiring nothing more than comity. He proposed going beyond comity by giving Congress exclusive power to declare the effect of such judgments or acts.

Only by giving Congress the power to "*declare the effect*," did the 1787 Clause rise above comity or the "mutual conveniency" required by the Articles.

This interpretation is also supported by the fact that Edmund Randolph objected to Wilson's motion, because Randolph believed that giving Congress authority to require a state to enforce the judgments or laws of other states "strengthen[ed] the general objection agst. the plan," by giving Congress "opportunities of usurping all the State powers." *Id.* at 488-89. Similarly, in the *Federalist*, Madison explained that only this new Congressional power to declare the effect decreased the states' authority to determine for themselves when to apply sister states' law. In other respects, the Clause was identical to the Articles of Confederation.

> The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established [by adding Congressional authority to declare the *effect*] may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States . . . .

The Federalist No. 42, at 271 (James Madison) (C. Rossiter ed., 1961). If the Clause was " 'of little importance . . .' it is highly unlikely that it could have imported conclusive evidentiary effect on the merits or incorporated jurisdictional or other conflict of laws rules." Whitten, 14 Creighton L. Rev. at 554.

Madison's language makes sense only if the Clause is understood as giving Congress the sole authority to prescribe

what effect that the laws of sister states will have. As Professor Whitten notes, "[i]t is implausible to suppose that [the Clause] would require the forum state to enforce a sister-state's law. . . . It is more plausibly read as a command that the sister-state's statute, perhaps authenticated as prescribed by Congress, be admitted as conclusive evidence of the law of the sister-state." *Id.* at 544.

Courts interpreting the Clause after ratification generally did not hold that it required states to give substantive effect to the statutes or judgments of other states. In *Banks v. Greenleaf*, 10 Va. 271 (1799), Justice Bushrod Washington explained:

> [T]he laws of every government have force within the limits of the government; and are obligatory upon all, who are within its bounds. . . . They have no effect, directly, with the people of any other government; but, by the courtesy of nations, to be inferred from their tacit consent, the laws, which are executed within the limits of any government, are permitted to operate every where, provided they do not produce injury to the rights of such other government, or its citizens.

Id. at 272. Justice Washington held that the Clause required Virginia courts to admit Maryland judgments as evidence, but Congress had sole power to determine the effect of such judgments, and had not done so. Therefore, Virginia courts were free to determine the effect of Maryland judgments on the basis of comity. Justice Washington declined to give *conclusive* effect, because the laws "of one state are as little obligatory upon another, as those of a foreign country; . . . [the people] cannot be said to owe allegiance to any state, in which they do not reside." *Id.* at 278. Likewise, here, Mr. Hyatt is not a California resident, and should not be subject to California law.

Justice Washington wrote in *Green v. Sarmiento*, 10 F. Cas. 1117, 1118-19 (C.C.D. Pa. 1810):

> [T]he change of the language of this section of the constitution, from the parallel section of the articles of confederation, affords a strong reason for the opinion, that the former was intended to give to the judgments of each state within the other states, a more extensive force and effect, than the rule of law, founded on mere comity, had allowed to foreign judgments. The fourth article of the confederation, goes no farther than to declare, that "full faith and credit shall be given in each state, to the records, acts, and judicial proceedings of the courts and magistrates of every other state;" whereas the constitution proceeds to add, that congress may declare what shall be the effect of such records, acts, and judicial proceedings.

But the Clause "remained unfulfilled, until congress should have made provision" declaring what shall be the effect. *Id.* at 1119. Thus, since Congress had not determined what effect sister states' laws should have in each others' courts, states were required to admit the existence of foreign judgments and statutes as *evidence*, but remained free to determine for themselves, on comity principles, when to *apply* outside law. *See further Hammon & Hattaway v. Smith*, 1 Brev. (3 S.C.L.) 110 (1802); *Bartlet v. Knight*, 1 Mass. 401, 410 (1805); *Taylor v. Bryden*, 8 Johns. 173 (N.Y. 1811); *Bissell v. Briggs*, 9 Mass. 462, 467 (1813); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith And Credit*, 12 Mem. St. U. L. Rev. 1, 41-53 (1981). Only Kentucky held unequivocally that the Clause required states to give conclusive effect to other state judgments and statutes. *See id.* at 49.

As Judge Kent wrote in *Hitchcock v. Aicken*, 1 Cai. R. 460, 480 (N.Y. 1803), the Clause "distinguished between giving full faith and credit, and the giving effect to the records of another State, and until Congress shall have declared by law what that effect shall be, the records of different states are left precisely in the situation they were in under the articles of confederation."

Justice Washington then explained that the Full Faith and Credit Act of 1790, 1 Stat. 122 (1790), now codified at 28 U.S.C. § 1738, with minor revisions, did *not* prescribe the effect that statutes would have, because it declared only that forum states should give the "same faith and credit" to acts and judgments that were given by nonforum states. Judge Radcliff agreed that neither the Clause nor the act required one state to apply the law of other states:

> The full faith and credit, intended by the Constitution, cannot be interpreted to mean their legal effect, for otherwise the subsequent provision that Congress may prescribe the effect would be senseless and nugatory. The Constitution makes a plain distinction between "credit" and "effect;" . . . consistent with that principle of the common law which ascribes absolute verity to the records and judicial proceedings in our own courts. When a judgment or recovery in our own courts is pleaded, it is alleged as a fact, the record of which cannot be denied, and is conclusive of the fact . . . but its legal effect, or operations on the rights of the parties, is still to be considered, and frequently may form a distinct question. The provision . . . can extend no farther.

Aicken, 1 Cai. R. at 475-76 (opinion of Radcliff, J.). Thus, 28 U.S.C. § 1738 does not dispose of this case. As Chief Justice Marshall explained, that statute does not determine what effect

judgments or statutes shall have in other states. *Peck v. Williamson*, 19 F. Cas. 85 (C.C.D. N.C. 1813). The Clause itself provides no mandate, and the statute merely parrots the language of the Clause, which means that state courts may still decide for themselves when to apply the laws of other states just as they could under the Articles of Confederation.

D. Even in the Law of Slavery, the Clause Did Not Require States to Apply Each Others' Laws

The history of slavery law is striking evidence of the Clause's original meaning. Had it required states to apply the laws of other states, as California argues, slaves who moved into free states would have remained slaves. But that was not the case. *See, e.g.* Joseph Story, *A Familiar Exposition of The Constitution of The United States* § 411 (1840) ("[A]t the common law, a slave escaping into a State, where slavery is not allowed, would immediately become free, and could not then be reclaimed."). To avert this problem, the Fugitive Slave Clause, art. IV, § 2, cl. 3, was added. If the Full Faith and Credit Clause had required northern states to apply southern states' laws, the Fugitive Slave Clause would have been surplusage. But in fact, "legal argument concerning interstate comity and slavery did not invoke the full faith and credit clause . . . . In the 1780s 'it was almost axiomatic that the operation of "normal" . . . reciprocity would not lead to the recognition by one state of the slave property of another.'" Anthony J. Sebok, Note: *Judging the Fugitive Slave Acts*, 100 Yale L.J. 1835, 1847 n.68 (Apr. 1991) (citations omitted).

In fact, many antebellum courts held that slavery laws did not extend into nonslavery jurisdictions. Those courts often rejected the argument that the Full Faith and Credit Clause permitted slave states to extend their slavery laws over state borders. *See, e.g.*, *Harry v. Decker*, 1 Miss. 36 (1818); *Commonwealth v. Aves*, 35 Mass. 193, 216-18, 221 (1836); *In Re Booth*, 3 Wis. 1 (1854); *Anderson v. Poindexter*, 6 Ohio St.

622, 631 (1856) ("Kentucky can not, by the law of comity, demand of this state an abrogation of its constitution and municipal laws, to promote any of its own peculiar institutions . . . . ").[3] These decisions doubtless had a "chilling effect" upon the policies of the slave states, *cf.* Pet. Br. at 35, but that did not, and does not, violate the Constitution.

Were California's interpretation correct, northern states would have been required to apply the laws of slave states. But such arguments were routinely rejected, because the Clause was understood to impose only an evidentiary rule on state courts, not a national conflict-of-laws rule. Just as northern courts did not have to apply southern slave laws, Nevada is not required to apply California law in this case.

E. The Full Faith and Credit Clause Was Not Interpreted to Require a Forum State to Apply Sister States' Laws until After the Civil War

In 1813, this Court held that while Congress had authority to require states to give conclusive effect to the judgments or statutes of other states, the Constitution itself did not impose such a requirement. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813). *Mills* addressed only the reach of the Full Faith and Credit *statutes*, not the Clause. *See id.* at 485; Nadelmann, *supra*, at 67.[4] Courts at the time understood that *Mills* did not

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[3] Indeed, even after *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1856), courts continued to hold that out-of-state slavery laws did not extend into nonslavery states. *See Lemmon v. People*, 20 N.Y. 562 (1860). The *Lemmon* court rejected the dissent's argument that the Clause required New York to apply the laws of slavery. *Compare id.* at 634 (Clerke, J., dissenting).

[4] Nadelmann notes that Justice Story later changed his mind. *See* Story, Commentaries § 1313. But Story wrote without the benefit of Madison's notes on the Philadelphia convention, and in any case, his later view was a minority view in conflict with binding precedent.

(continued...)

address the Clause. *See, e.g.*, *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 175-76 (1850); *Rathbone v. Terry*, 1 R.I. 73, 77 (1837), *Silver Lake Bank v. Harding*, 5 Ohio 545, 546-47 (1832); *Hoxie v. Wright*, 2 Vt. 263, 267 (1828); *Hampton v. M'Connel*, 16 U.S. (3 Wheat) 234, 235 n.3 (1818).

The question in one such case, *Draper's Executors v. Gorman*, 35 Va. 628 (1837), was whether the Clause, and the acts passed under it, required states to give conclusive effect to the decisions of Washington, D.C. courts, which are federal. The court held that the Clause did not require states to enforce judgments from federal jurisdictions, because if it did, "the limitations upon the power of congress, and the rights reserved to the states, [would be] idle and illusory." *Id.* at 632. If the Clause required states to give effect to all laws from other American jurisdictions,

> [the federal government] may establish a lottery in the district, and authorize a sale of its tickets in the states, contrary to their penal laws: or it may establish a bank there, and in aid of this corporation, extend its branches into every state of the union; which, for the sake of the argument, I assume it has no constitutional right to do under its general powers. Is it possible that such a construction can be given to this grant of powers, limited to the ten miles square? And if we yield to this construction, where are the rights reserved to the states?

Id. at 633. The case at bar involves the same problem: under California's interpretation of the Clause, California could

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[4] (...continued)
Moreover, Story was discussing only the applicability of judgments, not statutes, and he concluded that "[t]he constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." *Id.*

extend its laws into Nevada, and every other state, and this would infringe on the rights of the states to set their own policies.

In *Earthman's Administrators v. Jones*, 10 Tenn. 484 (1831), the Tennessee Supreme Court held that *Mills* did not require states to apply sister states' laws. "[H]as the legislature of Missouri power and jurisdiction," asked the court, "to pass laws, operating directly or indirectly upon the citizens of other states beyond her territorial limits?" *Id.* at 485. If the Clause did require such enforcement, then "the State of Missouri say[s] to the State of Tennessee . . . You must execute our laws upon your citizens, of whose persons we never have had jurisdiction . . . because the judgments of our courts, rendered in pursuance of our laws, do . . . that conclusively." *Id.* at 487.[5] Therefore, "[t]he legislature and courts of Missouri have no more jurisdiction to bind the citizens of Tennessee, not found in Missouri, than the authorities of Tobago had to bind the people of England." *Id.* at 488-89. Likewise, California has no power to write laws binding on the residents of Nevada, including Mr. Hyatt.

Mills and its progeny are consistent with *Federalist* 42: Congress has exclusive authority to declare the effect which one state's judgments and statutes will have in other states, but where Congress has not done so, states are "left precisely in the situation they were in under the articles of confederation," *Aicken*, 1 Cai. R. at 480—namely, they may decide on principles of comity, whether or not to apply the other states' law.

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[5] *Jones* noted that *Mills* had been misinterpreted by those who believed the Clause required extra-territorial enforcement of state laws. The court pointed out that Justice Story, who wrote *Mills*, had explained in another case that " 'no legislature can compel any persons beyond its own territory.' " *Id.* at 487 (quoting *Flower v. Parker*, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823)).

It was not until *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615 (1887), that this Court began interpreting the Clause to require states to apply the laws of other states. *Chicago & Alton* held that under *Mills*, the Clause "implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home." *Id.* at 622. But this was a misreading of *Mills*, since *Mills* addressed the statutes, not the Clause. Although this difference might seem minor, it has caused widespread misunderstanding of the actual import of Article IV section 1. This confusion has led to the notion that the Clause was meant to create a single, unified judiciary system. *See* Whitten, 32 Creighton L. Rev. at 344-45; Nadelmann, *supra*, at 74 (quoting Robert Jackson, *Full Faith And Credit: The Lawyer's Clause of The Constitution*, 45 Col. L. Rev. 1, 34 (1945)); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935). But as *Gorman* pointed out, such an interpretation would allow states to legislate for each other, rendering the sovereignty of the states meaningless, and making the Constitution of 1787 a wholly national document, instead of "a federal, and not a national, act." The Federalist No. 39, at 243 (James Madison) (C. Rossiter ed., 1961). *See also Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) (noting "absurd" results if Clause requires one state to apply other state's laws regardless of its own policy). Not even Justice Story, or Chief Justice Marshall, who famously believed in expanding federal power, went this far.

Instead, as this Court explained in *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873):

> It has been supposed that . . . [the Clause] had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered. And the

> language of this court in *Mills v. Duryee*, seemed to give countenance to this idea . . . . [But] the Constitution "did not make the judgments of other State's domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence."

Id. at 462-63 (quoting Joseph Story, *Commentary on the Conflict of Laws* § 609 (1834)).

Beginning in the early part of this century, courts followed the dictum in *Chicago & Alton* in holding that the Clause requires that states apply, rather than merely accept into evidence, the laws of other jurisdictions. *See, e.g.*, *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 155 (1932). This interpretation is contrary to the original meaning of the Clause, the sovereignty of the states, and over a century of American case law. *See* Nadelmann, *supra*, at 73-74. As one court noted, "the provision of the 4th article of the national constitution, which requires each state to 'give full faith and credit to the public acts, records, and judicial proceedings of the other states'. . . cannot have the effect of making the laws of one state the laws of another." *Ex Parte Kinney*, 14 F. Cas. 602, 607 (C.C.E.D. Va. 1879).

Reiterating the original understanding of the Clause would protect the Constitution's federalist design, protect the rights of states to set their policies, and give guidance to courts attempting to apply the Full Faith and Credit Clause.

III

REQUIRING NEVADA TO APPLY CALIFORNIA'S IMMUNITY STATUTE UNDER THE FULL FAITH AND CREDIT CLAUSE WOULD INFRINGE ON NEVADA'S SOVEREIGNTY

California's argument is inconsistent with both modern Full Faith and Credit cases and with the original meaning of the Clause, but it also would contradict sound policy, undermine state sovereignty, and lead to absurd results.

California asks this Court to allow California to "project its laws across state lines so as to preclude [Nevada] from prescribing for itself the legal consequences of acts within it," *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1939), whenever California's actions "involve a core, sovereign state function."

Even assuming *arguendo* that such a rule is appropriate in some cases, it would not be appropriate here. This case does not involve a "core, sovereign function," a "threat to our constitutional system of cooperative federalism," *Hall*, 440 U.S. at 424 n.24, or "any policy of hostility to the public Acts of [California]. [Nevada] is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). Nevada did not attempt to meddle in California tax policy. Instead, California's agents chose to travel to Nevada and allegedly commit torts there. Nevada's policies are legitimate, have been consistently applied, and ought to prevail within Nevada's borders.

However, California's proposed "effects rule" is not appropriate. Although allowing states to make their own policy decisions may inconvenience neighboring states which choose differently, that does not justify depriving states of the power to make such choices. States may pursue their own policies within the framework of the Constitution, even where they differ from

those of other states. This is the very definition of federalism. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *New York v. United States*, 505 U.S. 144, 155-60 (1992); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This Court has repeatedly held that states may set policies different from those of other states:

> The several States of the Union are not, it is true, in every respect independent . . . . But, except as restrained and limited by [the Constitution], they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them . . . . [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others . . . . [T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity . . . .

Pennoyer v. Neff, 5 Otto (95 U.S.) 714, 722 (1877). *See also Bradford Electric Light Co. v. Clapper*, 286 U.S. at 163-64 (Stone, J., concurring) ("I should hesitate to say that the Constitution projects the authority of the Vermont statute across state lines into New Hampshire, so that the New Hampshire courts, in fixing the liability . . . for a tortious act committed within the state, are compelled to apply Vermont law instead of their own.").

Nor is there any exception to this rule when a case "involves" a state's "sovereign functions." In *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), this Court rejected the argument that the Clause required one state to apply another state's tax exemptions. "No state can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in [tax policy] . . . ." *Id.* at 594. The Court saw that interpreting the Clause to require states to apply the laws of other states threatens state sovereignty, even where the case involves the state's "sovereign function"of tax policy. "States are left free to extend the comity which is sought, or not, as they please." *Id.* at 595.

Although couched in language suggesting that it supports state sovereignty, California's "effects rule" actually undermines it. The Constitution leaves states free to adopt different policies, and it is precisely to protect the policy-making powers of the states that this Court has repeatedly held that the Clause "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' " *Baker by Thomas v. General Motors*, 522 U.S. 222, 232 (1998) (quoting *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493 at 501 (1939)). Nevada's sovereignty would be curtailed by allowing federal courts to determine whether or not to permit Nevada to prosecute torts occurring within its boundaries. To require that California immunities extend to Nevada courts in contravention of Nevada's policy, would make Nevada a "vassal" to California, restricting the remedies available to Mr. Hyatt and other Nevada residents. *See Lanza*, 349 U.S. at 412. Should a case arise justifying such a requirement, the Clause gives Congress exclusive authority to impose it.

California's proposed rule is also impermissibly vague. California argues that the Clause should require the application of another state's law "[w]hen the *subject* of the litigation is the state's *activities* in carrying out its core government functions." Pet. Br. at 19. California was not engaged in the actual collection of taxes, but in an investigation in support of tax collection. According to California's proposed rule, any "legislatively immunized activities undertaken in carrying out the State's core government functions," *id.*, would necessarily be covered, unless federal courts have authority to draw a line between actions which are, and which are not, "incidental" to "critical sovereign responsibilities." *Id.* at 11. Such line-drawing would necessarily involve policy determinations which might run counter to policy determinations by the states. California asks this Court whether "the judicial authority of one State with respect to the governmental actions of another State be tempered by [Federal Courts]." Pet. Reply Brief in Support of Writ of Certiorari at 6. But, with respect, the Clause vests *Congress alone* with the authority to determine the effects of one state's public acts in other states, and neither it, nor current case law, justifies federal courts in making these decisions.

Where the state's highest court has determined that the state has a legitimate interest in applying its own law, the *Allstate* test is satisfied, and where the tort in question occurred within Nevada's borders, any possible exception which footnote 24 of *Hall* may have carved out of *Allstate*, is inapplicable.

California's theory is also self-contradictory, in that it actually undermines sovereignty. According to California, the Clause requires Nevada to defer to California to such a degree as to undermine Nevada's own sovereign interest in protecting its residents. Yet

> [i]t is difficult to perceive how [California] could be said to have an interest in Nevada's domiciliaries superior to the interest of Nevada. Nor is there any

> authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.

Williams v. North Carolina, 317 U.S. 287, 296 (1942). *See also Allstate*, 449 U.S. at 323 (Stevens, J., concurring) ("[I]n view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.").

Presumably, California's theory would also work the other way, requiring California to defer to Nevada's sovereignty despite California's sovereign interests (*contra Hall*). California would have to obey the discovery orders in this case because they are "incidental" to Nevada's "core sovereign function" of protecting Mr. Hyatt from torts. But this "would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers*, 294 U.S. at 547. It was precisely to avoid such a paradox that this Court delineated the "public policy exception" in its Full Faith and Credit cases.

Finally, California's proposed rule leaves people like Mr. Hyatt without either a legal *or a political* remedy. Courts often defer to the acts of administrative agencies on the grounds that those who disagree with agency policies can change them through political action. But residents of Nevada have no say in the elections of California. Were California to prevail here, Nevada residents would have no remedy, at either the bar or the ballot box, for torts such as those alleged. This would render bureaucracies unaccountable, and Nevada unable to protect its residents. These policy considerations, plus the original meaning of the Clause, demonstrate that California's argument must fail.

CONCLUSION

California proposes an "effects rule," under which the Full Faith And Credit Clause would require a forum state to apply the law of a sister state when failing to do so would "interfere with the sister state's capacity to fulfill its own core sovereign responsibilities." This rule is contrary to the original meaning of the Clause, and infringes on the sovereignty of forum states. The judgment of the Supreme Court of Nevada should be *affirmed*.

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Respectfully submitted,

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