ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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AUG 06 2009

TRACIE K. LINDEMAN
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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent

v.

CASE NO: 53264

GILBERT P. HYATT,

Respondent/Cross-Appellant

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RESPONSE TO HYATT'S MOTION TO STRIKE *AMICUS CURIAE* BRIEF AND NOTICE OF CONCURRENCE

Appellant Franchise Tax Board of the State of California (FTB) hereby responds to respondent Gilbert P. Hyatt's motions filed July 28, 2009 addressing the various briefs of *amicus curiae* and the Notice of Concurrence filed by the State of Nevada.

Introduction[1]

In the guise of a procedural document purporting to keep this court from considering two *amicus* briefs, Hyatt actually seeks much broader, outcome-determinative rulings by this court. Specifically, he seeks rulings on the merits of the primary issues in this appeal. Hyatt's ruse should be rejected.

It is no secret that in 2002 and 2003, this court and the United States Supreme Court reviewed parts of this case and established limitations on the scope of issues to be tried. By mischaracterizing the contentions of *amici,* Hyatt argues that the *amicus* briefs should be rejected because they ignore the prior appellate rulings. Hyatt contends that the "ship has sailed" on all issues relating to sovereign immunity, comity, and other constitutional bars to this lawsuit. (Opp. p.3, line 3.)

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[1] To decide this motion correctly, the court needs to understand the nature of this litigation and the appeal issues. FTB has attached a copy of the short Summary of Litigation contained in FTB's opening brief. (Exhibit 1). We have also attached a copy of the brief's table of contents. (Exhibit 2).

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Perhaps Hyatt is correct in stating that the "ship has sailed" on certain issues in this case, but unfortunately, the district court's application of those decisions missed the boat. As demonstrated in the opening brief, the scope of sovereign immunity to which FTB is entitled must be evaluated again in light of the recent series of cases decided by this court on the subject of discretionary function immunity. AOB 35-52. These cases were decided after the 2002 and 2003 appellate decisions by this court and the United States Supreme Court; the cases were brought to the district court's attention, but she refused to apply them. The law of the case doctrine, which Hyatt asks this court to blindly apply as a purported basis for rejecting the *amicus* briefs, is not applicable because of the court's change in the substantive law, and does not bar reevaluation of the scope of FTB's immunity. AOB 37-38. This fact was also brought to the district court's attention, but she refused to recognize it.

Additionally, the district judge ignored the express directions of this court and the United States Supreme Court, because she failed to apply fundamental principles of comity mandated by the 2002 and 2003 appellate decisions. AOB 55-57. Those decisions required the district court to apply comity to the sovereign State of California, and essentially to treat California the same as the State of Nevada would be treated in similar circumstances. The district court, however, erred by failing to obey the limitations established in the prior appellate decisions. Instead, she allowed this case to be tried on theories and evidence far beyond anything ever contemplated by the appellate courts in the 2002 and 2003 decisions. And then she failed to apply comity to multiple issues, including issues relating to immunity, caps on compensatory damages, and the prohibition against punitive damages.

Hyatt ignores all of these contentions. Instead, he asks this court simply to reject FTB's appellate contentions summarily -- and essentially to affirm the district court's rulings on these issues -- all in the guise of his attack on the *amicus* briefs. Hyatt cites no legal authority in support of his novel theory that an appellate court should evaluate and determine the merits of key issues in an appeal as part of the court's procedural determination of whether to allow *amicus* participation in an appeal.

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Furthermore, Hyatt's motion also relies on a very limited view of *amicus* participation in appeals, a view that is contrary to NRAP 29, contrary to modern judicial perceptions of *amicus* participation, and contrary to reality.

Accordingly, for the reasons explained in further detail below, both *amicus* briefs and their concurrence by the State of Nevada, are proper and should be considered by this court.

Argument

Hyatt's attack on the *amicus* briefs is two-fold. First, he asserts that the *amicus* briefs should be stricken because the briefs contain legal arguments that are without merit. Second, he argues that the briefs are procedurally improper for various reasons. Both of these grounds are not reason to strike the *amicus* briefs.

1. The court should not determine the merits of appeal issues at this time

With regard to Hyatt's first contention, he argues that "each *amicus* brief asserts the same false premise" regarding sovereign immunity and intentional tort actions. (Opp. p.2, lines 13-14.) But it is Hyatt who incorrectly contends that "[e]ach proposed *amicus* argues that, as a matter of state sovereign immunity, tax agencies of one state should not be subjected to tort suits, even for intentional bad faith conduct, in a sister state." *Id.* p.3, lines 1-3. A simple review of their briefs reveals that is not *amici's* contention. *Amici* simply argue the importance of sovereign immunity in the context of this court's recent decisions in *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007) and its progeny, a key issue raised in FTB's Opening Brief. AOB 35-52.

From his false premise Hyatt argues that this court allowed the intentional tort claims to avoid dismissal, because such claims are not subject to immunity (Opp. pp. 7-9), and concludes that since the prior holdings by this court "are definitive and conclusive, and the law of the case," there is "no reason to allow *amici* to reargue the law of the case." (Opp. p. 9, lines 18-19.)

Hyatt's reliance on the law of the case doctrine attacks the merits of issues that are at the heart of this appeal. The first major issue in the opening brief is whether Hyatt's claims, as tried, should have been dismissed under the doctrines of comity, discretionary function

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immunity, and applicable United States Constitutional provisions. (AOB 4) The second major issue in the opening brief is whether the district court improperly allowed the jury to impose liability based upon activities that were within FTB's discretionary functions, despite jurisdictional limitations established by this court and the United States Supreme Court. (*Id.*)

In discussing these general issues, FTB's brief provides separate legal arguments relating to the doctrine of comity, the doctrine of discretionary function immunity, and the law of the case doctrine. Regarding comity, FTB's brief observes that this court and the United States Supreme Court applied comity in a manner to avoid hostility between the two sovereign states. This court and the United States Supreme Court did so by granting immunity to California to the full extent that a Nevada government agency would be entitled to immunity in similar circumstances. (AOB 29-32) The United States Supreme Court allowed FTB to be sued in a Nevada court only because the Nevada Supreme Court "sensitively applied principles of comity with a healthy regard for California's sovereign status **relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis.**" (AOB 32, citing *Franchise Tax Board v. Hyatt,* 538 U.S. 488, 499 (2003) (emphasis added)).

FTB's opening brief then argues that a determination of the contours of Nevada's own sovereign immunity from suit requires an evaluation of Nevada's new test governing discretionary function immunity. (AOB 35-38) In a series of cases starting with *Martinez, supra,* this court adopted a new rule designed to prevent judicial second-guessing of government employee conduct grounded in social, economic and political policy considerations. This court adopted the discretionary function immunity test applied by the United States Supreme Court and the federal courts when analyzing claims under the Federal Tort Claims Act. *Martinez,* 168 P.3d at 729. The two-part test adopted in *Martinez* and its progeny does not include an evaluation of a government employee's subjective intent; nor does the test include considerations such as bad faith. The federal courts, on which this court relies in interpreting Nevada's discretionary function immunity, have universally rejected attempts to avoid immunity by assertions of governmental bad faith - - which was the entire foundation of Hyatt's case tried to the jury. (AOB 52-55)

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Based upon this new body of Nevada case law, FTB and *amici* contend that this court's April 2002 order must be revisited, in part, and that Hyatt's allegations of subjective bad faith do not prohibit the application of discretionary function immunity.

Hyatt argues that this court's April 2002 order is "definitive and conclusive, and the law of the case," and that this fact is ignored in the *amicus* briefs. (Opp. p. 9, lines 17-19.) Once again, Hyatt's argument goes to the merits of an issue on appeal. FTB's opening brief specifically addresses the question of whether the law of the case doctrine applies to the part of this court's April 2002 decision relating to the scope of immunity to be extended to FTB. (AOB 37-38.) In the case of *Hsu v. County of Clark,* 123 Nev. 625, 173 P.3d 724 (2007), this court held that where there has been a change in controlling law after the first appellate decision in a case, but before the second appellate decision, the law of the case doctrine does not apply. 173 P.3d at 729-30. Instead, the new controlling law on the substantive issue applies to the case, despite the prior ruling based on old law. *Id.* (AOB 37-38.) Hyatt's attack on the *amicus* briefs entirely ignores FTB's argument that the law of the case doctrine does not prevent application of the court's new test for governmental discretionary function immunity.

Hyatt also ignores the fact that the *amicus* briefs weigh in on other aspects of comity and sovereign immunity, such as the application of caps on compensatory damages and the prohibition against punitive damages. Although this court and the United States Supreme Court did not address these specific issues in the 2002 and 2003 decisions, the appellate courts did apply comity, requiring FTB to be treated no worse than a similarly situated Nevada government agency. Yet, the district court ignored that dictate. FTB raised those issues in its opening brief. *Amici* had every right to discuss these issues, yet Hyatt seeks a blanket order striking the *amicus* briefs in their entirety. *Amicus* briefs cannot raise issues that are not already part of the appeal. *Baptist Health v. Murphy,* 189 S.W. 3d 438, 439 (Ark. 2004) (*amicus* curiae is bound by issues raised by parties on appeal; *amicus* cannot introduce new issues at appellate level). The *amicus* briefs of the State of Utah and the Multistate Tax Commission comply with this limitation and only address issues raised in FTB's opening brief.

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Hyatt points out that the *amicus* briefs attempt to argue that the case Hyatt tried to the jury was not the intentional tort case approved by this court. (Opp. p.3, lines 6-7.) Hyatt contends: "This is absolutely false." (*Id.*) Specifically, Hyatt contends that the case he tried to the jury "is the same case he presented to and argued to this Court seven years ago, . . ." (Opp. p.3, line 8.)[2] Once again, Hyatt is attempting to short-circuit the appellate process, to obtain a preliminary ruling on a substantive issue in the appeal. FTB's opening brief, supported by *amici*, argued that the case actually tried to the jury involved conduct that was merely negligence, at worst, not intentional or bad faith conduct. (AOB 55-57.) When this court issued its decision seven years ago, the court did so based upon a very limited record consisting of pleadings and early dispositive motions. The trial was held years later, after extensive discovery. The trial lasted four months, with dozens of witnesses and thousands of pages of exhibits. It is difficult to believe that Hyatt can now say, with a straight face, that the case he tried to the jury is the same case he presented to this court seven years ago.

As amply demonstrated in the opening brief, Hyatt's trial attack on FTB was based upon criticisms such as failing to gather evidence properly, failing to weigh evidence properly, failing to write reports properly, failing to take actions in a time frame that Hyatt deemed reasonable, and otherwise failing to perform in accord with reasonable professional standards. (AOB 55-57.) This conduct was, at worst, merely negligence, despite Hyatt's effort to label the conduct as being intentional misconduct or done in bad faith. This is precisely why FTB is contending that Judge Walsh failed to follow this court's 2002 ruling, which established the jurisdictional boundaries for this case. Hyatt now seeks to avoid this important and dispositive issue completely, by providing this court with seven lines of argument in his motion to strike

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[2] Hyatt's contention on this point is false. Most of the factual contentions made in Hyatt's petition for rehearing were either not introduced as evidence by Hyatt or shown by FTB before trial to be without factual support and therefore excluded by the district court. Once again, these are points to be resolved in the appeal, not via the procedural ruse being practiced by Hyatt now.

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the *amicus* briefs. (Opp. p. 3, lines 6-12.) This issue requires careful analysis, and the issue should not be decided on a procedural motion dealing with the viability of *amicus* briefs.

The decision on whether to allow filing of an *amicus* brief must be made at a relatively early stage in an appeal. At this point it is often difficult to tell with any accuracy if a proposed *amicus* brief will be helpful, because the court has not yet thoroughly studied the parties' briefs and the appendix. *Neonatology Associates v. Commissioner of Internal Revenue,* 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J., opinion on motion). Under these circumstances, it is preferable to err on the side of allowing the *amicus* brief. *Id.* at 133. If a filed *amicus* brief turns out to be unhelpful, the court, after studying the case, can simply disregard the *amicus* brief. *Id.* "On the other hand, if a good brief is rejected, the [court] will be deprived of a resource that might have been of assistance." *Id.*

Here, the *amicus* briefs provide input from the viewpoint of other states and third parties who will not bear the brunt of the judgment, if it is affirmed, but who have a legitimate interest in the effect of the judgment and how it will impact public entities across the nation. It is legitimate for *amici* to provide this input and for this court to consider the views and arguments of *amici.* Hyatt's efforts to obtain preliminary rulings on the merits of important issues in this appeal, through the mechanism of a motion/opposition dealing with the contents of *amicus* briefs, must be rejected.

2. Hyatt's procedural arguments are without merit

Hyatt contends that the *amicus* briefs should be rejected because they "mimic" arguments set forth in FTB's opening brief. (Opp. p. 2, lines 16-17.) Hyatt also makes other procedural attacks on the *amicus* briefs, contending that the *amici* are too interested in the outcome; *amici* are supportive of arguments for reversal, rather than being neutral friends of the court; the briefs improperly included factual references; and *amici* are too aligned with the interests of FTB. (Opp. pp. 4-7, 9-10.)

Hyatt relies primarily on *Price v. New York City Board of Education,* 837 N.Y.S.2d, 507 (N.Y. Sup. Ct. 2007). (Opp. pp. 5-7.) Hyatt neglects to inform this court that the *Price* opinion is a decision by a single trial judge in a New York county court, not a judge on an

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appellate court. In the entire section of the *Price* opinion regarding *amicus* briefs (quoted at length in blocked paragraphs in Hyatt's paper), the trial judge (who may or may not have any appellate experience) fails to cite a single case from any state or federal jurisdiction supporting his statements regarding the *amicus* process. Furthermore, a Westlaw search reveals that the *amicus* discussion in the judge's opinion has never been cited by any other court. This is hardly persuasive authority, yet Hyatt asks this court to follow the trial judge's decision in *Price*, as a basis for striking *amicus* briefs filed by numerous sister states and by the Multistate Tax Commission in this $490 million case.[3]

If this court does decide to consider the views of one judge, FTB respectfully suggests that the court should consider the views of then circuit judge (and now United States Supreme Court justice) Samuel Alito, in the case of *Neonatology Associates, supra.* At the time of his opinion in *Neonatology Associates* in 2002, then Judge Alito had already served twelve years as an appellate judge.[4] Judge Alito's well-reasoned discussion of *amicus* jurisprudence contains numerous citations to case precedents and law review articles. Additionally, Judge

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[3] Hyatt's citation to *Price* is misleading. After providing the "N.Y.S. 2d" volume and page numbers, Hyatt's citation gives the following parenthetical information regarding the court that issued the opinion: "(N.Y. 2007)." Hyatt motion, p. 5, line 9. This leads a reader to believe that the *Price* opinion was issued by the highest appellate court in the State of New York, which is the New York Court of Appeals. See *The Bluebook: A Uniform System of Citation*, at 217 (Columbia Law Review Ass'n et al., 17th ed. 2000). The opinion was actually issued by a county judge at the trial court level in New York's courts, i.e., a judge on the New York Supreme Court. Thus, the correct parenthetical court reference in Hyatt's citation, if Hyatt really wanted to alert the reader to the fact that the opinion was rendered by a lower court trial judge, should have been "(N.Y. Sup. Ct. 2007)." *Id.* at 218. Although Hyatt mentions the fact that the opinion was issued by "Judge Stone" (e.g., Hyatt motion, p. 6, line 12), Hyatt fails to advise the reader that Judge Stone is not a judge on the New York Court of Appeals, as Hyatt's parenthetical reference suggests.

[4] According to the United States Supreme Court website, Judge Alito served on the United States Court of Appeals for the Third Circuit from 1990 until he took his seat on the Supreme Court in January of 2006.

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Alito's opinion has been widely cited by other courts. See e.g. *Animal Protection Institute v. Martin,* 2007 W.L. 647567 (D. Me. 2007); *U.S. v. Alkaabi*, 223 F.Supp. 2d 583 (D. N.J. 2002).

Neonatology Associates was an appeal from a decision of the Tax Court, involving disputed deductions taken by medical corporations who participated in certain benefit plans. Five physicians who also participated in the same plan sought leave to file an *amicus* brief. These physicians had an interest in the outcome of the case, because the outcome would personally affect their taxes. The opposing party argued that the *amici* did not satisfy the standards for filing a *amicus* brief, because the *amici* were not impartial individuals, they were actually very partial to the outcome, and they had pecuniary interests in the outcome. 293 F.3d at 130. The opposing party also argued that the party supported by the *amicus* brief was represented adequately in the appeal, and therefore, *amicus* participation was unnecessary. *Id.* The opposition cited "a small body of judicial opinions that look with disfavor on motions for leave to file *amicus* briefs." *Id.*

Judge Alito granted the motion and allowed the *amicus* curiae brief to be filed. He first dealt with the opponent's argument that an *amicus* participant must be an impartial individual whose function is to advise the court rather than to advocate a point of view so that the case may be won by one party or another. *Id.* at 131. Judge Alito observed that such a description of the role of an *amicus* brief "became outdated long ago." *Id.* In fact, Judge Alito noted that FRAP 29 requires that an *amicus* have an "interest" in the case. *Id.* Thus, the argument that an *amicus* must be impartial cannot be squared with the rule requirement. *Id.*

In Nevada, NRAP 29, as applicable in this pre-July 2009 appeal, requires an *amicus* applicant to identify the "interest" of the applicant. The rule also provides that an *amicus* brief must be filed within the time allowed for the brief of "the party whose position as to affirmance or reversal the *amicus* brief will support." Thus, the Nevada rule itself expressly requires that an *amicus* applicant must have an interest in the case, and the rule contemplates that an *amicus* brief will support a party's effort to obtain an affirmance or reversal.

The history of the present case is a perfect example of the fact that impartiality is not required. When this case was briefed in the United States Supreme Court, the Pacific Legal

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Foundation filed an *amicus* curiae brief. The cover of the brief indicated that it was filed "in support of respondents Gilbert Hyatt, et al." (Exhibit 3) The Foundation had an interest in the case (*id.* at 1-2), and the Foundation's *amicus* brief concluded by arguing: "The judgment of the Supreme Court of Nevada should be *affirmed.*" (*Id.* at 29; italics emphasis in original.) Thus, the Foundation had an interest in the appeal, and the Foundation advocated in support of Hyatt's position for affirmance of this court's April 2002 decision.

Another example arises from a recent published decision of this court. Hyatt is represented in the present appeal by the firm of Hutchison & Stephen. On June 25, 2009, this court issued its opinion in the case of *MGM Mirage v. Nevada Ins. Guaranty Ass'n.,* 125 Nev. ____, 209, P.3d 766 (2009), in which the Hutchison firm represented the respondent Nevada Insurance Guaranty Association (NIGA). An *amicus* brief was filed by the Property Casualty Insurers Association. The Association's motion for leave to file the *amicus* brief stated that the brief was being submitted in support of the position of the Hutchison firm's client, "seeking affirmance of the order of the District Court . . . granting summary judgment in favor of NIGA." (Docket No. 49445; Motion, p.1) The motion noted the *amicus* applicant's direct financial interest in the outcome of the issue in the appeal. (*Id.* at p.2) Furthermore, the *amicus* brief strenuously argued the position of the Hutchison firm's client, concluding with a request that this court affirm the district court's judgment in its entirety. (Docket No. 49445, *amicus* brief, p.17) Thus, Hyatt's own appellate counsel, in another case, received *amicus* support and participation by an entity that had a financial interest in the outcome of the case, that argued in favor of his client, and that was anything but neutral.

An *amicus* brief is rarely, if ever, filed by a completely neutral and disinterested party. Instead, *amicus* briefs are almost always filed in strong support of the position taken by one party or the other in an appeal. E.g., *Heller v. Legislature,* 120 Nev. 456, 459, 93 P.3d 746 (2004) (numerous *amici* all joined against appellant's position). Here, Hyatt argues that an *amicus* curiae is a "friend of the court, not friend of a party." (Opp. p. 4, lines 3-4.) Judge Alito dealt with this quoted phrase in *Neonatology Associates*, where he noted the opponent's argument that *amicus* curiae "means friend of the court, not friend of a party." 293 F.3d at

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131. Judge Alito responded: "The implication of this statement seems to be that a strong advocate cannot truly be the court's friend. But this suggestion is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." *Id.* Judge Alito also noted that "an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Id.*

Judge Alito also soundly rejected the contention that an *amicus* cannot be someone who has a pecuniary interest in the outcome of the case. Judge Alito observed that such an argument "flies in the face of current appellate practice," and that numerous *amicus* entities with pecuniary interests regularly appear as *amici* in appellate courts. *Id.* at 131-32.

With regard to the argument that *amicus* briefs sometimes merely duplicate the arguments of the parties, and thereby waste the court's time, Judge Alito recognized that some *amicus* briefs might make little contribution to the appellate process. Nevertheless, a restrictive practice regarding *amicus* filings is an "unpromising strategy." Thus, "the predominant practice in the courts of appeals" is to grant motions for leave to file *amicus* briefs, unless it is obvious that the briefs do not meet the criteria of Rule 29.[5] *Id.* at 133.

Hyatt also complains that the *amicus* submissions might be improper because of possible pre-filing communications between FTB and *amici*. (Opp. p. 7.) Nothing in NRAP 29 prohibits communications between an interested *amicus* participant and a party in an appeal. In reality, communication is a necessity, to make sure *amicus* counsel knows and understands the issues in the appeal and the underlying facts of the case. There is simply

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[5] Hyatt recognizes the existence of Judge Alito's *Neonatology Associates* opinion. Hyatt cites the opinion in a footnote. (Opp. p.4, line 20, fn 5.) Hyatt states that *Neonatology Associates* outlines "a more liberal standard" regarding *amicus* filings. (*Id.*) By labeling Judge Alito's viewpoint as a "more liberal standard," Hyatt seems to be suggesting that the viewpoint should be rejected in favor of the hard-line approach taken by the New York trial court judge in *Price*. Judge Alito (now Supreme Court Justice Alito) can hardly be considered a liberal judicial activist. His viewpoint regarding *amicus* jurisprudence was based upon years of experience as an appellate court judge, supported by sound legal citations to case law. His viewpoint should not be given short shrift, as Hyatt seems to be suggesting.

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nothing wrong with communications in this regard. See *Tenafly Eruv Association, Inc. v. Borough of Tenafly,* 195 Fed. Appx. 93, 99 (3d Cir. 2006) ("We therefore reject appellee's apparent belief that there is something unseemly about discussions between appellants and supportive *amici*").

Finally, Hyatt complains that *amici* are tangentially related to FTB, through their membership in the Multistate Tax Commission, and by virtue of the fact that many of the states joining in Utah's proposed *amicus* brief are also members of the Commission. As such, Hyatt argues that each *amicus* brief is "nothing more than an additional brief" for FTB. (Opp. p. 9, lines 20-21.) Hyatt cites no legal authority for the proposition that the Commission cannot submit an *amicus* brief simply because California is a member of the Commission. FTB is aware of no such authority. Furthermore, the *amicus* briefs do not simply repeat or regurgitate arguments already made in FTB's brief. Rather, *amici* provide valuable insight into the potential nationwide ramifications of this case, including the detrimental effects on tax collectors and other government employees and entities.

Conclusion

For the foregoing reasons, the *amicus* briefs do not violate any Nevada rules or standards for such briefs. There is no basis for striking the brief of the State of Utah, or striking the concurrence by the State of Nevada, or for refusing to consider the brief of the Multistate Tax Commission.

DATED: Aug. 5, 2009

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I. SUMMARY OF LITIGATION AND ARGUMENTS[1]

This is an appeal from a $490 million judgment in favor of Gilbert Hyatt, an individual, against the California Franchise Tax Board (FTB). The judgment includes, among other awards, $52 million for invasion of privacy damages, $85 million for emotional distress damages, and $250 million in punitive damages.

A. Summary Of Litigation

FTB is a state agency responsible for administering and enforcing California's personal income tax laws. This lawsuit arose out of an investigation of Hyatt by FTB for the 1991 and 1992 tax years, FTB's tax and penalty assessments made at the conclusion of that investigation, and the administrative appeal of those assessments. Hyatt put those tax years at issue when he claimed that he changed residency from California to Nevada in 1991 shortly before he received millions of dollars of income. Ultimately, FTB determined that Hyatt remained a California resident – as defined by California law – until April 1992, and he simply pretended to move earlier than that, to avoid tax liability. Accordingly, FTB assessed Hyatt additional income taxes and civil fraud penalties. Not liking that result, Hyatt filed an administrative appeal in California and a lawsuit against FTB in Nevada.

California statutes provide FTB with complete government immunity. Early on, FTB requested application of those statutes. When the district court declined to dismiss, FTB sought extraordinary relief in this court. On April 4, 2002, the court issued a writ of mandamus, requiring the district court to apply the doctrine of comity and to dismiss Hyatt's negligence-based claims. The court determined that FTB should be afforded the same discretionary function immunity as a similarly situated Nevada government agency. The United States Supreme Court affirmed in Franchise Tax Board v. Hyatt, 538 U.S. 488 (2003). Hyatt's remaining claims were those alleging intentional torts.

A four-month jury trial was held in 2008. The jury awarded Hyatt $52 million for

[1] For ease of reading, appendix citations are omitted in this overview, but will be provided as required herein.

invasion of privacy damages, $85 million for emotional distress, over $1 million in attorneys fees as special damages, and $250 million in punitive damages. The district court added another $102 million in prejudgment interest and denied all post-trial relief sought by FTB from these staggering awards.[2]

B. Summary Of Argument

This extraordinary judgment is the result of a series of fundamental errors. First, a newly assigned District Judge, Jessie Walsh, repeatedly refused to apply the doctrine of comity in a manner that was consistent with this court's April 2002 order, as affirmed by the United States Supreme Court. Those decisions required the district court to treat FTB no worse than a Nevada government agency in similar circumstances, but she failed to provide FTB with any of the protections and limitations to which a similarly situated Nevada government agency would have been afforded. More important, since 2002 this court adopted a new test, that has been applied and refined in a series of new cases, to determine the scope of government discretionary function immunity. The policy behind this new rule is "to prevent judicial 'second guessing' of the legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Martinez v. Maruszczak, 123 Nev. 433, 168 P.3d 720, 728 (2007). FTB's conduct, as presented by Hyatt to the jury, met the two-part test, but the district court refused to apply it.

Instead, the district court permitted Hyatt to ask the jury to re-analyze and re-evaluate purely discretionary decisions made by FTB. In fact, Hyatt's case at trial was nothing more than an attack on discretionary decisions made by California government employees on a regular basis, e.g., decisions concerning what personnel to assign to Hyatt's audit, whether to seek additional information, the manner in which to seek information, the weight to be given to information, what California legal principles

[2] The district court also denied FTB's post-trial motion for a stay of execution of the judgment without a bond, pending this appeal. On April 8, 2009, this court reviewed the district court's decision and ordered a stay without a bond, essentially determining that the district court erred by requiring a bond.

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applied, conclusions reached using those principles, and deciding if and when they had sufficient information to resolve Hyatt's protests. In sum, a Las Vegas jury was allowed to impose its judgment on California's vitally important tax collection policies and procedures, reviewing the analysis of evidence made by FTB, and then questioning whether those decisions were "fair and impartial." This was error of the highest magnitude, with nationwide consequences, as emphasized by the numerous amici from around the country, who are urging a reversal of the judgment.

The district court also erroneously allowed Hyatt's sundry claims to survive, despite the absence of law and evidence supporting such claims. For example, Hyatt's fraud claim was based primarily on his contention that FTB breached an implied promise to be "fair and impartial." Case law provides no basis for such a vague and nebulous claim, yet the district court refused to dismiss it. The district court allowed Hyatt's multiple breach of information privacy claims to proceed, despite the fact that all of the "confidential information" used by FTB as they gathered evidence to ensure they were getting information about the right Gilbert Hyatt, i.e. name, address and social security number, was already in the public realm. The district court allowed a claim for abuse of process to survive, despite the fact that FTB never used, let alone abused, any legal process, and she allowed Hyatt to advance a claim for intentional infliction of emotional distress without the required proof of severe emotional distress after Hyatt had been limited to recovery for "garden variety" emotional distress as a discovery sanction for refusing to produce his medical records. In addition, the district court committed numerous other reversible errors – too many to list here or fully brief within.

On issues dealing with damages, the district court erroneously refused to provide any relief from the jury's compensatory damage verdicts which were obviously products of passion and prejudice, and had no support in evidence. And after the jury returned its award of $250 million in punitive damages, an award which could not possibly have withstood scrutiny under any standard, the district court once again did nothing – allowing the entire award to stand.

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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.*

DATED: January, 2003.

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