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**United States Court of Appeals**  
*for the*  
**Ninth Circuit**

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Nos. 02-56002 & 02-56067

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**IN RE: VICKIE LYNN MARSHALL, DEBTOR.**  
**ELAINE T. MARSHALL,**  
**AS INDEPENDENT EXECUTOR OF THE ESTATE OF E. PIERCE MARSHALL**  
*Appellant and Cross-Appellee,*

v.

**HOWARD K. STERN**  
**AS EXECUTOR UNDER THE WILL OF VICKIE LYNN MARSHALL,**  
*Appellee and Cross-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
No. CV-01-00097-DOC  
(HONORABLE DAVID O. CARTER)

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE IN SUPPORT OF APPELLANT**

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## **INTERESTS OF *AMICUS CURIAE***

*Amicus Curiae* Washington Legal Foundation is a non-profit public interest law and policy center with supporters in all 50 States, including many in Texas and California. *Amicus* has appeared in the United States Supreme Court and other federal courts on numerous occasions to urge faithful adherence to the principles of federalism and the dictates of the Full Faith and Credit Act, 28 U.S.C. § 1738, which require federal courts to give full faith and credit to the judgments of state courts.

*Amicus* is concerned that the district court's refusal to give preclusive effect to the Texas judgment undermines the principles of federalism and contravenes the Full Faith and Credit Act. In *Amicus*' view, our federal system cannot function properly unless federal courts accord proper deference to the prior judgments of state courts. *Amicus* therefore respectfully asks this Court to give heed to the principles of federalism and the dictates of the Full Faith and Credit Act, which are dispositive of this appeal.

## **SUMMARY OF ARGUMENT**

This Court must determine which of three judgments relating to Vickie Marshall's tortious interference claims concerning the estate of J. Howard Marshall II should be given preclusive effect: (i) the December 29, 2000 judgment of the United States Bankruptcy Court for the Central District of California in favor of Vickie Marshall, which was vacated by the District Court for the Central District of

California on June 20, 2001; (ii) the December 7, 2001 judgment of the Statutory Probate Court of Harris County, Texas, in favor of Pierce Marshall, which became final for preclusion purposes on February 11, 2002; or (iii) the March 7, 2002 judgment of the district court in favor of Vickie Marshall. Although the California bankruptcy court judgment was final before the Texas probate court judgment issued, Vickie never properly pled preclusion as a defense in the Texas probate court proceeding. In any event, the probate court entered a final judgment without affording preclusive effect to the judgment of the bankruptcy court. When Pierce later raised the Texas judgment before the retrial in the district court, the district court declined to give it preclusive effect and issued yet a third judgment.

*Amicus* urges this Court to consider the foundational purposes of the Full Faith and Credit Act and follow the dictates of the Act. Here, the Full Faith and Credit Act favors giving preclusive effect to the Texas state court judgment. This is so for three reasons.

*First*, the Full Faith and Credit Clause of the United States Constitution, and the Full Faith and Credit Act that implements it, promote important values of federalism. The Full Faith and Credit Clause commands that each state give deference to the judgments of its sister states. The Full Faith and Credit Act implements this command and extends it to require federal courts to give similar deference to the state judgments. By requiring federal and state courts to give deference to the judgments of

each state, the requirement of full faith and credit promotes harmonious relations between state and federal institutions. Consistent with this goal, the Full Faith and Credit Clause and its implementing Act require state and federal courts to apply the claim and issue preclusion principles that the judgment state would apply.

*Second*, the last-in-time rule, which provides that the most recent of two inconsistent judgments controls, likewise serves the purposes of the Full Faith and Credit Clause and its implementing Act. When two inconsistent judgments issue from the same forum, res judicata and collateral estoppel give conclusive effect to the last in time of the competing judgments. Similarly, when two inconsistent judgments issue from different fora, the full faith and credit command gives preclusive effect to the judgment that is last in time. In both situations, the last-in-time rule encourages litigants to plead formally the preclusive effect of an earlier judgment or forever lose its benefit. By uniformly determining which judgments are preclusive according to a bright-line rule—without regard to outcome, public policy, “fairness,” or other merit-based considerations—the last-in-time rule discourages gamesmanship and preserves the benefits of the full faith and credit principle.

Accordingly, *third*, full faith and credit principles help resolve this appeal in favor of granting preclusive effect to the Texas probate court judgment. This is so no matter how this case is viewed. If the district court was presented with a state judgment (the Texas judgment) and asked to halt ongoing proceedings in the federal

forum, then the principles of federalism and full faith and credit favor giving the Texas judgment the same preclusive effect it would receive from a Texas court as the sole preexisting judgment. Alternatively, if the district court was presented with two inconsistent judgments (the bankruptcy judgment and the Texas judgment) and asked to choose which of the two should be given preclusive effect, then the principles of federalism and the full faith and credit command similarly point to giving the Texas judgment preclusive effect as the last in time of the two judgments. The foundational principles of federalism and full faith and credit thus provide important guidance in this appeal.

## **ARGUMENT**

### **I. THE FULL FAITH AND CREDIT CLAUSE AND ITS IMPLEMENTING ACT ARE VITAL TO OUR FEDERAL SYSTEM.**

The Full Faith and Credit Clause exemplifies the genius of our Constitution. The Clause was incorporated into the Constitution to make “an aggregation of independent, sovereign States into a nation.” *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). By requiring each independent, sovereign State to respect the sovereignty of every other, the Clause helps to forge a national government without abrogating the sovereignty of any State. Thus the Full Faith and Credit Clause is integral to the

Constitution’s purpose of promoting “a more perfect *Union*.” U.S. Const. preamble (emphasis added).<sup>1</sup>

The Clause promotes this goal by requiring that full faith and credit “be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. Const. art. IV, § 1. This command “is implemented by” the Full Faith and Credit Act, 28 U.S.C. § 1738. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80 (1984). The Act mandates that the “judicial proceedings” of any State “shall have the same full faith and credit *in every court* within the United States . . . as they have by law or usage in the courts . . . from which they are taken.” 28 U.S.C. § 1738 (emphasis added). It thus “directs *all courts* to treat a state court judgment with the same respect that it would receive in the courts of the rendering state.” *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) (emphasis added).

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<sup>1</sup> That the Clause promotes the unification of the states without abrogating their sovereignty has been noted by the Supreme Court and respected commentators. *See, e.g., Johnson v. Muelberger*, 340 U.S. 581, 585 (1951) (noting that the Clause “promotes unification, [but] not centralization”); 3 J. Story, *Commentaries on the Constitution of the United States* § 1303 (1833) (noting that the motive “must have been ‘to form a more perfect Union,’ and to give to each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all”); Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 Colum. L. Rev. 1, 27 (1945) (noting “the policy ultimately to be served in application of the clause is the federal policy of a ‘more perfect union’ of our legal systems”); Rex Glensy, *The Extent of Congress’ Power Under the Full Faith and Credit Clause*, 71 S. Cal. L. Rev. 137, 153 (1997) (noting that Clause “seeks to valorize state power rather than denigrate it” and “protects the rights of the states by assuring their equal status in the union”).

Lest there be any doubt as to whether federal courts are subject to this full faith and credit command, the Supreme Court has clarified that the Act “specifically require[s] all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.” *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Extending the full faith and credit command to require federal courts to defer to state judgments was an effort to “promote the comity between state and federal courts” that is a “bulwark of the federal system.” *Id.* In sum, the Full Faith and Credit Clause and its implementing Act promote a “more perfect Union” by commanding federal and state courts alike to give deference to the judgments of each State.

The benefits of the full faith and credit command to our federal system of government are manifold. Most important, commanding deference to state judgments resolves tensions inherent in our federal system and thus promotes and protects federalism. In addition, by commanding deference to state judgments, the Clause and its implementing Act effectively incorporate into our national jurisprudence the res judicata and collateral estoppel doctrines of the states. Accordingly, the Clause and the Act confer the benefits of these doctrines, including promoting the finality of judicial proceedings, coordinating and conserving of judicial resources, and limiting forum shopping.

**A. The Full Faith And Credit Clause And Its Implementing Act Resolve Tensions Inherent In Our Federal System.**

Our federal system melds independent, sovereign states into a Nation; but it does not abrogate the sovereignty of the states or ipso facto resolve the tensions inherent in the relations of separate sovereigns. Instead, our system requires faithful application of principles that unify the states by resolving tensions among the states and between the several states and the federal government.

The Full Faith and Credit Clause and its implementing Act aid the maintenance of our federal system by responding to and resolving one such tension: absent the constitutional command to give them full faith and credit, each state would be “free to ignore . . . the judicial proceedings of the others.” *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935). And history proves they would. As Alexander Hamilton observed: “To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.” *The Federalist* No. 6 (Alexander Hamilton).

Our federal system responds to this tension by mandating that each state-court judgment “have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.” *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C. J.). This approach promotes harmony among the states, and between the state and federal government, without imposing upon the

states any particular substantive policy of the federal government. By requiring that full faith and credit be given, the Clause “substituted a command for the earlier principles of comity.” *Estin v. Estin*, 334 U.S. 541, 546 (1948). That is, rather than suggesting respect for state court judgments, the Clause commands such respect. *See* Glensy, *supra*, at 152 n. 61 (collecting citations and noting that the commanding nature of the Clause has been discussed by scholars).

This command, of course, does effect a limited encroachment on each state’s sovereignty, as it sometimes requires states to enforce policies contrary to their own. *See, e.g., Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233-34 (1998) (noting that there is “no roving ‘public policy exception’ to the full faith and credit” command); *Estin*, 334 U.S. at 546 (noting that the Clause “order[s] submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it”). However, “because judgments, unlike statutes, typically adjudicate past behavior rather than proscribing future behavior, a requirement that states enforce sister-state judgments imposes only weak limits on the sovereign power of a state to control behavior within its borders.” Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 Wash. & Lee L. Rev. 47, 49 (2001).

Requiring states and the federal government to accept the judgments of other states does not impose any substantive policy of the federal government on the states;

instead, it is a limited and occasional encroachment necessary to the maintenance of harmony among the states and between the states and the federal government. *See* Glensy, *supra*, at 153; Hearings on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. (1996) (statement of Prof. Cass Sunstein) (“[T]he best reading of the text may well be that it gives Congress power to help ensure recognition of sister-state judgments and help ensure the smooth functioning of a federal system, but emphatically not that it authorizes Congress to pick and choose among the judgments that states should be required to recognize. There is no historical evidence that this latter power was something that the framers thought to grant to Congress.”).

Moreover, by requiring that each state give deference to the judgments of sister states and that federal courts afford the same deference to state-court judgments, the Clause and the Act equalize the roles of the courts of the several states while enabling each state to exercise its legislative powers to the full extent permissible under the Constitution. The command to give full faith and credit thereby protects our state “laboratories of democracy” from both the federal government and each other. Accordingly, and consistent with the goals of federalism, the Clause and the Act exalt and equalize each state’s judicial acts and thereby promote unification without centralization—the very ideal of federalism. *See id.*; *Johnson*, 340 U.S. at 585 (noting that the Clause “promotes unification, [but] not centralization” and “leaves each state

with power over its own courts but binds litigants, wherever they may be in the Nation, by prior orders of other courts”).

**B. The Full Faith And Credit Clause And Its Implementing Act Bring To The National Union The Benefits Of State Doctrines Of Res Judicata And Collateral Estoppel.**

One way the Full Faith and Credit Clause and its implementing Act help resolve the tension inherent in our federal system is by incorporating into our national jurisprudence state doctrines of res judicata and collateral estoppel. *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349 (1942) (noting that “[b]y the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence”). The Full Faith and Credit Act “specifically require[s] all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.” *Allen*, 449 U.S. at 96. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336 (2005) (noting that the Act “has long been understood to encompass the doctrines of res judicata, or ‘claim preclusion,’ and collateral estoppel, or ‘issue preclusion’”); *Atherton v. Atherton*, 181 U.S. 155, 159 (1901) (noting that the Clause “was intended to give the same conclusive effect to the judgment of all the states”). *See generally* Sterk, *supra*, at 48-74.

Because the Clause and the Act thus are claim and issue preclusion mandates, they bring to our national union the benefits that res judicata and collateral estoppel

doctrines provide within the several states.<sup>2</sup> The Supreme Court has emphasized that the preclusion doctrines serve “vital public interests,” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), and that they are rules of “fundamental and substantial justice” that “should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way.” *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917). This emphasis is well placed, because faithful application of the preclusion doctrines provides substantial benefits, including promoting the finality of judicial proceedings, coordinating and conserving of judicial resources, and limiting forum shopping.

### **1. Finality Of Judicial Proceedings**

Providing finality to judicial proceedings is a core benefit derived from faithful application of the preclusion doctrines. *See, e.g., Montana v. United States*, 440 U.S. 147, 153 (1979) (“Application of both [preclusive] doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.”); *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (noting that

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<sup>2</sup> “Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Allen*, 449 U.S. at 94.

doctrine of res judicata “ensures the finality of decisions”). *See generally* 18 James Wm. Moore et al., *Moore’s Federal Practice* § 131.12[2] (3d ed. 2008). Finality, which can be achieved only by giving judgments preclusive effect, advances the interests of both the courts and the litigants. *See, e.g., Reed v. Allen*, 286 U.S. 191, 198-99 (1932) (noting that “the interest of the state requires that there be an end to litigation”); *Montana*, 440 U.S. at 153 (noting that “preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits”). *See generally* 18 James Wm. Moore et al., *Moore’s Federal Practice* § 131.12[2] (3d ed. 2008) (“The idea of a dual interest—that of society and of the individuals involved—has been reflected in the court decisions that have elaborated on the various policy concerns that justify application of the doctrine”).

Commentators and courts laud the benefits of finality. James Kent, in his respected *Commentaries on American Law*, praised preclusion doctrines for providing finality and repose. The doctrines, he said, are “intended to prevent litigation, and to preserve peace; and were it otherwise, men would never know when they might repose with security on the decisions of courts of justice, and judgments solemnly and deliberately given might cease to be revered, as being no longer the end of controversy and the evidence of right.” 2 Kent’s Comm. (3d ed. 1836) Lect. 37, p. 502. The Supreme Court has often echoed Chancellor Kent’s sentiment. *See, e.g.,*

*S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49 (1897) (noting that preclusion “is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination”); *Aspden v. Nixon*, 45 U.S. 467, 492 (1846) (noting that “if we produce yet stronger [preclusion] cases, it is only to manifest more clearly the earnestness with which courts, at this day, sustain every means of terminating vexatious litigation, and cherish that repose so essential to the security of property and the peace of society”).

## **2. Coordination And Conservation Of Judicial Resources**

The preclusion doctrines and the finality they provide also benefit the Nation by coordinating and conserving judicial resources. *Allen*, 449 U.S. at 94 (noting that the preclusion doctrines “conserve judicial resources”). For both federal and state courts, limiting litigants to one trial of an issue conserves judicial resources that otherwise would be wasted on redundant proceedings. *Migra*, 465 U.S. at 84 (same); *Montana*, 440 U.S. at 153 (same); *Brown*, 442 U.S. at 131 (same); *Riley*, 315 U.S. at 348-49 (same). *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991) (same). Indeed, the need to coordinate and conserve judicial resources renders the policies favoring the preclusion doctrines “even more compelling in view of today’s crowded dockets.” *Federated*, 452 U.S. at 401.

### 3. Reduction Of Forum Shopping

The preclusion doctrines also reduce forum shopping. As noted, absent the preclusion doctrines, each state would be “free to ignore . . . the judicial proceedings of the others,” *Milwaukee County*, 296 U.S. at 277, as would the federal government. Similarly, absent the preclusion doctrines, litigants also would be free to ignore the judgments of state courts and relitigate issues decided against them, resulting in duplicative, inconvenient, and vexatious litigation. The preclusion doctrines benefit the Nation by preventing this. *See Allen*, 449 U.S. at 94 (noting that the preclusion doctrines “relieve parties of the cost and vexation of multiple lawsuits . . . and, by preventing inconsistent decisions, encourage reliance on adjudication”); *Migra*, 465 U.S. at 84 (same); *Montana*, 440 U.S. at 153 (same).

## II. THE LAST-IN-TIME RULE PROMOTES THE PURPOSES AND BENEFITS OF THE FULL FAITH AND CREDIT CLAUSE AND ITS IMPLEMENTING ACT.

The last-in-time rule, which provides that the most recent of two inconsistent judgments controls, faithfully applies the principles of the Full Faith and Credit Clause and its implementing Act. State res judicata and collateral estoppel doctrines, which the Clause and Act incorporate into our national jurisprudence, give conclusive effect to the last in time of two or more inconsistent judgments from the same forum. *See* Restatement (Second) of Judgments § 15 (1982) (“When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that

is accorded conclusive effect in a third action under the rules of res judicata.”). Similarly, when inconsistent judgments are from different fora, the full faith and credit command gives conclusive effect to the judgment that is last in time. *See, e.g., Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78 (1939) (holding that conclusive effect must be given to the last in time of two inconsistent judgments); *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1530 (9th Cir. 1985) (same). *See generally* Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798 (1969). By giving conclusive effect to last in time of inconsistent judgments, the rule preserves the benefits of the preclusion doctrines and thereby remains faithful to Full Faith and Credit Clause and its implementing Act.

A bright-line rule that gives deference to one of the inconsistent judgments without allowing courts to consider the merits of either judgment is the only choice-of-judgment rule consistent with the purposes of the full faith and credit command and the preclusion doctrines. This Court has noted that, when confronted with two inconsistent judgments, “it is tempting for a court to reexamine the merits of the litigants’ dispute and choose the result it likes best.” *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). But allowing courts to choose between inconsistent judgments based on the merits would leave them “free to ignore . . . the judicial proceedings of the others” and thereby exacerbate the tensions inherent in the relations

between separate sovereigns. *Milwaukee County*, 296 U.S. at 277. Doing so would undermine the purposes of the preclusion doctrines. Parties would be tempted to repeatedly re-file actions, with each seeking to terminate the prior litigation and execute a judgment in a favorable forum. *See Porter v. Wilson*, 419 F.2d 254, 259 (9th Cir. 1969) (noting that the rule “end[s] the chain of relitigation”).

Accordingly, this Court has held that, “even when we think that the most recent judgment might be wrong, we still give it res judicata effect so that finality is achieved.” *Robi*, 838 F.2d at 323. Thus, consistent with the Supreme Court’s recognition that there is “no roving ‘public policy exception’ to the full faith and credit due judgments,” *Baker by Thomas*, 522 U.S. at 233, there can be no merits-based exception, including public policy or “fairness,” to the bright-line last-in-time rule, or the purposes of the full faith and credit command would be defeated.

The last-in-time rule responds to the reality that inconsistent judgments are always the product either of judicial error or the failure of a party to plead properly the preclusive effect of a prior judgment. To avoid a second, and potentially inconsistent judgment, a party may plead the preclusive effect of a prior judgment as an affirmative defense to any subsequent action embracing the already litigated matter. *See* FED. R. CIV. P. 8(c). When such a pleading has been made, the full faith and credit command requires any court, federal or state, to give the judgment the same preclusive effect it would receive in the courts of the rendering state. Accordingly,

absent judicial error or the failure of a party to plead properly the preclusive effect of a prior judgment, no inconsistent judgment would ever issue. But inconsistent judgments do issue.

The Supreme Court has held that an inconsistent judgment that results from such judicial error should be remedied on appeal of that judgment, not by a collateral attack on the inconsistent judgment in different forum. *Treinies*, 308 U.S. at 77. Indeed, “there is no reason to depart from the general preference for the second judgment” and the principle that a “judgment should be reviewed only within its own system.” *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4404 (2d ed. 1981). The rationale is that allowing the court reviewing the first judgment to enter a judgment that would prevail over the second judgment “would simply lead to a parallel assertion that review of the second judgment can lead to yet another and most final judgment.” *Id.* Thus, the last-in-time judgment should control unless that judgment is reversed on appeal.

Moreover, giving preclusive effect to the earlier of two inconsistent judgments would wrongly reward litigants who fail to properly plead the preclusive effect of a prior judgment. That should not be. Accordingly, the last-in-time rule encourages litigants to formally plead the preclusive effect of an earlier judgment or forever lose its benefit. *See Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 329 (9th Cir. 1995) (noting that *res judicata* may be waived if not raised in the pleadings);

*Robi*, 838 F.2d at 322-23 (“[I]f one party could have raised *res judicata*, but did not, that litigant must bear the cost of its tactic or inadvertence.”). The last-in-time rule thus renders a judgment preclusive for both parties or for neither, and it thereby helps to prevent gamesmanship and to preserve the benefits of the full faith and credit command.

### **III. THE FULL FAITH AND CREDIT CLAUSE, ITS IMPLEMENTING ACT, AND THE LAST-IN-TIME RULE ARE DISPOSITIVE OF THIS APPEAL.**

Consistent with the full faith and credit command and its corollary, the last-in-time rule, the Texas state probate court judgment here should be given preclusive effect. As explained above in Part I, the principles of federalism and the command of the Full Faith and Credit Act favor giving the same preclusive effect to the Texas judgment that it would receive in the courts of Texas. Accordingly, if the Texas judgment was the only one validly before it, the district court should have looked to Texas law to determine the preclusive effect of that Texas judgment. *See Matsushita*, 516 U.S. at 373 (“Federal courts may not ‘employ their own rules . . . in determining the effect of state judgments’ but must ‘accept the rules chosen by the State from which the judgment is taken.’” (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982))). As amply demonstrated by Appellant Elaine Marshall, the district court erred by refusing to do so. (*See* Appellant’s Supplemental Brief (“ASB”) at pp. 25-45.) Indeed, as Elaine Marshall explains, any Texas court would

afford the Texas judgment preclusive effect because Texas res judicata and collateral estoppel law affords the judgment preclusive effect. (See ASB at 25-45.) *Amicus* will not repeat Elaine Marshall’s arguments here. Instead, *Amicus* directs this Court’s attention below to how several of the district court’s provided rationales for refusing to give the Texas judgment preclusive effect undermine the principles of federalism and contravene the dictates of the Full Faith and Credit Act.

On the other hand, if the bankruptcy court judgment was improperly vacated and the district court was faced with two prior judgments, the principles of federalism and the command of the Full Faith and Credit Act favor that preclusive effect be given to the last in time of the two inconsistent judgments, as explained in Part II, above. This *per se* command allows no *ad hoc* or selective deviation.

**A. The District Court’s Rationales For Declining To Afford The Texas Judgment Preclusive Effect Violate The Principles Of Federalism And Full Faith And Credit.**

Three of the district court’s rationales for refusing to afford preclusive effect to the Texas judgment particularly contravene the principles of federalism outlined above: namely, the supposed rationales (1) that application of a preclusion doctrine would be “unfair” to Vickie Marshall (ER 91); (2) that preclusion principles applied only before “trial” proceedings commenced in the bankruptcy court (ER 89-91); and (3) that the bankruptcy court might decide to vacate the Texas court’s judgment (ER 93). Each of these rationales defies the logic of the full faith and credit command.

*First*, where the requirements for applying preclusion are present, a court is not free to opt out of precluding the claims at issue because of concerns about fairness. In *San Remo Hotel, L.P. v. City & County of San Francisco*, the Supreme Court rejected a fairness-based objection to application of res judicata, explaining that, whatever the merits of petitioners’ concern that it was “unfair to give preclusive effect to state-court proceedings that are not chosen,” “we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.” 545 U.S. at 347; *see Federated*, 452 U.S. at 401 (“[W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. . . . The doctrine of res judicata serves vital public interests beyond any individual judge’s ad hoc determination of a particular case. There is simply ‘no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.’”) (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)).

Moreover, the district court’s “unfairness” objection undermines the rules that require courts to give the same preclusive effect to a judgment that it would receive in the rendering state. Texas law does not recognize an “unfairness” exception to its preclusion doctrines for parties who seek to withdraw from a prior litigation but are unsuccessful in doing so. To the contrary, embedded in the Texas law of claim preclusion is the concept that a party may be bound not only by adverse judgments on claims she actually litigated, but also those she chose not to present but could have

presented in the prior proceeding. Likewise, under the doctrine of special Texas probate preclusion (*see* ASB 32-33), a party may be bound by a probate judgment even if she did not participate in the probate proceeding at all. *See e.g., Ladehoff v Ladehoff*, 436 S.W.2d 334, 336 (Tex. 1968); *see also In re Estate of York*, 951 S.W.2d 122, 126 (Tex. App. 1997); *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981). Moreover, Texas’s decision not to recognize an “unfairness” exception of the kind Vickie Marshall has presented is sound and should be respected. Allowing a separate sovereign to review the merits of its judgments would exacerbate the tensions inherent in the relations between separate sovereigns.

Adherence to the command of the Full Faith and Credit Clause would thus result in giving the Texas judgment preclusive effect even if the district court’s fairness concerns were not factually mistaken. As demonstrated by Appellant Elaine Marshall, Vickie Marshall actively participated in the probate proceedings by eliciting testimony of numerous witnesses, including testifying herself for many days, presenting other evidence and argument, and vigorously opposing Pierce Marshall’s action for declaratory relief regarding her claims and rights. (ASB at 27-29.) Based on this record, even if the full faith and credit command did permit a “fairness” exception, it would not apply here. Nothing is “unfair” about applying preclusion principles in this case to prevent the policies these principles uphold—the avoidance of duplicate proceedings and the risk of inconsistent judgments.

*Second*, the district court was incorrect to suggest that the preclusion doctrines did not apply because the preclusion motion could have been heard only before “trial” proceedings began in the bankruptcy court. (ER 89.) The district court reasoned that preclusion does not apply in situations where a party pursues identical claims in two courts and one court enters judgment before the other. (ER 89-91.) This is incorrect. Where, as here, the same parties are litigating in two different courts, “both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other.” *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939).<sup>3</sup>

*Third* and finally, the district court improperly speculated that preclusion would be inappropriate because the bankruptcy court might at some point decide to vacate the Texas judgment. (ER 93.) As Appellant Elaine Marshall demonstrates, it is well established that the lower federal courts may not sit in review of state-court judgments. (*See* ASB at 45 (citing numerous cases).)

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<sup>3</sup> Texas law is the same: “[R]egardless of which court first took jurisdiction of the case, neither should be enjoined from proceeding with the trial, but when one court has rendered a final judgment in the cause such judgment may be pleaded as *res judicata* in the other court.” *Mack v. Reserve Life Ins. Co.*, 217 S.W.2d 39, 40 (Tex. Civ. App. 1948).

In sum, the district court's rationales for refusing to give the Texas judgment preclusive effect undermine the principles of federalism and contravene the dictates of the Full Faith and Credit Act, warranting their rejection by this Court.

**B. In Any Event, The Last-In-Time Rule Affords The Probate Court's Judgment Preclusive Effect.**

If, in addition to the Texas court judgment, the bankruptcy court judgment were also valid, the district court would have had to choose between the two inconsistent judgments. As discussed above (*supra*, Part II), the principles of federalism and the command of the Full Faith and Credit Act require that preclusive effect be given to the last in time of the two inconsistent judgments (the Texas judgment), and this *per se* command allows no deviation. This same analysis holds true irrespective of whether the bankruptcy judgment had never been vacated or is reinstated.

Because Vickie Marshall failed properly to plead in the Texas action that the bankruptcy court was preclusive of it (ASB at 43-44), she waived the preclusive effect of the bankruptcy judgment (*see supra*, at pp. 17-18). In any event, the Texas court reached the merits of her claim and the propriety of the Texas' court's judgment is not subject to collateral review in federal court. Because, as between two inconsistent judgments, the last-in-time rules controls, the Texas judgment prevails. If Vickie Marshall believed that the Texas court erred in entering its final judgment notwithstanding the bankruptcy court's entry of its judgment, she should have pursued that issue in the Texas appellate courts. (*See supra*, at p. 17.) Having failed over

these many intervening years to take any action to overturn or set aside the probate court's judgment, Vickie should now be bound by that judgment's preclusive effect.

### CONCLUSION

For the reasons discussed above, *Amicus Curiae* respectfully supports Appellant's request that this Court vacate the district court's judgment and instruct the district court to dismiss Vickie Marshall's claims.

Respectfully submitted,

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May 12, 2009

## CERTIFICATE OF COMPLIANCE

I am an attorney for *Amicus Curiae* Washington Legal Foundation. Pursuant to the Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *Amicus Curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (Word 2003), the word count of the brief is 5953, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Kathleen M. Sullivan  
Kathleen M. Sullivan

## CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class mail, postage prepaid, to the following non-CM/ECF participants:

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