No. 17-1348

IN THE
Supreme Court of the United States

NEVADA DEPARTMENT OF WILDLIFE
Petitioner,
v.
MARK E. SMITH,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California

BRIEF OF INDIANA AND 42 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioner. The *amici* States have a strong interest in protecting their sovereign immunity by overturning *Nevada v. Hall,* 440 U.S. 410 (1979). *Hall* is—and always has been—irreconcilable with the Court's larger body of sovereign immunity decisions, and the *amici* States support certiorari in any case that presents an appropriate vehicle for a full-strength Court to overturn it.

As discussed in detail below, States all too frequently find themselves the targets of private-plaintiff lawsuits filed in the courts of other States. Such cases not only insult the sovereign dignity of defendant States, but also pose the real risk of exposing States to judgments unrestrained by any concern for local fiscal impact.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the Amici States' intention to file this brief at least 10 days prior to the due date of this brief.

SUMMARY OF THE ARGUMENT

Since *Nevada v. Hall*, 440 U.S. 410 (1979), States have been frequently haled into the courts of their sister-States on a myriad of legal claims. They have faced suits in other States concerning tax assessments, tort claims, contract disputes, and family law.

Such a system is an insult to state sovereignty and conflicts with the principles of sovereign immunity that the Court has articulated in its more recent precedents. The Court has long held that sovereign immunity is broader than the text of the Eleventh Amendment, so it generally looks to whether anything in the Constitution authorizes jurisdiction against States. With respect to being haled into other States' courts, nothing in the Constitution or the plan of the convention provides a justification. Indeed, the Court has explicitly recognized that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

Two terms ago, the Court split 4–4 on whether to overturn *Hall*. *See Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016). This term the Court is again presented with that opportunity, both here and in *Hyatt III*. *See* Pet. for Writ of Cert., *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), No. 17-1299 (Mar. 12, 2018); Amicus Br. of Ind. & 44 Other States, *Hyatt III*, No. 17-1299 (Apr. 13, 2018). It should take one or

both cases and finally correct the unjustified sovereign immunity anomaly that *Hall* represents.

REASONS FOR GRANTING THE PETITION

I. *Hall* Continues To Enable Widespread State Judicial Interference with the Sovereign Functions of Other States

Plaintiff-respondent Mark E. Smith, a Nevada resident, is a wildlife advocate and an active member and director of two wildlife advocacy organizations, the Mark E. Smith Foundation and the Nevada Wildlife Alliance. Pet. App. 14. Smith celebrates "a difference of opinion regarding the broad topics of wildlife advocacy" between himself and the Nevada Department of Wildlife. *Id.* He alleges that in 2016, Carl Lackey, an employee of the Department, gave a wildlife training presentation to the Truckee, California Police Department where he accused Smith of "soliciting harassment" and engaging in advocacy that amounted to "domestic terrorism." *Id.* at 14–15.

When he learned of Lackey's alleged comment, Smith filed suit for defamation against the Department in the California Superior Court for Nevada County. *Id.* at 11–30. The Department moved to quash service of summons for lack of jurisdiction on grounds of interstate sovereign immunity, but the California Superior Court denied its motion. *Id.* at 4–10. The Department then petitioned for writ of mandate at the California Court of Appeal, and when that was denied, petitioned for review by the California

Supreme Court, which was also denied. *Id.* at 1, 2. The Department now petitions for certiorari.

Unfortunately, the scenario where a State is haled into court in another State is hardly unusual. Three years ago, West Virginia's cert-stage multistate amicus brief in *Hyatt II* apprised the Court that, in the wake of *Hall*, state courts have exercised jurisdiction over other States in cases involving the revocation of a degree by a state university, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992), the firing of a state auditor, *McDonnell v. Illinois*, 725 A.2d 126 (N.J. Super. Ct. App. Div. 1999), *aff'd per curiam*, 748 A.2d 1105 (N.J. 2000), and the treatment of indigent patients of a state-run psychiatric hospital, *Nevada v. Superior Court of Cal., S.F. Cnty.*, 135 S. Ct. 2937 (2015). And, of course, *Hyatt* is back before the Court again on the *Nevada v. Hall* issue. *See* Pet. for Writ of Cert., *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), No. 17-1299 (Mar. 12, 2018); Amicus Br. of Ind. & 44 Other States, *Hyatt III*, No. 17-1299 (Apr. 13, 2018).

In short, recurring state judicial interference with sister state agencies (and often core policy determinations) is the principal legacy of *Hall*'s unsound destruction of interstate sovereign immunity. States are currently facing lawsuits in the courts of other States on a variety of legal claims. Ohio is a defendant in an Indiana state court case arising out of a motor vehicle collision. Order Den. Summ. J., *Chilton v. Ohio Dep't of Transp.*, No. 15D01-1404-CT-019 (Ind. Super. Ct. Dec. 19, 2016). North Dakota is currently defending

against a contract dispute in Minnesota state court. Statement of Claim & Summons, *Rosewood Hospitality, LLC v. N.D. Dep't of Soc. Servs.*, No. 62-CO-18-538 (Minn. D. Ct. Feb. 27, 2018). Rhode Island has a family law case in Connecticut state court. Compl., *Reale v. Rhode Island*, No. WWM-CV18-5008257-S (Conn. Super. Ct. Nov. 17, 2017). And Texas recently defended a medical malpractice case in New Mexico state court. *Montano v. Frezza*, 393 P.3d 700 (N.M. 2017).

State taxation authority, moreover, has been a particular target for litigation in sister state courts. In addition to the lawsuit against California in Nevada courts in *Hyatt*, Massachusetts is currently being sued in Virginia state court over its sales and use tax. Mass. Comm'r of Revenue's Mem. of Points and Auths. in Supp. of his Mot. to Dismiss for Lack of Personal Jurisdiction, *Crutchfield Corp. v. Harding*, No. CL17001145-00 (Va. Cir. Ct. Feb. 15, 2018). Similarly, Ohio has an appeal pending in the Kentucky Court of Appeals concerning a section 1983 claim over a corporate activity tax assessment. Notice of Appeal of Defs./Appellants State of Ohio & Joseph W. Testa, Tax Comm'r of Ohio, *Great Lakes Minerals, LLC v. Ohio*, No. 17-CI-00311 (Ky. Ct. App. Mar. 16, 2018). And South Dakota has been sued in both North Dakota *and* Minnesota over a tax audit. Compl. for Declaratory J., *Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Feb. 14, 2018); Compl. for Declaratory J., *Agvise Labs., Inc. v. Gerlach*, No. 76-

CV-18-80 (Minn. D. Ct. Feb. 14, 2018). Finally, Connecticut has been sued in Texas state court by a Connecticut taxpayer seeking declaratory and injunctive relief against the collection of Connecticut taxes, along with damages. Pl.'s First Am. Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. State of Conn. Dep't of Revenue Servs.*, No. DC 13-08568 (Tex. D. Ct. Oct. 28, 2013).

As these cases make clear, *Hall* continues to have a sustained nationwide impact, affecting many States in many legal contexts. The widespread practice of haling state agencies into the courts of their sister States is an insult to the most fundamental notions of state sovereignty. The Court now has before it two petitions urging that *Hall* be overruled; it should take one or both to correct this anomaly in sovereign immunity doctrine.

II. *Hall* Is Fundamentally Contrary to the Remainder of Sovereign Immunity Doctrine and Should Be Overruled

Nevada v. Hall rests on the flawed premise that State courts may assert jurisdiction over their sister States unless there is something in the Constitution that expressly limits such jurisdiction. 440 U.S. 410, 421 (1979). Because the Court found nothing in Article III or in the Eleventh Amendment that explicitly forbade such jurisdiction, it held that lawsuits against a State in the courts of another State do not offend

sovereign immunity. *Id.* But later decisions from the Court reject that premise.

As the Court recognized in *Hall* itself, the Framers assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.* at 419. Stated more directly, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985). But while *Hall* took that underlying sentiment to mean that an expectation of comity was sufficient protection against interstate jurisdiction, the more appropriate inference is that the inquiry for this Court should be whether anything in the Constitution *allows* jurisdiction of state courts over their sister States—not whether anything *forbids* it.

Sovereign immunity cases since *Hall* have established what *Hall* rejected—sovereign immunity is derived from the history and structure of the Constitution and is antecedent to the text of both Article III and the Eleventh Amendment. *Cf. Hall*, 440 U.S. at 426–27. In *Seminole Tribe of Florida v. Florida*, the Court, overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), said that "we long have recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." 517

U.S. 44, 69 (1996) (internal quotations omitted). The very next year, in *Idaho v. Coeur d'Alene Tribe of Idaho* the Court again emphasized that the "recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment." 521 U.S. 261, 267 (1997).

Later, in *Alden v. Maine*, 527 U.S. 706, 715 (1999), the Court elaborated on this principle: "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." The Eleventh Amendment was adopted "not to change" the Constitution "but to restore the original constitutional design." *Id.* at 722. For this reason, "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.* at 713; *see also Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."). Ultimately, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden*, 527 U.S. at 713.

Seminole Tribe, *Coeur d'Alene*, *Alden*, and *Federal Maritime Commission* represent a fundamental course correction in the law of sovereign immunity—

one that respects constitutional history and structure in a way that several earlier decisions, including not only *Union Gas* but also *Hall*, did not. Yet *Hall* remains as a vestige of the discarded doctrine, one that starkly contradicts other governing sovereign immunity precedents. The Court should overturn it.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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