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, Third Appellate District*

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979) should be overruled.

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The decisions of the Superior Court of California, County of Nevada (App. 4), the California Court of Appeal (App. 2), and the California Supreme Court (App. 1) are unreported.

## JURISDICTION

The Superior Court of California issued its decision on December 27, 2017. App. 4. Petitioner filed a Petition for Writ of Mandate on January 9, 2018 in the California Court of Appeal, which was denied on January 11, 2018. *Id*. at 2. On January 18, 2018, Petitioner filed a Petition for Review with the California Supreme Court. The Petition for Review was denied, en banc, on February 21, 2018. *Id*. at 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

Articles III and IV and the Eleventh Amendment of the United States Constitution are reproduced in Petitioner's Appendix at App. 31-35.

## STATEMENT OF THE CASE

This case arises out of defamation committed by employees of the Nevada Department of Wildlife ("NDOW") against Respondent, Mark E. Smith, a private citizen and resident of the State of Nevada. App. 12. Respondent, individually and as an assign for two California non-profits, sued NDOW and its participating employees in the California Superior Court of Nevada County located in Truckee, California. App. 11. Respondent commenced the action in Truckee, California because that is where NDOW, by and

through its employees, published the defamatory statements about Respondent, by way of slide show presentations given by NDOW to Truckee law enforcement. App. 14-15.

NDOW filed a Motion to Quash or Stay or Dismiss Action on Ground of Inconvenient Forum, based in part on sovereign immunity grounds. App. 5. Relying on *Nevada v. Hall*, 440 U.S. 410 (1979), the California Superior Court denied NDOW's Motion to Dismiss based on sovereign-immunity but instead ordered that the case be filed in Nevada, finding California to be an inconvenient forum, but retaining jurisdiction. App. 7-8, 9-10. NDOW appealed that decision to the California Court of Appeals (App. 2) and the California Supreme Court (App. 1), both of which summarily denied NDOW's petitions.

NDOW now petitions this Court to revisit *Hall*. However, *Hall* was (and remains) rightly decided and this case illustrates just some of the potential abuses that would result if *Hall* were overturned. Here, NDOW and its participating employees physically went to Truckee, California, on more than one occasion, to give presentations on behalf of NDOW, to Truckee law enforcement. App. 14-15. It was during those presentations, *in Truckee, California*, that NDOW and its employee(s) committed the intentional tort of defamation against Respondent by including a slide in the presentations asserting Respondent has engaged in "Domestic Terrorism," which is unequivocally not true. *Id*. Now, in seeking home court advantage, NDOW argues that *Hall* is bad law and that Nevada should not be permitted to be haled into a California Court on the basis of sovereign-immunity; despite the fact that

NDOW had no problem availing itself and committing an intentional tort in California.

## REASONS FOR DENYING THE PETITION

### I. *NEVADA V. HALL* WAS AND REMAINS CORRECTLY DECIDED.

Recently, in *Franchise Tax Bd. of California v. Hyatt*, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016), this Court kept available an important way of holding state governments accountable: the ability to sue a state in another state's courts. In *Nevada v. Hall*, the court ruled that sovereign immunity does not protect a state from being sued in another state's courts. The court declared: "no sovereign may be sued in its own courts without its consent, but [sovereign immunity] affords no support for a claim of immunity in another sovereign's courts." *Hall*, 440 U.S. at 416.

The Constitution, in combination with this Court's longstanding jurisprudence, illustrates the principled distinction between two different classes of state sovereign immunity: a state's immunity in its own courts and a state's immunity in the courts of a sister state. "The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." *Id.* at 414; *See also Alden v. Maine,* 527 U.S. 706, 715 (1999). However, the same cannot be said for a state's immunity in the courts of another state.

### A. *Hall* is supported by and consistent with the fundamental framework of the Constitution.

The *Hall* decision is supported by the Constitution, long-standing jurisprudence and the basic concepts of the justice system. *Hall* involved a California child who was badly injured and his mother (also injured), who sued Nevada in a California state court after being negligently hit by a State of Nevada employee driving in California. 440 U.S. at 411.

Here, Petitioner seeks to overturn *Hall*, to foreclose on a victim's ability to seek redress in the state where the injury occurred—even though the tortfeasor state clearly has sufficient contacts and availed itself of the forum state. Such request is particularly offensive here as this case arises out of *intentional* tortious conduct by NDOW, occurring in the state of California, causing injury to Respondent.

Dispensing with the *Hall* decision would open the door to situations in which states outside the forum state could inflict substantial harm or injury, intentionally or otherwise, on citizens of the forum state, leaving the victims with no recourse. Such an absolutist stance on sovereign immunity would result in obliteration of even the most basic grade school concept that "no one is above the law."

Using as an example the issue in *Hall*, if an individual injures a victim by driving negligently, that individual is responsible for the victim's injuries. If a corporate driver causes an accident resulting in injuries, both the driver and the company are responsible for the injuries. But under the strict

sovereign immunity regime Petitioner urges, the same negligent driving performed by a government worker causing the same injuries to the same victims would result in little to no damage award available to the victims.

It is difficult to understand how our constitutional framework, founded on equity based principals like equal protection and due process, can be reconciled with a rule of law expressly designed to effectuate such disparate treatment as that sought by Petitioner.

### B. No Constitutional provision overrides the historical and founding policy of Comity.

Comity, the doctrine leaving states to work out their disputes on their own with ideals of reciprocal treatment, can be overridden by law, similar to the way the Eleventh Amendment overruled the Court's rejection of state sovereign immunity in federal courts in *Chisholm v. Georgia,* 2 U.S. 419 (1793). However, Petitioner fails to identify a source of authority expressly conferring the sovereign immunity it seeks. As such, *Hall* stands correct in concluding that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits" on a state's ability to entertain a lawsuit against another state. 440 U.S. at 420.

In *Alden v. Maine,* this Court expressly distinguished the absolute right of a sovereign to immunity in its own courts from its lack of right to sovereign immunity in the courts of another sovereign. *Alden v. Maine*, 527 U.S. 706, 738-740, 119 S. Ct. 2240,

2258–59, 144 L. Ed. 2d 636 (1999). Relying on *Hall* (as opposed to calling it into question), the Court pointed out that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign,'" again declaring that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." *Id.* at 738, quoting *Hall*, 440 U.S. at 416.

Both history and precedent squarely contradict the long-rejected theory that sovereigns may demand immunity in the courts of other sovereigns as a matter of absolute privilege. While Petitioner remains conveniently silent on the issue, both California and Nevada have made it clear they believe expanded immunity is appropriate and it has been long-held that the two States are free to enter into an agreement to provide immunity in each other's courts, neither has elected to go this route. *Hall*, 440 U.S. at 426. Instead, Petitioner asks this Court to do what Petitioner and California have clearly been unwilling to do on their own.

## II. FURTHER REVIEW IS UNWARRANTED.

None of the issues raised in the Petition merits further review. In urging this Court to revisit *Hall*, Petitioner essentially rests on its complaints that *Hall* has proven to be "unworkable" (Pet. 22); however, Petitioner confuses the accountability forced upon it by *Hall*, with the asserted concept of unworkability. Aversion to the consequences of such precedent, does not render the practical effects of the decision "unworkable" and Petitioner has failed to point to any authority which would support such position.

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," *Hilton*, 502 U.S. at 202, the Court has emphasized that "'[A]ny departure' from the doctrine 'demands special justification.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036, 188 L. Ed. 2d 1071 (2014) quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Petitioner offers no good reason, let alone a compelling one, for disregarding the principles of *stare decisis* and overruling *Nevada v. Hall*.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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