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*

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

To his credit, Smith effectively concedes that this case presents an exceptionally important issue that has remained controversial since *Hall* was decided nearly four decades ago. He must. This Court's 4-4 impasse just two terms ago, combined with the fact that the same issue is already before the Court again—and again in *multiple* petitions—does not allow him to downplay the significance or prevalence of the ongoing problem presented by this case.

Nor does Smith contest that the question is squarely presented or that this case presents a uniquely clean vehicle in which to address the issue. Again, that argument is not available since the California courts had only one issue—this one—that they unambiguously decided against the Nevada Department of Wildlife. This case is the most straightforward vehicle the Court will see on this issue.

Instead, Smith presents one argument for denying review in this case: that "*Nevada v. Hall* was and remains correctly decided." Opp. 3. Of course, that is precisely why this Court should grant this case: to decide that question left undecided in *Hyatt II*.

This is the right case in which to finally address that question. Just as *Hyatt II* presented a core sovereign interest (the taxing power) juxtaposed against allegations of intentional, out-of-state misconduct by a state official, this case likewise presents core sovereign interests (the law enforcement power and cross-state coordination) similarly contrasted with claims of intentional, out-of-state misconduct by a state official. But this case's simple

procedural history means that the Court does not need to worry about antecedent questions that, once the case is granted, could prevent the Court from reaching the important issue presented. And Smith in his opposition has demonstrated his willingness to strenuously defend *Hall*—an effort in which he will no doubt also be readily supported by friendly amici.

As for its part, no state is better positioned than Nevada to demonstrate why *Hall* is both practically unworkable and inconsistent with the structure of the Constitution and this Court's state sovereignty jurisprudence generally. Between *Nevada v. Hall*, *State of Nevada v. San Francisco*, *Hyatt I*, *II*, and *III*, and now this case, *Hall* has cost the State of Nevada millions of dollars and repeatedly interfered with the State's core sovereign functions, including its law enforcement, medical, and judicial systems. *Nevada v. Hall* has been a wrecking ball that hits Nevada both coming and going, and this case would be an especially suitable bookend to this four-decade saga for the Silver State.

## I. THE COURT SHOULD GRANT THIS CASE TO OVERRULE *NEVADA V. HALL*.

Unable to escape the powerful historical and structural arguments for state immunity from suit in another state's courts, Smith does what essentially all defenders of *Hall* do: he emphasizes comity and *stare decisis*. Opp. 5-7.

First, comity does not work. If the ongoing spectacle of Nevada and California repeatedly asking this Court to stop them from being haled into each other's courts shows anything, it is that comity is no

solution to this constitutional quandary. Part of that may be because separation of powers makes it very difficult for states in this context to reach an agreement, even though it would actually benefit both states. As demonstrated by the California court's terse sovereign immunity analysis in this case, most state courts when confronted with claims of another state's sovereign immunity will simply cite to this Court's decision in *Hall*, and never even take "comity" into consideration. Notwithstanding the *Hall* majority's hope that comity would provide some remaining protection for a state's sovereignty, as a practical matter it is rarely even considered by a sister state's courts.

This is partly a result of a simple race-to-the-bottom or unilateral-disarmament problem. Nevada and California again illustrate this problem. While the majority of states, like Nevada, have consistently advocated for immunity from suit in other states' courts, not all states have been consistent. Recall, for example, that before this Court decided *Hall*, the California Supreme Court unanimously rejected Nevada's claim of immunity from suit in California, reversing a lower-court decision that had acknowledged Nevada's sovereign immunity. *See Hall v. Univ. of Nevada*, 503 P.2d 1363 (Cal. 1972).[1] And California's executive branch more recently refused to ask the

[1] In contrast, only decades *after* the California Supreme Court and this Court in *Hall* rejected Nevada's claims of sovereign immunity did the Nevada Supreme Court hold that California was likewise not immune from suit in Nevada, and then in explicit reliance on *Hall*. *See* Cert. Pet. App. 144a & n.12, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), No. 17-1299 (U.S. Mar. 14, 2017).

Court to reconsider *Hall* in *Hyatt I* and did not join a majority of the states on the amicus brief supporting Nevada's petition in this case or Nevada's earlier petition raising the same issue.[2] So if, for example, Nevada's courts or legislature were to grant sovereign immunity from suit to California as a matter of "comity," there is little reason to think that California would reciprocate.

Of course, none of this would have been particularly surprising to the Founders, who were determined to protect interstate relations with structural constitutional constraints instead of by reliance on mere goodwill. As explained in the petition, there is no reason to think that the Founders would have intentionally removed most of the historical countermeasures that ensured that "comity" worked (when it worked) for independent sovereigns, while leaving the universally accepted immunity from suit in the courts of another sovereign as a constitutional orphan. *See* Pet. at 17-20. The same structural considerations that this Court has emphasized in all of its leading state sovereign immunity cases militate with as much or more force against the majority's reasoning in *Hall*. *See* Pet. at 21.

Smith argues that *Alden v. Maine*, 527 U.S. 706 (1999), supports the result in *Hall*. Opp. 5-6. *Hall* was one of the precedents that this Court had to account for when deciding *Alden*, since none of the parties in *Alden* were asking the Court to overrule *Hall*. So the Court in *Alden* needed to distinguish *Hall*—which it did,

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[2] *See* States' Amicus Br., *Nevada v. City & Cnty. of San Francisco*, No. 14-1073.

easily, since *Alden* addressed a different issue. But there is no doubt that, as explained at length in the petition, the rationale and analysis in *Alden*—and this Court's other recent state-immunity decisions—all hew more closely to the *Hall* dissent than to the *Hall* majority opinion. *See* Pet. at 9, 12-14, 15, 17, 21. That is why commentators, struggling to reconcile *Hall* with this Court's subsequent cases, have asked: "Is *Nevada v. Hall* still good law?" Fallon *et al*., *Hart & Wechsler's The Federal Courts and the Federal System* 1060 (Foundation, 5th ed. 2003); *see also* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 250-51 & nn.10, 12 (citing articles).

Smith argues that *Hall* has not proven unworkable but is instead necessary to hold states accountable, including for their intentional torts like those alleged in this case (and *Hyatt*). Opp. 4-6. But as demonstrated by the state amici, the proliferation of suits against states in other states' courts is a widespread and growing problem. *See* States' Amicus Br. 3-6. Smith ignores that, in many instances, a lawsuit against a state in another state's courts never actually progresses to the stage where the plaintiff's claims are actually decided on the merits. Faced with the prospect of a hostile out-of-state jury, a state is often better advised to simply settle the case notwithstanding strong disagreement about the merits. That is exactly what happened, for example, in the lawsuit that San Francisco brought against the State of Nevada in San Francisco's own courts. *See* Pet. 1-2 & n.2. As recognized by the California courts in *this* case, there is nothing preventing Smith (a Nevada citizen) from bringing his claims against the Nevada Department of Wildlife in Nevada state court. So

Smith's choice of a California venue is classic forum-shopping, and has nothing to do with being the only venue in which to hold a Nevada agency accountable.

Finally, despite Smith's paean to *stare decisis* (Opp. 6-7), this Court's *stare decisis* factors powerfully favor overruling *Nevada v. Hall*. *See* Pet. 22. *Hall* is a glaring anomaly in this Court's state sovereignty jurisprudence. Its rationale cannot be squared with the Court's other precedents. And as illustrated by Nevada, California, and the overwhelming majority of states, it is an anomaly with very real consequences: it results in "recurring state judicial interference with sister state agencies (and often core policy determinations)" that is the "principal legacy" of *Hall*. States' Amicus Br. 4 (citing many examples). For centuries before *Hall*, courts—including this one—uniformly recognized the fundamental "principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Beers v. Arkansas*, 61 U.S. 527, 529 (1857) (emphasis added). Abandoning this Court's unfortunate detour from that long-settled understanding will validate, not violate, *stare decisis*.

## II. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE WHETHER OR NOT IT GRANTS *HYATT III*.

Just a few years ago this Court was presented with two neighboring states, both being sued in the other state's courts, and both asking this Court to reconsider

*Hall*.[3] Faced with this unusual event, the Court decided to accept review in one of those cases—*Hyatt II*—to consider the ongoing validity of *Nevada v. Hall*. But the Court was unable to decide whether *Hall* should be overturned, and ended up "affirm[ing] the Nevada courts' exercise of jurisdiction over California" in the *Hyatt* case by an equally divided Court. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1279 (2016).

This Court is once again presented with the same two states asking the Court to review the same question—Nevada in yet another lawsuit brought against it in California, and California in the third iteration of *Hyatt*. *See* Cert. Pet., *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), No. 17-1299 (U.S. Mar. 14, 2017) (pending). To ensure that the Court reaches the enduring question of state sovereign immunity left undecided in *Hyatt II*, it should grant certiorari in this case whether or not it also grants *Hyatt III*.

That is because *Hyatt III* presents a procedural wrinkle that this case does not. Although it is well-established that "an affirmance by an equally divided Court [is not] entitled to precedential weight" vis-à-vis *other* litigants, *Neil v. Biggers*, 409 U.S. 188, 192 (1972), this Court has refused to address, in a subsequent appeal involving the *same parties*, an issue that it previously affirmed by a divided Court. In *Washington Bridge Co. v. Stewart*, 44 U.S. 413,

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[3] *See* Cert. Pet. 12 n.3, 17 n.8, 19, *Nevada v. City & Cnty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015) (cert. denied); Cert. Pet. 26-35, *Franchise Tax Bd. of the State of California v. Hyatt* (*Hyatt II*), No. 14-1175 (U.S. Mar. 23, 2015) (cert. granted).

424 (1845), the appellant, just like the petitioner in *Hyatt III*, argued on a repeat visit to this Court that the lower court lacked jurisdiction. But this Court refused to reach the jurisdictional issue in the second appeal, explaining that the fact that the earlier affirmance was merely "by a divided court, can make no difference as to the conclusiveness of the affirmance *upon the rights of the parties*…. Having passed upon the merits of the decree, this court has now nothing before it but the proceedings subsequent to its mandate." *Id.* (emphasis added).

Half a century later, in *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910), the Court reiterated that, while an affirmance by a divided Court is not precedential, it does constitute law-of-the-case as to the parties in the previous appeal to this Court:

> Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.

*Id.*; *see also Great W. Tel. Co. v. Burnham*, 162 U.S. 339, 343-44 (1896); *Browder v. McArthur*, 20 U.S. 58, 58-59 (1822); 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 2.5(b) (5th ed. 2012) ("An affirmance by an

equally divided Court is conclusive and binding upon the parties with respect to that controversy.").[4]

Even if the Court was inclined to revisit *Washington Bridge*, and so raise and decide this unpresented but antecedent issue in the *Hyatt III* case—an issue that has not been joined at the cert-stage—doing so would be a risky endeavor that could once again prevent the Court from reaching the *Hall* issue. Whether or not the Court grants *Hyatt III*, it should grant this case to ensure that it finally resolves whether *Nevada v. Hall* should be overturned, the issue cleanly and singularly presented by this case.

## CONCLUSION

The Court should grant the petition.

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[4] *Biggers*, 409 U.S. at 190, is not inconsistent with *Washington Bridge* and *Hertz*. In *Biggers* the affirmance by an equally divided Court and the later proceedings were actually two different cases—the first case was a direct appeal from a criminal conviction and the second case (*Biggers*) was a federal habeas proceeding. So *Biggers* did not involve law-of-the-case principles, but rather statutory interpretation of federal habeas law that bars subsequent adjudication of an issue earlier decided against the habeas petitioner—whether in the same case or not.

Respectfully submitted,

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June 2018