

No. 19-1315

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In The  
SUPREME COURT OF THE UNITED STATES

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STATE OF NEVADA, *et al.*,  
*Petitioners,*

v.

DONALD WALDEN, Jr., *et al.*,  
*Respondents*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
For the Ninth Circuit

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**BRIEF IN OPPOSITION**

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## TABLE OF AUTHORITIES

### Cases

<i>Lapides v. Board of Regents</i> , 535 U.S. 613 (2002).....	2, 4
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## REASONS FOR DENYING THE WRIT

The question presented expressly assumes that the defendant state agency in this case would be immune if this action were litigated in state court: “Whether a state remains immune from suit after voluntarily removing a federal claim to federal court when the state *is* immune from such claims in its own court.” (Pet. i) (emphasis added).<sup>1</sup> The petition acknowledges that under *Lapides v. Board of Regents*, 535 U.S. 613 (2002), “voluntary removal results in the state waiving immunity from suit [in federal court] for state claims *if* the state has already waived immunity from such claims in its own courts.” Pet. 6 (emphasis in original). But petitioners insist that this case presents the distinct question that would arise when a state has chosen not to waive its immunity in state court:

The Ninth Circuit’s amended opinion expressly acknowledges that it resolved . . . whether Nevada’s removal waives immunity from suit for a federal claim that Nevada would remain immune to in its own courts.

Pet. 12.<sup>2</sup> “[T]he question [is whether a state waives immunity if it] removes an action involving claims for which the state *has not* waived immunity in its own court. . . . [T]his case squarely presents the issue.” Pet. 7 (emphasis in original).

This case does not present that issue, squarely or otherwise. To the contrary, whether Nevada has waived immunity from the type of claims in this case has not yet been determined.

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<sup>1</sup> See Pet. 1 (asserting that there is a circuit conflict regarding “whether a state waives immunity from suit by voluntarily removing a federal claim to federal court *when* the state would remain immune from suit for the same claim in its own courts”) (emphasis added); Pet. 2 (“the question presented here [is] whether voluntary removal will result in a waiver of immunity from suit or a federal claim *if* the state would remain immune from suit on the federal claim in its own courts”) (emphasis added).

<sup>2</sup> The petition cites for this assertion App. 7 n. 1. But that portion of the Ninth Circuit opinion does not assume that, or address whether, “Nevada would remain immune . . . in its own courts.”

In April 2020, following the decision of the Ninth Circuit<sup>3</sup>, the defendants asked the district court to resolve that very question, moving for summary judgment on the ground that the plaintiffs' claims were barred by sovereign immunity in any court. *See* Defendant State of Nevada ex rel. Department of Corrections' Motion for Summary Judgment on Sovereign Immunity (Doc. 276).<sup>4</sup> The petition for writ of certiorari failed to mention the existence of that then-pending and unresolved district court motion.

On July 10, 2020, the district court responded to the defendants' motion by certifying to the Nevada Supreme Court the question of whether the state of Nevada has waived its immunity. The question so certified is:

Has Nevada consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-07, or analogous provisions of state law, whether in enacting NRS § 41.031 or otherwise?

Order certifying question of law to the Nevada Supreme Court (Doc. 321 at p. 7).<sup>5</sup> That certified question asks the Nevada Supreme Court to determine the very issue which the question presented here assumes has already been resolved. The district court stayed all further proceedings in this case pending the Nevada Supreme Court's response to the certified question. *Id.*

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<sup>3</sup> Petitioners do not claim that the Ninth Circuit itself decided whether they would have enjoyed immunity in state court. *See* Defendant State of Nevada ex rel. Department of Corrections' Reply in Support of Its Motion for Summary Judgment on Sovereign Immunity (Doc. 315 at p. 1) ("The Ninth Circuit's decision on appeal explicitly states it made no determination regarding Nevada's immunity from liability").

<sup>4</sup> *See id.* at p. 10 ("sovereign immunity bars federal FLSA claims against the State of Nevada in its own courts.").

<sup>5</sup> A true and correct copy of the district court's July 10, 2020, Order certifying the question to the Nevada Supreme Court is submitted contemporaneously herewith this Brief In Opposition.

A decision by the Nevada Supreme Court on that certified question will be dispositive. Because this is a question of Nevada state law, a determination of that issue by the highest court of that state would be binding on all federal courts. It would make no sense for this Court to grant review to decide in this case whether removal would have waived immunity from suit where the state had not waived state court immunity, because whether the state of Nevada has waived its immunity in state court is still unresolved. If the Nevada Supreme Court holds that the state has *not* waived its immunity, petitioners' pending district court motion to dismiss will be granted. Conversely, if the Nevada Supreme Court holds that the state *has* waived its immunity, then under *Lapides* (as respondents concede) (Pet. 1-2, 3, 6), the plaintiffs will be entitled to litigate their claims on the merits in federal court because petitioners removed this original state proceeding to the federal courts. Either decision by the Nevada Supreme Court would require this Court to dismiss the petition as improvidently granted.

In the unlikely event that the Nevada Supreme Court does not decide the certified question, petitioners remain free to continue to litigate the issue presented of whether Nevada has waived its state-court immunity from claims such as those asserted by the plaintiffs in federal court, as they have been doing since April 2020. If the Court wishes to resolve the question presented in the petition, it should wait for a case in which there has already been a determination that the state concerned has not waived its immunity in state court.

### **CONCLUSION**

For the above reasons, the petition should be denied.

Respectfully submitted,

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