



January 19, 2018

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102-4797

**Re: *Oregon State University v. Superior Court of San Diego County, George Sutherland, et al.*
Supreme Court of California Case No. S245981**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The American Association for Justice urges you to grant the petition for review filed by George Sutherland.¹ The application of the Full Faith and Credit Clause of the Constitution of the United States by the Fourth District Court of Appeal raises an important question of law that this Court should address and settle.

The lower court held that California courts are compelled by the Full Faith and Credit Clause to apply Oregon's notice of claim provision in a tort action by a California resident injured in an accident in California. (*Oregon State University v. Superior Court* (2017) 16 Cal.App.5th 1180.) That determination will have widespread impact, undermining other California plaintiffs seeking legal recourse for injury in California courts. The holding by the court of appeal also conflicts with U.S. Supreme Court precedent regarding the constitutional provision and is inconsistent with determinations of other state courts. Accordingly, amicus curiae asks this Court to review the decision below.

INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in personal injury actions, workplace injury and employee rights cases, consumer protection actions, and other civil suits. Its members practice law in every state of the Union, including California. Throughout its 70-year history, AAJ has served as a leading advocate of the right to access to the courts for legal redress for wrongful injury.

¹ No party has participated in the preparation of this letter and no party has provided any funding for it.

This case is of acute interest to *amicus curiae*. State tort remedies may, subject to state constitutional requirements, be circumscribed by the state legislature, striking an appropriate balance of interests. But the lower court in this case held that the federal constitution demands that California courts apply a restriction on remedies devised by Oregon's legislators, accountable to the people of Oregon, based on that state's needs. The decision below thus subordinates the interests of California and Californians, including open access to California courts for redress of wrongful injury occurring in California, based on an erroneous application of a federal constitutional provision. This Court should grant review to settle this important question.

WHY THIS COURT SHOULD GRANT REVIEW

I. The Petition for Review Presents This Court With an Important Question of Law That Will Have Widespread Impact on Workers and Consumers in California.

Chief Justice John Marshall, in one of the U.S. Supreme Court's earliest pronouncements regarding the fundamental rights of Americans to seek legal redress in the courts, declared:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

(*Marbury v. Madison* (1803) 5 U.S. 137, 163 [1 Cranch 137, 2 L.Ed 60].) The Court has made clear that this right includes legal recourse for tortious actions by government. Thus, the Court in *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388, 397 [91 S.Ct. 1999, 29 L.Ed.2d 619], quoting *Marbury*, recognized the right to recover damages for violation of the Fourth Amendment by federal agents. This Court, as well, has held that "courts, exercising their authority over the common law, may, in appropriate circumstances, recognize a tort action for damages to remedy a constitutional violation..." (*Katzberg v. Regents of Univ. of California* (2002), 29 Cal.4th 300, 307 [127 Cal.Rptr.2d 482, 58 P.3d 339].)

Despite that bedrock principle, governmental immunity "became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts." (*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 214-15 [11 Cal.Rptr 89, 359 P.2d 457].) This Court viewed the immunity of governmental entities from accountability in tort as "an anachronism, without rational basis, [persisting] only by the force of inertia" (*Id.* at p. 216.) which "must be discarded as mistaken and unjust." (*Id.* at p. 213.).

Although the California legislature has imposed limits on government-agency liability, this Court has cautioned that "[t]he 1963 Tort Claims Act did not alter the basic teaching of *Muskopf* [citation omitted]: 'when there is negligence, the rule is liability, immunity is the exception.' Accordingly, courts should not casually decree governmental immunity..." (*Johnson v. State* (1968) 69 Cal. 2d 782, 798 [73 Cal.Rptr 240, 447 P.2d 352].)

Every state has eliminated absolute governmental immunity, but every state has also placed restrictions on claims against governmental entities. These include not only notice-of-claim requirements, *see* Annot., “Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental entity” (59 A.L.R.3d 93); but also limits on recoverable damages, *see* Annot., “Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit,” (43 A.L.R.4th 19); as well as the breadth of the scope of immunity itself. In this case, for example, the Oregon Tort Claims Act includes the University of Oregon within its scope. But California’s Government Claims Act “does not apply to claims against the Regents of the University of California.” (Gov. Code, §§ 905.6). Such differences reflect important policy choices by the legislatures of the respective states. The decision below subordinated the policy judgment by California’s elected representatives to those made by legislators representing Oregonians.

The question presented to this Court by Petitioner is “an important question of law.” (Cal. R. Ct. 8.500(b)(1).) The lower court’s decision upsets the balance of state interests that co-exist within the Union. As the U.S. Supreme Court has instructed with respect to the Full Faith and Credit guarantee, “[t]he people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California . . . have adopted a different system. Each of these decisions is equally entitled to our respect.” (*Nevada v. Hall* (1997) 440 U.S. 410, 426 [99 S.Ct. 1182, 59 L.Ed.2d 416].) The decision below cedes the policy choices arrived at by Californians’ elected representatives and defers to the decisions by Oregon’s legislators, who are responsible to look only to the interests of their own state.

State governmental entities have become involved in all manner of activities, often in competition with private enterprise. (Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity* (2000) 75 Notre Dame L.Rev. 953, 961.) The decision below will result in closing the courthouse door to a substantial number of Californians injured in California by foreign governmental entities conducting potentially hazardous activities in this state.

Moreover, the decision below is not at all limited to claims against governmental entities of other states. Nearly every state legislature has adopted tort “reforms,” which are legislative policy choices “to find decently acceptable ways of subordinating generally favored remedial policies to a perceived current exigency.” (Weinberg, *Against Comity* (1991) 80 Geo. L.J. 53, 66.) Amicus disagrees that such exigencies, such an “insurance crisis” exist or warrant drastic limits on remedies for wrongful injury. (See Weinberg, *supra*, at nn. 70 & 71.) Nevertheless, it cannot be disputed that state legislatures have adopted widely disparate “reforms,” reflecting the balance each has struck between affording their residents legal recourse for injury and protecting defendants from the burden of liability. (Weinberg, *supra*, at p. 66.) The decision below stands as an invitation to a significant number of defendants in California tort actions, such as corporations headquartered in states with protective tort reform statutes, to claim the benefit of those statutes as a matter of federal constitutional law as a shield against full accountability for wrongful injury to Californians in California.

II. The Decision Below Is Inconsistent With United States Supreme Court Precedent With Respect To The Federal Constitutional Command of the Full Faith and Credit Clause.

This Court should accept review of this case to address the conflict between the ruling by the court of appeal and the holding by the Supreme Court of the United States in *Nevada v. Hall*, *supra*, 440 U.S. at p. 411.

Hall arose out of an auto collision in California between a California resident and a vehicle owned by the State of Nevada and driven by a Nevada employee. Nevada argued, first, that it was not subject to suit in the courts of a foreign state. Second, Nevada asserted, if it is subject to suit in California, the Full Faith and Credit Clause required the California Court to apply Nevada's statutory cap on damages recoverable in tort claims against the state. (*Nevada v. Hall*, *supra*, 440 U.S. at p. 412-13.) The Supreme Court rejected both contentions.

The Court's holding that a state is not constitutionally immune from suit in the courts of another state necessarily answers the assertion by the University of Oregon in this case. Limits on liability, such as damage caps and notice requirements, are simply a form of limited immunity. If a state may not make itself fully immune from a tort suit in the courts of another state, it may not grant itself limited immunity by imposing stringent conditions on the California plaintiff's cause of action. Such restrictions, like immunity from suit itself, may only operate in the courts of the legislating state and cannot override the interests of other states in providing full redress to injured victims in their courts.

The *Hall* Court further held that the Full Faith and Credit Clause did not require California to apply Nevada's sovereign immunity provisions in violation of its own legitimate public policy. (*Nevada v. Hall*, *supra*, 440 U.S. at p. 421-22.) The Court explained:

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

(*Id.* at p. 426.) Thus, the Court has held that liability limitations imposed by one state on its own citizens in its own courts cannot be constitutionally imposed as mandatory in the courts of a sister state. (*Id.* at p. 421-422.) A state court might apply such a limitation only as "a matter of comity," based on "an understanding of state policy, rather than a constitutional command." (*Id.* at p. 425.)

III. The Lower Court's Ruling Conflicts With the Decisions of Courts of Other States.

The courts of other states, relying on *Nevada v. Hall*, have held that they are not constitutionally required to enforce the limitations on governmental liability enacted by the legislatures of other states. For example, in *Radley v. Transit Auth. of City of Omaha* (Iowa 1992) 486 N.W.2d 299, 302, an Iowa resident who was injured when disembarking from an

Omaha Transit Authority bus in Council Bluffs, Iowa sued the Nebraska political subdivision that operated the bus. The Iowa Supreme Court, citing *Hall*, held that the subdivision could not assert Nebraska's notice-of-claim requirement as a defense. (*Id.* at p. 301-02.)

Similarly, in *Head v. Platte Cty., Mo.* (Kan. 1988) 242 Kan. 442, 447 [749 P.2d 6], a Kansas resident was misidentified by Missouri law enforcement officers and falsely imprisoned in Kansas. The Kansas Supreme court held that Kansas courts were not compelled by the Full Faith and Credit Clause to give effect to the sovereign immunity of Missouri or the limitations on Missouri's liability where immunity would conflict with "the public policy of Kansas to compensate its citizens and those within its borders for injuries occurring in Kansas." (*Id.* at p. 9.)

In *Crair v. Brookdale Hospital Medical Center* (N.Y.Ct.App. 2000) 94 N.Y.2d 524, 527 [728 N.E.2d 974], the decedent received allegedly contaminated injections of a human growth hormone manufactured and distributed by the University of Virginia and the University of Maryland, instrumentalities of their respective states. The Court of Appeals of New York, relying on *Hall*, held: "Neither the Full Faith and Credit Clause nor any other provision of the United States Constitution requires New York to apply Virginia and Maryland's notice of claim provisions." (*Id.* at p. 976.) The court, however, would enforce such restrictions as a matter of comity where New York law restricted claims against similar educational institutions. (*Id.* at p. 978.) (See also *Schoeberlein v. Purdue Univ.* (1989) 129 Ill.2d 372, 378 [544 N.E.2d 283] [Illinois courts are not obliged by the U.S. Constitution to apply another state's established limits on governmental liability, but may do so as a matter of comity]; *Greenwell v. Davis* (Tex.Ct.App. 2005) 180 S.W.3d 287, 290 [in suit arising out of a traffic accident involving an Arkansas resident and an Arkansas police cruiser occurring just inside Texas, the Full Faith and Credit Clause did not require the Texas court to apply Arkansas' sovereign immunity rule, which would have limited recovery to \$20,000, though the court could do so as a matter of comity if consistent with Texas' public policy].)

These and other state court decisions are not, of course, binding on this Court. Nevertheless, they are persuasive for the proposition that under *Nevada v. Hall* the Full Faith and Credit Clause does not compel the courts of the state where plaintiff resides and where the accident occurred to enforce the restrictions on governmental liability enacted by another state. Moreover, the fact that other states will not give effect to California's statutory limitations in similar circumstances raises an important consideration that was not considered by the court of appeal and further supports the necessity for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Review should be granted.

Respectfully submitted,



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cc. See attached Proof of Service

PROOF OF SERVICE

Re: *Oregon State University v. Superior Court of San Diego County, George Sutherland, et al.*
Supreme Court of the State of California Case No. S245981

I, Amy L. Brogioli, declare that I am over 18 years of age and not a party to this action. I am employed in the District of Columbia. My business address is American Association for Justice, 777 6th Street NW, Suite 200, Washington, DC 20001.

On January 19, 2018, I served a true and correct copy of the attached document, described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW**, on the interested parties in this action, as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC MAIL: I served the parties, as indicated below, via Electronic Mail at the addresses listed below.

BY U.S. MAIL: I served the Respondent, as indicated below, via U.S. Mail. I enclosed a true copy of the document in a sealed envelope or package addressed to the party at the address listed below. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in Washington, DC, where the mailing occurred.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2018 in Washington, District of Columbia.



Amy L. Brogioli
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