No. _____

In the
Supreme Court of the United States

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

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

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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 courts.

PARTIES TO THE PROCEEDING

Petitioners in this proceeding are the State of Nevada and its Department of Corrections. Respondents Donald Walden, Jr., Nathan Echeverria, Aaron Dicus, Brent Everist, Travis Zufelt, Timothy Ridenour, and Daniel Tracy are class representatives of similarly situated correctional officers employed by the Nevada Department of Corrections.

RELATED PROCEEDINGS

Donald Walden, Jr., et al., v. State of Nevada, et al., No. 14-OC-00089-1B
First Judicial District Court of the State Of Nevada in and for Carson City – case removed to United States District Court for the District of Nevada – June 17, 2014

Donald Walden, Jr., et al., v. State of Nevada, et al., No. 3:14-cv-00320-LRH-WGC
United States District Court, District of Nevada – Order Granting in Part and Denying in Part Defendant's Motion to Dismiss – March 26, 2018

Donald Walden, Jr., et al., v. State of Nevada, et al., No. 18-15691
United Sates Court of Appeals for the Ninth Circuit – Order and Amended Opinion Affirming Denial of Defendant's Motion to Dismiss – December 23, 2019

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Immunity from private suit is "'[a]n integral component' of the States' sovereignty," and a concept fundamental to, and implicitly embedded in, the constitutional design of our republic. *Franchise Tax Board of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *see also Alden v. Maine*, 527 U.S. 706 (1999). While this Court continues to emphasize that the States did not completely forfeit their immunity from suit by ratifying the Constitution, *see Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020), in this case, the Ninth Circuit eschewed principles of state sovereignty in favor of its preference for establishing an "easy-to-administer," and admittedly unfair, rule.

In the process, the Ninth Circuit deepened a split of authority on a question this court left open nearly two decades ago: 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. *Lapides v. Board of Regents*, 535 U.S. 613, 617-18 (2002). And the Ninth Circuit's failure to pay due regard to principles of state sovereign immunity demonstrates the need for this Court to intervene and resolve this long-standing split of authority.

In *Lapides*, this Court granted review to address the question "whether the State's act of removing a lawsuit from state court to federal court waives" the state's immunity from suit. 535 U.S. at 616. Recognizing that the case before it only presented the need to answer the question of waiver in a very narrow context, this Court held that a state's removal to federal court results in a

waiver of immunity from suit only with respect to state-law claims for which the state had already waived its immunity from suit in its own courts. *Lapides*, 535 U.S. at 617-18, 624. However, this Court expressly left open the question presented here: whether voluntary removal will result in a waiver of immunity from suit for a federal claim if the state would remain immune from suit on the federal claim in its own courts. *Id*. at 617-18.

In the eighteen years that have passed since *Lapides*, the Circuits have split on whether removal waives immunity from suit on federal claims if the state would enjoy such immunity from those claims in its own court. In this case, the Ninth Circuit joined the Third, Fifth, Tenth, and Eleventh circuits in holding that removal waives immunity from suit in all cases, while the First, Second, Fourth, and D.C. circuits have held that removal does not result in a waiver of immunity from suit where a state has not waived immunity from suit in its own courts. *See*, App. 8-16; *Stroud v. McIntosh*, 722 F.3d 1294, 1300-02 (11th Cir. 2013) (discussing split)[1]; *Beaulieu v. Vermont*, 807 F.3d 478, 485-90 (2d Cir. 2015) (same).

This case provides an opportunity for this Court to draw a clear line on the issue of waiver by removal as it relates to the important constitutional principle of

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[1] Although the Eleventh Circuit identified the Seventh Circuit as falling on the side of the split that would find a waiver of immunity from suit in all cases, the Seventh Circuit has more recently explained that the question remains unanswered in that circuit. *Compare Stroud*, 722 F.3d at 1300, *with Hester v. Indiana State Dept. of Health*, 726 F.3d 942, 949-51 (7th Cir. 2013).

state sovereign immunity. The Ninth Circuit based its holding on the "rationale of *Lapides*" and the desire to implement an "easy-to-administer rule…." App. 14-15. But the Ninth Circuit's reliance on *Lapides* makes little sense here, leaving only the Ninth Circuit's desire for an easy-to-apply rule as the justification for its categorical rule on waiver.

In *Lapides*, this Court acknowledged a state should not be able to use the immunity recognized by the Eleventh Amendment as a sword to defeat claims the state has waived its immunity to in its own courts. But the potential for unfairness that this Court intended to curtail in *Lapides* does not exist when a state removes a case from one forum to another where the state is immune from suit in *both* forums. And judicial expedience, unlike this Court's desire to avoid "selective use of 'immunity' to achieve litigation advantages" in *Lapides*, 535 U.S. at 620, does not outweigh a foundational principle like state sovereign immunity.

This case squarely presents an important question of federal constitutional law that this Court identified and left unresolved in *Lapides*. After nearly two decades of percolation in the lower courts, the time has come for this Court to address that question. This Court should grant the petition.

OPINIONS BELOW

The original opinion in this matter, which has since been withdrawn, was reported at *Walden v. Nevada*, 941 F.3d 350 (9th Cir. 2019). *See also* App. 17-31. The order denying rehearing and the amended opinion are reported at *Walden v. Nevada*, 945 F.3d 1088 (9th Cir). *See also* App. 1-16. The district court's order is unreported. *See* App. 32-56.

JURISDICTION

The Ninth Circuit entered judgment on October 16, 2019, and entered an order denying rehearing with an amended opinion on December 23, 2019. Petitioner invoked the appellate jurisdiction of the Ninth Circuit by challenging the district court's denial of immunity from suit under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). This Petition is timely filed under Supreme Court Rule 13 and this Court's order dated March 19, 2020, which extended the deadline for filing any petition for writ of certiorari due after the date of the order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Eleventh Amendment of the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Plaintiffs, correctional officers employed by the Nevada Department of Corrections (NDOC), filed suit in Nevada's state courts, alleging violations of the Fair Labor Standards Act (FLSA) along with other claims made under state law. App. 4-5. NDOC removed the case to federal court. App. 4-5.

After reviewing dispositive motions on Plaintiffs' first-amended complaint, the district court *sua sponte* requested briefing on whether it lacked subject matter jurisdiction to proceed on Plaintiffs' FLSA private causes of action. App. 5-6. Based on the parties' briefs, the court determined that NDOC waived sovereign immunity under *Lapides*, without distinguishing between immunity from suit and immunity from liability. App 6.

NDOC appealed and the Ninth Circuit affirmed. App. 31. The Ninth Circuit summarized the limited holding of *Lapides* and its own decision in *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), where it "built on *Lapides*" by holding that removal waives immunity from suit with respect to federal claims. App. 23-26. But the court recognized this case involved a question of first impression in the Ninth Circuit because (1) a footnote in *Embury* acknowledged the court was not deciding whether removal would result in a waiver of immunity from suit for claims where Congress had not validly abrogated sovereign immunity, and (2) Congress did not validly abrogate sovereign immunity when adopting the FLSA. App. 26-28.

The Ninth Circuit went on to establish a categorical rule that removal waives immunity from suit in all cases. To support this conclusion, the Ninth Circuit offered two justifications for its rule. First, the court reasoned that allowing Nevada to assert immunity from suit as a defense would be unfair because the state "only points to one place in the first four years of active litigation where it arguable raised the issue of sovereign immunity…." App. 29-30. Second, although the court acknowledged that its categorical rule might be unfair to states in some cases, it concluded that its desire for clear, "easy-to-administer" jurisdictional rules overrides any potential for unfairness to the States. App. 30. Finally, the Court issued an amended opinion that followed NDOC's petition for rehearing, which included a new footnote clarifying that the decision only addresses immunity from suit and leaves open whether a state may still assert immunity from liability after removing to federal court. App. 7 n.1.

REASONS FOR GRANTING THE PETITION

In *Lapides*, this Court issued a narrow holding, deciding that voluntary removal results in the state waiving immunity from suit for state law claims *if* the state has already waived immunity from such claims in its own courts. 535 U.S. at 617-18, 624. This Court reached this sensible conclusion by invoking the general rule that voluntary invocation of federal jurisdiction demonstrates an intent to waive immunity. In particular, this Court recognized the unfairness that would result from permitting a state to use the immunity recognized by the Eleventh Amendment as a sword to defeat the state's waiver of immunity from

claims raised under its own laws in its own courts. *Id.* at 621-23 (noting that interpreting the Eleventh Amendment to imply waiver "rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness," and that adopting the state's position allows a state "to achieve unfair tactical advantages, if not in this case, in others").

However, this Court expressly left open the question whether the same result should occur where a state removes an action involving claims for which the state *has not* waived immunity in its own courts. *Id.* at 618. The Circuits have split on how to resolve that question, and this case squarely presents the issue.

Plaintiffs brought the claims that are the subject of this appeal under the FLSA. App. 6. The Ninth Circuit acknowledged that Congress's adoption of the FLSA does not result in a valid abrogation of state sovereign immunity. App. 12. The court nevertheless held that Nevada is not entitled to immunity from suit because it voluntarily removed this case to federal court. App. 13-16.

With eighteen years having passed since *Lapides*, the time is right for this Court to resolve the question it left open in that case.

I. A pervasive split of authority exists on resolution of the question this Court left open in *Lapides*.

Eighteen years ago, this Court left the lower courts to address the question whether removal to federal court results in a waiver of immunity from suit for

federal claims from which the state would remain immune in its own courts. Since then, the circuits have split on how to answer that question.

Now, including the Ninth Circuit, App. 16, five circuit courts have held that removal waives immunity from suit to all claims, even where the state would retain its immunity from suit for such claims in its own courts. *Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190, 198 (3d Cir. 2008); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 254-55 (5th Cir. 2005); *Estes v. Wyoming*, 302 F.3d 1200, 1206 (10th Cir. 2002); *Stroud*, 722 F.3d 1294, 1302 (11th Cir. 2013). The common thread amongst these cases is straightforward: they have held that the state waives immunity from suit in the federal forum by voluntarily invoking federal jurisdiction. *Id.*

In contrast, the First, Second, Fourth, and D.C. circuits have reached the conclusion that a state's removal to federal court only results in waiver of immunity from suit *if* the state has already waived its immunity in state court. *Bergmann v. Rhode Islnd Dep't of Environmental Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011); *Beaulieu*, 807 F.3d at 486; *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005); *Watters v. Washington Metro Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). As the First Circuit explained in *Bergmann*, the "desire to avoid unfairness" links this Court's decision in *Lapides* and other cases where this Court has determined that a voluntary invocation of federal jurisdiction waives immunity from suit. 665 F.3d at 341. But that rationale does not support the need to force a waiver of immunity on the state when

the state would remain immune from a federal claim in its own courts. *Id.* at 342 ("In the case at hand, Rhode Island's sovereign immunity defense is equally as robust in both the state and federal court. Consequently, there is nothing unfair about allowing the state to raise its immunity defense in federal court after having removed the action. Simply put, removal did not change the level of the playing field."). The concern for unfairness that drove this Court's decision in *Lapides* is nonexistent if the state removes a federal claim when the defense of sovereign immunity is also available in state court. But a categorical rule for waiver is unfair to the States because it forces them to choose between their immunity and their right to have a federal court decide the issue of immunity. *Id.*

II. The Ninth Circuit's decision deepens the disagreement on the question left open in *Lapides* and creates tension with this Court's precedents recognizing the importance of state sovereign immunity.

In settling on the conclusion that a state waives immunity from suit by removing a case to federal court, the Third, Fifth, Tenth, and Eleventh circuits all focused on this Court's reliance on the general principle that voluntary invocation of federal jurisdiction waives immunity from suit in *Lapides*. *Lombardo*, 540 F.3d at 198; *Meyers*, 410 F.3d at 254-55; *Estes*, 302 F.3d at 1206; *Stroud*, 722 F.3d 1302. The Ninth Circuit's opinion joining those circuits in applying a categorical rule for waiver of immunity from suit misreads *Lapides* and creates tension with this Court's long-standing

recognition of the important principle of state sovereign immunity.

The Ninth Circuit recognized, as this Court did in *Lapides*, that the voluntary invocation of federal jurisdiction does not result in a categorical waiver of immunity from suit. App 8 (citing *Lapides*, 535 U.S at 618-21). Thus, the Ninth Circuit offered two justifications for its decision to establish a categorical rule for waiver by removal.

First, the Court considered the possibility of unfairness, but the court did not focus on whether *removal* creates unfairness. App. 14-15. Instead, the court concerned itself with when Nevada raised the issue of immunity from suit. App. 14. Such a case-specific consideration is no justification for the categorical rule established here, especially when the court simultaneously agreed with the First Circuit's view that such a rule will result in unfairness to the States in some cases. App. 14-15.

Second, the court suggested that *Lapides* indicated a preference for clear jurisdictional rules. App. at 14-15. However, that aspect of *Lapides* is a response to Georgia's suggestion that it did not have a nefarious motive for removing the case where this court returned to the foundation for its decision: avoiding the creation of a rule that "would permit States to achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. No such tactical advantages are gained by removal when the defense of immunity from suit is also available to the state in its own courts, leaving the Ninth Circuit's desire for an "easy-to-administer rule" as the only justification for its categorical rule on waiver. Judicial

expedience alone is an inadequate justification for overriding a foundational principle like state sovereign immunity. *Cf. Metcalf & Eddy, Inc.*, 506 U.S. at 146 (recognizing the "dignitary interests" protected by the doctrine of state sovereign immunity).

The Ninth Circuit's decision in this case, and the rationale offered by the Third, Fifth, Tenth, and Eleventh circuits, concluding that removal always results in waiver of immunity from suit is not supported by *Lapides*, which was focused on the potential for a state's conduct to give the State an unfair advantage. And the Ninth Circuit's desire for straightforward, easy-to-apply rules cannot be a basis to override an issue so fundamental to our constitutional design as state sovereign immunity. Rules that are easy to apply may be desirable, but a court's preference for judicial expedience alone does not justify displacement of the "dignitary interests" that the States retain under the Constitution in the form of immunity from suit. *Metcalf & Eddy, Inc.*, 506 U.S. at 146.

III. This case is a good vehicle for resolving a long-standing split of authority on a recurring question of constitutional magnitude.

This case presents a fundamental question of constitutional law upon which there is an intractable split of authority. There is no sign of the circuits coming to a consensus on how to resolve the question presented. *Compare* App. 8-16, *with Passaro v. Virginia*, 935 F.3d 243, 247 (4th Cir. 2019) ("Nothing in these out-of-circuit cases makes us inclined to revisit

Stewart; in any event, we are powerless to overturn *Stewart*."). With the passage of eighteen years since this Court left the issue open for resolution, the time has come for this Court to put the issue to rest.

And this case provides a clean vehicle for this Court to resolve the issue. There is no debate that the FLSA does not abrogate state sovereign immunity. App. 12. The Ninth Circuit's amended opinion expressly acknowledges that it resolved the singular issue presented in this petition: whether Nevada's voluntary removal waives immunity from suit for a federal claim that Nevada would remain immune to in its own courts. App. 7 n.1.

Finally, although the Ninth Circuit's amended opinion leaves the question of immunity from liability unaddressed, App 7 n.1, the other circuits that side with the Ninth Circuit on waiver of immunity from suit have concluded that the state may still assert immunity from liability. *Lombardo*, 540 F.3d at 200; *Meyers*, 410 F.3d at 254-55; *Stroud*, 722 F.3d 1302; *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014). Thus, all the circuits that have addressed the issue recognize that removal does not forfeit immunity altogether, they only disagree on what form that immunity should take. But the distinction between the two forms of immunity is critical for a state in Nevada's position. As this Court recognized in *Metcalf & Eddy,* the issue of immunity from suit falls within the scope of the collateral order doctrine to ensure that States are not "unduly burdened by litigation" and "that the State's dignitary interests can be fully vindicated." 506 U.S. at 146. The issue of immunity from liability,

however, is redressable by ordinary appeal, requiring a state to wait for a final appealable order to appeal the denial of a defense based on immunity from liability. *Taylor v. County of Pima*, 913 F.3d 930, 934 (9th Cir. 2019). States should not have to wait for a final appealable order to vindicate the sovereignty they retain under the Constitution. *Metcalf & Eddy,* 506 U.S. at 146.

* * *

Eighteen years is time enough for this Court to let the lower courts attempt to reach a consensus on the question that this Court left unaddressed in *Lapides*. They have been unable to do so, and only this Court can resolve the dispute.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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