

No. 19-1315

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**

REPLY BRIEF FOR PETITIONERS

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The issue decided by the Ninth Circuit below—whether a state waives its right to be free from suit by removing a federal claim brought under an act of Congress that does not otherwise abrogate state sovereign immunity—currently divides the circuit courts and concerns a matter of tremendous importance to the states. The Ninth Circuit’s decision wrongfully denies Nevada its immunity from suit and conflicts with this Court’s precedent.

Respondents do not dispute the impact of the Ninth Circuit’s holding, the existence of a circuit split, or that this issue is critically important to the states. Their sole argument for denying Nevada’s petition rests on the shaky assertion that a certified question framed by the district court below “asks the Nevada Supreme Court to determine the very issue which the question presented here assumes has already been resolved” and is thus dispositive of the question Nevada has presented to this Court. Brief in Opposition (BIO) at 2.

The two issues are distinct, however. This Court’s precedent establishes that Nevada, like all states, retains its immunity from suit absent its affirmative consent. Respondents’ suggestion that Nevada’s immunity remains undecided is thus incorrect. Respondents can only make this assertion, and elide the critical distinction between the question presented to this Court and the district court’s question, by purposely disregarding relevant principles of sovereign immunity outlined in this Court’s prior cases. The mere existence of a certified question on whether Nevada has statutorily waived its immunity from liability in state court thus should not dissuade this Court from

resolving the very real and pressing question before it regarding removal resulting in waiver of a state's immunity from suit for Respondents' federal claims.

Any hint of truth to Respondents' suggestion that Nevada's immunity remains undecided results from the Ninth Circuit's mistaken reliance on the Eleventh Amendment as the source of Nevada's immunity. App. 8. This error provides an additional reason for this Court to grant review. Granting Nevada's petition would provide an opportunity for this Court to address continued confusion in the lower courts about the role of the Eleventh Amendment by reaffirming the broader concept that the states did not forfeit their sovereignty *in toto* when joining the Union. This Court should take the opportunity to clarify these principles, squarely presented by—and central to—this case.

The Ninth Circuit's reliance on the Eleventh Amendment as the basis for Nevada's immunity discredits its entire analysis. Despite recognizing the inherent unfairness its waiver-by-removal rule imposes on the states, the court grounded its decision in a desire for judicial efficiency. That rationale collapses, however, when confronted with the precedent of this Court establishing that a state's sovereign immunity is inherent in the constitutional design of our republic.

The time has come for this Court to resolve the important question it left open in *Lapides v. Board of Regents*, 535 U.S. 613 (2002). And this case presents an ideal vehicle to do so.

Should this Court determine that addressing the question presented on the merits is premature, the

Court should follow the procedure it recently outlined in *Mckesson v. Dow*, 592 U.S. __ (Nov. 2, 2020), and remand for the lower courts to address the effect of any decision from the Nevada Supreme Court on the district court’s certified question.

I. This Court Can and Should Resolve the Issue Presented by the Ninth Circuit’s Erroneous Decision.

The only issue presented to this Court is the one decided by the Ninth Circuit: whether Nevada automatically waived its immunity from suit by removing Respondents’ claims under the Fair Labor Standards Act (hereinafter “FLSA”) to federal court. This Court can, and should, resolve that question here.

A. Nevada enjoys the right to be free from suit absent consent.

This Court’s precedents squarely establish that, with limited exceptions, the Constitution confers upon the States the sovereign right to be free from suit in any court—state or federal—absent consent. *See, e. g., Franchise Tax Board of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493-96 (2019); *see also Alden v. Maine*, 527 U.S. 706 (1999). Under the doctrine of equal footing, Nevada’s sovereignty as a state existed the moment Nevada joined the Union. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). In the absence of affirmative consent to suit, that immunity extends to federal claims like Respondents’ FLSA claims, which derive from statutes established under Congress’s Article I powers. *Alden*, 527 at 757-58; *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Respondents thus can proceed on their FLSA claims only if Nevada has, in some way, affirmatively waived that immunity by consenting to suit. The Ninth Circuit concluded that it has, stripping Nevada of its immunity by holding that Nevada’s *decision to remove the case to federal court* waived immunity on *all federal claims*, including Respondents’ FLSA claims. App. 13-16. Respondents’ assertion that no Court has decided Nevada’s immunity is thus misplaced. As this Court’s decisions establish, Nevada’s immunity springs from the structure of the Constitution. The existence of this immunity is inherent in the Ninth Circuit’s determination that Nevada waived its immunity by *removing the case to federal court*.

B. The Ninth Circuit’s analysis necessarily recognized Nevada’s immunity.

Nevada’s *removal of this case to federal court* provides the sole basis for the Ninth Circuit’s conclusion that Nevada *waived its immunity*. App. 8-16. The court recognized that Nevada’s situation here is distinct from that of the states’ in *Lapides* and *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), because Nevada would have been able to assert an immunity defense to the federal claims in state court based on the rationale of *Alden* and *Seminole Tribe*. App. 11-12.

The Ninth Circuit’s opinion squarely frames the issue presented here: “whether Nevada *waived its sovereign immunity by removing* Plaintiffs’ FLSA claims to federal court.” App. 8 (emphasis added). As it had in the district court, Nevada argued that (1) Nevada is immune from the FLSA claims in *any* court, and (2) the Ninth Circuit should join the circuits

that have concluded that removal does not waive immunity on federal claims where the state could raise a defense of immunity in state court. Appellant’s Opening Brief, *Nevada v. Walden*, No. 18-15691 (Aug. 28, 2018) (Dkt. 10) (relying on *Alden*, and *Seminole Tribe*).

The Ninth Circuit expressly chose not to address Respondents’ “alternate argument” that Nevada waived immunity under state law. App. 16 n.4. Instead, it unambiguously held that “a state that *removes a case to federal court* waives *its immunity from suit* on all federal claims in the case, including those federal-law claims that Congress failed to apply to the states through unequivocal and valid abrogation of their Eleventh Amendment immunity.” App. 4 (emphasis added). In reaching that conclusion, the court implicitly recognized that this case presents the question left unanswered by *Lapides* and *Embury*—whether removal results in waiver even where a state would be able to assert an immunity defense in state court. That is the question Nevada now presents to this Court.

The Ninth Circuit began its analysis by retreading the rationale and holding of *Lapides* while citing Nev. Rev. Stat. 41.031 in support of its recognition that “[m]any states statutorily waive their immunity from suit on *state-law claims in state court*. App. 8-10 (emphasis added). Then, the court acknowledged its extension of *Lapides* to “certain federal-law claims” in *Embury*, where the court declined to address removal of “federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their Eleventh Amendment immunity.” App. 11-12

(quoting *Embury*, 361 F.3d at 566 n.20). Thus, *Lapides* and *Embury* both found waiver based on removal in situations where the state had, in some way, already consented to suit in state court—consenting under state law or to federal causes of action where Congress has validly abrogated state sovereign immunity. But both opinions also left open the question whether removal should result in waiver of immunity from suit where a defense of sovereign immunity would remain viable in state court because Congress failed to validly abrogate state sovereign immunity.

The Ninth Circuit acknowledged that *Lapides* and *Embury* did not control its decision because this case presents the question those cases left undecided. App. 12. And prior to addressing that question, the court identified the relevant split of authority “on whether *Lapides* indicates that a State defendant’s removal to federal court waives its Eleventh Amendment immunity *if the State has not waived its immunity to suit in state court.*” App. 12 n.3 (quoting *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1019 (9th Cir. 2016) (emphasis added)).

Respondents largely ignore the issue presented to and decided by the Ninth Circuit. The opposition’s sole reference to the Ninth Circuit’s opinion is a passing reference in a footnote misreading Nevada’s argument that the Ninth Circuit decided the issue in this case. Opp. at 1 n.2. Respondents selectively focus on more recent ongoing proceedings in the district court—wrongly implying that Nevada had not previously argued that it would be immune in its own courts—while eliding the critical distinction between

the issue before this court (immunity from *suit*) and the issue certified to the Nevada Supreme Court (immunity from *liability*). Opp. at 2-3.

To the extent there is any truth to Respondents' argument that Nevada's immunity remains undecided, it lies in the fact that the Ninth Circuit continues to identify the Eleventh Amendment—not the Constitution's framework—as the source of Nevada's immunity. App. 8. Under this Court's jurisprudence, however, the Ninth Circuit's understanding of the source of state sovereign immunity is mistaken. *Alden*, 527 U.S. 713 (recognizing that using the phrase "Eleventh Amendment immunity" when referring to state sovereign immunity "is convenient shorthand but something of a misnomer" because state sovereign immunity is a result of the constitutional framework, not the Eleventh Amendment). The Ninth Circuit's preference for judicial efficiency, upon which its decision here relies, is inadequate to displace the design of the Constitution. By granting review in this case, this Court can resolve the continued confusion about the source of state sovereignty under the Constitution.

II. This case is a clean vehicle to resolve the question presented.

The certified question does not present the Nevada Supreme Court with a binary choice that will be dispositive on the question presented. And Respondents are mistaken that any resolution of the certified question will require this Court to dismiss the petition as improvidently granted. Opp. at 3.

First, Respondents’ suggestion that Nevada’s pending motion for summary judgment¹ “will be granted” if the Nevada Supreme Court concludes that Nevada has not waived its immunity from liability conflicts with their arguments in the district court. On remand, opposing Nevada’s argument that it remains immune from liability, Respondents have argued that removal also waives immunity from liability. Plaintiffs’ Opposition to Defendant State Nevada *ex rel.* Department of Corrections’ Motion for Summary Judgment, *Walden v. Nevada*, No. 3:14-cv-00320-MMD-WGC, at 20-21 (May 11, 2020) (ECF No. 299).

Because the Ninth Circuit has not addressed whether removal waives immunity from liability, Respondents remain free to argue that the district court should deny the motion and force Nevada to defend itself at trial, regardless of what the Nevada Supreme Court says. If the district court agrees, Nevada would be left unable to appeal the order denying its motion until after the entry of final judgment—demonstrating the inadequacy of the rule in circuits where removal limits a state to asserting only that it is immune from liability. Pet. at 12-13. Even assuming the district court would ultimately rule in Nevada’s favor on immunity from liability,

¹ While Respondents initially correctly identify the motion for summary judgment, they later appear to inadvertently refer to the motion as a motion to dismiss. Opp. at 2-3.

Respondents will undoubtedly appeal, unduly prolonging final resolution of the FLSA claims.²

Second, even if Nevada has statutorily waived immunity from liability, this Court can still review whether a state's removal is a valid basis for rejecting the state's defense that it is immune from suit. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (noting that this Court reviews judgments, not opinions, to determine whether "legal error resulted in an erroneous judgment"). Assuming Nevada has statutorily waived its immunity from liability in state court, that is merely an alternative ground that may support the Ninth Circuit's conclusion that Nevada has consented to suit under the FLSA.

Thus, a resolution of the certified question in Respondents' favor is not a bar to this Court's review.

² This Court should not doubt that Nevada retains its immunity from suit on Respondents' FLSA claims. As Nevada has consistently argued in this case, the historical context of the adoption and application of Nev. Rev. Stat. 41.031 do not support the conclusion that Nevada has waived its immunity from suit for federal causes of action that Congress creates through its Article I powers, particularly when Nevada law creates a robust administrative mechanism to address the relevant issues under state law. *See, e.g.,* Opening Brief, *Nevada v. Walden*, No. 18-15691, at 21-27 (9th Cir., Aug. 28, 2018) (Dkt. 10). In the fifty-five years since the adoption of Nev. Rev. Stat. 41.031, not a single reported Nevada case has applied Nevada's waiver of immunity to sweep as broadly as Respondents' position requires. Plaintiffs' Opposition to Defendant State Nevada *ex rel.* Department of Corrections' Motion for Summary Judgment, *Walden v. Nevada*, No. 3:14-cv-00320-MMD-WGC, at 10 (May 11, 2020) (ECF No. 299).

If this Court grants plenary review and agrees with Respondents that removal waives immunity from suit, the parties can proceed in the district court in due course. However, if it agrees with Nevada that removal should not result in waiver of immunity, this Court can vacate and remand to let the lower courts determine the effect, if any, of the Nevada Supreme Court's resolution of the certified question in the first instance.

This case is ripe for review and presents a clean opportunity for this Court to rule on the question left open in *Lapides* that has been percolating in the circuit courts for more than 18 years.

III. Alternatively, this Court should remand under *McKesson*.

If this Court is concerned that the district court's certified question creates uncertainty about a related, but distinct, question of state law—whether Nevada has statutorily waived its immunity from liability in state court—this court should turn to its recent decision in *McKesson*. *McKesson* provides a path to alleviating concerns that uncertainty about a novel question of state law renders a question of federal constitutional law “purely hypothetical”: granting the petition, vacating the Ninth Circuit's opinion, and remanding for further consideration of the Nevada Supreme Court's ultimate disposition of the question already certified by the federal district court. *McKesson*, 592 U.S. at ___, (slip op. at 4-5).

A remand in this circumstance has two distinct advantages over denying the petition. First, if the Nevada Supreme Court determines that Nevada has

not waived immunity to the FLSA claims under state law, a remand preserves the interlocutory posture of the case and Nevada's interests in establishing the important distinction between immunity from suit and immunity from liability that is central to the relevant split of authority. Pet. at 12-13. And then this Court will be positioned to address any further decision from the Ninth Circuit on the issue.

Second, if the Nevada Supreme Court determines that Nevada has waived immunity under state law, vacating and remanding allows the Ninth Circuit to determine whether it can decide this case on narrower grounds specific to Nevada. Denying Nevada's petition, in contrast, leaves the Ninth Circuit's published opinion in place, which then remains binding on other Ninth Circuit states that have not waived their immunity from suit under state law.

* * *

Respondents have otherwise waived any opposition to the petition, and this case is ripe for review. Alternatively, this Court should grant, vacate, and remand for further consideration in light of *Mckesson*.

CONCLUSION

This Court should grant the petition for plenary review or, in the alternative, vacate the Ninth Circuit's decision and remand for further consideration in light of *Mckesson*.

Respectfully submitted,

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