

In the
Supreme Court of the United States

ASHLEY WILCOX PAGE,

Petitioner,

v.

TODD L. HICKS, ET. AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), the Court held that when a State voluntarily removes a case from state to federal court, that action waives the state's sovereign immunity under the Eleventh Amendment to the United States Constitution. The United States Courts of Appeals have split, however, on the extent and scope of this waiver of immunity. The majority of circuit courts that have considered the *Lapides* question have chosen to adopt a blanket waiver-by-removal rule. This approach has been taken by the Second, Seventh, Ninth, Tenth, and Federal Circuits. The First, Fourth, and D.C. Circuits have limited *Lapides* and held that the waiver of immunity should only apply to situations where the state actor had waived its immunity in state court. The Third, Fifth and Eleventh Circuits have adopted a hybrid approach and divide immunity from suit and immunity from liability, allowing the State to retain one while waiving the other.

Under the *Lapides* waiver-by-removal rule, does a state waive its constitutionally granted sovereign immunity to suit by voluntarily removing a civil claim from state to federal court?

PARTIES TO THE PROCEEDING

The Petitioner is Ashley Wilcox Page, a former student in the University of Alabama in Birmingham School of Nursing Anesthesia Program.

The Respondents are Todd L. Hicks, Susan P. McMullan, and Peter M. Tofani, employees of the University of Alabama in Birmingham, and the Board of Trustees of the University of Alabama.

LIST OF PROCEEDINGS

Ashley Wilcox Page v. Todd L. Hicks, et. al.

United States District Court, Middle District of
Alabama, Northern Division

Case No. Civil Action No. 2:16cv902-MHT (WO)

Decision Date: December 9, 2016

Ashley Wilcox Page v. Todd L. Hicks, et. al.

United States District Court, Middle District of
Alabama, Southern Division

Case No. 2:16-cv-01993-KOB

Decision Dates: June 9, 2017, July 17, 2017,
February 12, 2018.

Ashley Wilcox Page v. Todd L. Hicks, et. al.

United States Court of Appeals, Eleventh Circuit

Case No. 18-10963

Decision Date: May 10, 2019

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PETITION FOR WRIT OF CERTIORARI

This case provides an ideal case for the Court to resolve a significant split among the circuit courts of appeal. In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), the Court held that when a State voluntarily removes a case from state to federal court, that action waives the state's sovereign immunity under the Eleventh Amendment to the United States Constitution. The United States Courts of Appeals have split, however, on the extent and scope of this waiver of immunity. The majority of circuit courts that have considered the *Lapides* question have chosen to adopt a blanket waiver-by-removal rule. This approach has been taken by the Second, Seventh, Ninth, Tenth, and Federal Circuits. The First, Fourth, and D.C. Circuits have limited *Lapides* and held that the waiver of immunity should only apply to situations where the state actor had waived its immunity in state court. The Third, Fifth and Eleventh Circuits have adopted a hybrid approach and divide immunity from suit and immunity from liability, allowing the State to retain one while waiving the other. The Court should grant certiorari to resolve the circuit conflict and bring certainty to this area of the law.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, dated May 10, 2019, is

reported at App.1a. The Memorandum Opinion of the United States District Court, Northern District of Alabama, Southern Division, dated February 12, 2018, is reported at App.11a. The Final Order of the United States District Court, Northern District of Alabama, Southern Division, dated February 12, 2018, is reported at App.43a. The Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division, dated December 9, 2016, is reported at App.53a.



STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 10, 2019. The mandate was entered by the court of appeals on June 10, 2019. The Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides that:

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

A. Introduction

Ashley Wilcox Page originally filed this suit in state court alleging violations of federal and state law against a state university and various individual defendants. All of the named defendants removed the case to federal court and asserted that the federal court had jurisdiction to decide the issues presented involving Page's dismissal from school. (App.83a). After removal, the defendants contended, and the district court agreed, that the claims should be dismissed based on Eleventh Amendment immunity and other grounds. (App.11a). The court of appeals affirmed and rejected the plaintiff's arguments that the state had waived its Eleventh Amendment immunity by removing the case to federal court. (App.1a).

The suit requested monetary damages and injunctive relief. The underlying suit alleged that the plaintiff was unlawfully dismissed, in her final semester from the UAB School of Nursing Anesthesia Program, based on clinical evaluations on another student and without any notice or a hearing. The suit requested injunctive relief and reinstatement to remedy the due process violations that had occurred, and monetary damages as compensation for the constitutional violations. After removal, the state defendants responded by requesting a dismissal of the lawsuit asserting that they were entitled to Eleventh Amendment immunity, sovereign immunity, state agent immunity, and qualified immunity, and in the alternative, that

the complaint failed to state a federal claim. The district court granted the motion to dismiss. (App.43a).

On appeal, the court of appeals rejected Page's contentions that the state had waived its Eleventh Amendment immunity by removing the case to federal court. The court of appeals held, that while the state had had waived its immunity from suit, under the precedent of the Eleventh Circuit interpreting *Lapides*, the removal did not affect the Board's immunity for liability for monetary damages or for injunctive relief. (App.1a) In so holding, the court of appeals joined a minority of circuits that have adopted a hybrid approach which divides immunity from suit and immunity from liability, allowing the state to retain one while waiving the other. The majority of circuits that have considered the *Lapides* removal question have chosen to adopt a blanket waiver-by-removal rule. Another group of circuits have applied a second minority approach and held that the waiver of immunity should only apply to situations where the state actor had waived its immunity in state court. This Court should grant certiorari to resolve this circuit conflict and bring uniformity to this important question regarding state immunity and waiver-by-removal.

B. Proceedings in the District Court

In August 2014 the plaintiff began her education as a student in the University of Alabama in Birmingham School of Nursing Anesthesia Program. The plaintiff maintained good grades, performed well as a student, and was entering her final semester in August, 2016. As a requirement to complete her education and graduate in December, 2016 from the Nursing Anesthesia

Program, the plaintiff had begun her clinical rotations at various hospitals in Alabama, including a hospital in Montgomery, Alabama. On Sunday, August 28, 2016 the plaintiff received a voicemail and an email instructing the plaintiff to attend a meeting the next day regarding her clinical rotations. Prior to the meeting, the plaintiff unsuccessfully attempted to determine the purpose of the meeting. The record is undisputed that prior to the meeting that occurred on August 29, 2016, the plaintiff was not provided (1) any written report or complaint regarding any academic complaint, (2) any written report of alleged misconduct, or (3) any written report of any grievance reported or initiated against the plaintiff or any other notice that would have notified the plaintiff that the meeting could result in the plaintiff being dismissed from school. (App.65a).

The plaintiff appeared as instructed for the meeting, attended by five individuals employed by the state university. At the meeting the plaintiff was handed three clinical evaluations, one of which was on another student in the nursing program. One of the university employees, without following required due process, without providing any written notice of the proposed action and or reasons for the dismissal from school, and apparently without any discussion or consultation with any of the additional individuals in the meeting, informed the plaintiff that she was dismissed from school effective immediately. The plaintiff thereafter was removed from the nursing program and not allowed to attend class or participate in any further clinical rotations as part of her studies. (App. 66a).

The plaintiff tried for several months to correct the decision dismissing the plaintiff from school to no avail. Thereafter, the plaintiff filed her suit in state court alleging violations of federal and state law regarding her dismissal from school. (App.61a). Immediately prior to the state court conducting a scheduled hearing on the plaintiff's request for injunctive relief, all of the named defendants removed the case to federal court and asserted that the federal court had jurisdiction to decide the issues presented in the suit. (App.83a).

After removal, the defendants moved to dismiss the suit contending that the defendants enjoyed Eleventh Amendment immunity, sovereign immunity, and other forms of immunity under federal and state law. The plaintiff responded and argued that under this Court's precedent in *Lapides*, the defendants had waived their immunity under the Eleventh Amendment. The district court recognized the Supreme Court's ruling in *Lapides*, however, it held "that Defendants waived their Eleventh Amendment immunity from *suit* in this federal forum, but concludes that they did not waive their immunity from liability." (App.21a). The district court concluded that the defendant Board of Trustees "is entitled to Eleventh Amendment immunity as to all of the claims brought against it, regardless of the form of relief requested." (App.41a). The district court further concluded that "the individual defendants in their official capacities are entitled to Eleventh Amendment immunity" as to the plaintiff's request for monetary damages. (App.41a). The district court order dismissed the other federal claims finding that the defendants enjoyed qualified immunity and for failure to state a federal claim. (App.41a). Finally,

the district court declined to exercise supplemental jurisdiction over the state law claims and dismissed all of the plaintiff's state law claims without prejudice. (App.40a).

C. Proceedings in the Eleventh Circuit Court of Appeals

The court of appeals affirmed the dismissal of plaintiff's complaint and rejected the plaintiff's arguments that under *Lapides*, the state had waived its Eleventh Amendment immunity. (App.11a). The court of appeals concluded that "under this Court's precedent interpreting *Lapides*, this removal did not affect the Board's immunity from liability for monetary damages." (App.6a). The court of appeals further concluded that a state's removal to federal court waives its immunity from a federal forum, "that is, its immunity from *suit*, not from liability". (App.5a). This interpretation of *Lapides*, a hybrid approach taken by a minority of the circuit courts of appeal, attempts to create a divisible concept of waiver of immunity, a concept rejected by a majority of the courts of appeal.



REASONS FOR GRANTING THE PETITION

The circuits are deeply divided over the extent and scope of the waiver of immunity that occurs when a state removes a case from state court to federal district court under the Court's decision in *Lapides*. The waiver-by-removal question has been extensively litigated in the lower courts and a clear majority of the courts of appeal have now had an opportunity to decide the waiver-by-removal question directly. The issue is ripe for the Court's review and there is little to be gained from further litigation in the lower courts without guidance from the Court.

The majority of circuit courts that have considered the *Lapides* question have elected to adopt a blanket waiver-by-removal rule. This approach has been taken by the Second, Seventh, Ninth, Tenth, and Federal Circuits. The First, Fourth, and D.C. Circuits have limited *Lapides* and held that the waiver of immunity should only apply to situations where the state actor had waived its immunity in state court. The Third, Fifth and Eleventh Circuits have adopted a hybrid approach and divide immunity from suit and immunity from liability, allowing the State to retain one while waiving the other. Because eleven circuits have now taken sides in a debate that now has three possible outcomes depending on the state where the original case began, the question is fully developed in the lower courts and ripe for the Court's resolution.

The consequences of this debate for individual litigants and the States are significant. Individual

litigants should have clear procedural and jurisdictional rules when choosing the forum for filing litigation against unlawful conduct by state actors. Inconsistency has occurred in the lower courts and evaluating the motives of state actors that remove a case to federal court is difficult, if not impossible, to evaluate. As the Court stated in its unanimous decision in *Lapides*, there is a potential for “inconsistency, anomaly, and unfairness” where states are allowed to submit its case for resolution within the jurisdiction of the federal courts and, if advantageous to its litigation strategy, deny the federal courts’ jurisdiction to resolve the case. *Lapides*, 535 U.S. at 619-623, 122 S.Ct. at 1643-1646. The states also need clarity on the waiver-by-removal rule because of the difficult choice they face between relinquishing their sovereign immunity or foregoing an available federal forum depending on what federal circuit that the state has been assigned.

Individual litigants have limited resources to pursue their claims. The plaintiff chooses its forum carefully and generally has a plethora of state court decisions interpreting that state’s invocation of immunity in litigation involving state actors. If a state desires to exercise its sovereign immunity in state court, it may do so. The state maintains its ability to request a dismissal of the litigation based on its claimed Eleventh Amendment immunity in state court. Individual litigants and state actors will each have their opportunity to litigate whether the claimed immunity is appropriate in any particular case. Judicial economy is maintained and litigation resources are preserved for all parties to the litigation.

The consequence of a significant and wide disagreement in the courts of appeal on the extent of the waiver-by-removal has disadvantaged both individual litigants and the states. Individual litigants are often burdened with litigation that divides the federal claims from the state claims into two separate forums, one in state court on the state claims asserted by the plaintiff and one in federal court on federal claims dismissed on the basis of immunity. This results in expensive, if not unbearable costs of litigation, to seek judicial remedies under the law for unconstitutional and unlawful actions by state actors. Individual litigants should have clear and concise jurisdictional rules for presenting their individual claims against state actors.

States are also disadvantaged by this inconsistent interpretation of *Lapides* by the courts of appeal. States in the circuits that apply a blanket waiver-by-removal rule face a difficult choice of relinquishing the immunity the state enjoys or foregoing the federal forum. States in the circuits that have a limited *Lapides* waiver-by-removal rule are not burdened by this difficult choice. States sued in state court for alleged violations of federal law that have a legitimate and substantial claim of immunity, need to be allowed to make an informed decision about removal. States should be free to waive their immunity, however, depending on the circuit involved, it occurs simply by removing to a federal court in some states but not in others. All of the states should stand on equal footing on the important and strategic decision involved about whether or not to remove a case filed in state court to federal court.

Finally, the waiver-by-removal question has been extensively and fully litigated in the lower courts. The circuit courts of appeal have developed three separate and at times inconsistent ways of resolving claims of immunity after removal. The Court should grant certiorari to revisit the issues left open in *Lapides*, affirm the reasoning of the Court’s voluntary invocation of jurisdiction rationale, and render a decision that makes the waiver-by-removal rule the law in every state.

I. THE CIRCUIT COURTS OF APPEALS SIGNIFICANTLY DISAGREE OVER THE PROPER SCOPE AND EXTENT OF THE *LAPIDES* WAIVER-BY-REMOVAL RULE.

As the Eleventh Circuit, and most every one of the circuit court of appeals have recognized, the circuits are split over the question of the proper scope and extent of the waiver-by-removal rule under the Court’s decision in *Lapides*. *Stroud v. McIntosh*, 722 F.3d 1294, 1302 (11th Cir. 2013). In *Stroud v. McIntosh*, the Eleventh Circuit addressed the scope of *Lapides* in the context of “a state’s invocation of federal jurisdiction by removal, on one hand, and on the other, its denial of federal jurisdiction by asserting immunity from federal court proceedings.” *Stroud v. McIntosh*, 722 F.3d 1294, 1302 (11th Cir. 2013). In *Stroud*, the Eleventh Circuit held that under *Lapides* reasoning, a state waives its “immunity from a federal forum” when it removes a case, that is, its immunity from suit, not from liability. *Id.* The Eleventh Circuit applied this rationale to the appeal by the petitioner to the Eleventh Circuit as precedent within the circuit.

The Third and Fifth Circuits have taken an approach similar to the Eleventh Circuit. In *Lombardo*

v. Pennsylvania Department of Public Welfare, the Third Circuit held that the state's removal to federal court voluntarily invoked the court's jurisdiction to the federal forum, but allowed the state to retain its immunity for claims brought against the state under the federal Age Discrimination in Employment Act. *Lombardo v. Pennsylvania Department of Public Welfare*, 540 F.3d 190 (3rd Cir. 2008). In *Meyers, ex rel. Benzing v. Texas*, the Fifth Circuit also made this distinction between immunity from suit and immunity from liability. *Meyers, ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005). In *Meyers*, the Fifth Circuit found that the removal had waived the immunity from suit by the State of Texas but remanded the case to the state court for a determination of whether Texas was immune from liability under state law under Title II of the Americans with Disabilities Act.

The majority of circuit courts that have considered the *Lapides* question have elected to adopt a blanket waiver-by-removal rule. This approach has been taken by the Second, Seventh, Ninth, Tenth, and Federal Circuits. The Seventh Circuit in *Board of Regents of the University of Wisconsin System v. Phoenix International Software* held that the *Lapides* waiver of immunity rule should apply broadly to "all instances of removal initiated by a state." *Board of Regents of the University of Wisconsin System v. Phoenix International Software*, 653 F.3d 448, 461 (7th Cir. 2011). The Ninth Circuit has also applied the blanket waiver-by-removal rule under *Lapides* to both federal and state claims. *Embury v. King*, 361 F.3d 562 (9th Cir. 2004). The Second Circuit has twice expressed its view that a blanket waiver-by-removal rule is the proper approach. *In re Deposit Insurance*

Agency, 482 F.3d 612, 615 (2nd Cir. 2007); *Kozaczek v. New York Higher Education Services Corporation*, 503 F.App'x. 60, 61 (2nd Cir. 2012). The Tenth Circuit has also applied a broad waiver-by-removal rule to federal claims removed by the state. *Estes v. Wyoming Department of Transportation*, 302 F.3d 1200, 1202 (10th Cir. 2002). Finally, the Federal Circuit decided this very question several years before the Court decided *Lapides*. *In re Regents of the University of California*, 964 F.2d 1128 (Fed. Cir. 1992). This approach is sound, well-reasoned, and consistent with *Lapides*.

A smaller minority of circuits have limited *Lapides* and held that the waiver of immunity should only apply to situations where the state actor had waived its immunity in state court. The First, Fourth, and D.C. Circuits take this limited approach and these cases seem inconsistent with the Court's decision in *Lapides*. *Bergemann v. Rhode Island Department of Environmental Management*, 665 F.3d 336, 338 (1st Cir. 2011); *Stewart v. North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005); *Watters v. Wash. Metro Area Trans. Auth.*, 295 F.3d 36, 42 n. 13 (D.C. Cir. 2002).

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT IN THE LOWER COURTS.

A. Whether Removal Waives a State's Sovereign Immunity from Suit, in Addition to the State's Immunity from Suit in a Federal Forum, Is a Question of Vital Importance to Individual Litigants and to the States.

The question presented in this petition is of great importance to individual litigants seeking to

redress fundamental rights that are alleged to have been violated, and to the States. The extent and scope of the waiver of immunity that occurs by a decision to remove a case to federal court, impacts the daily decisions of state attorneys who must decide whether to remove suits brought in state court that include federal claims. Most every circuit has now had an opportunity to address the waiver-by-removal question directly, resulting in three different approaches by the courts of appeal. If removal waives the state's immunity from suit in its entirety, state attorneys must undertake a careful and difficult analysis to decide whether removal to federal court is even a viable option in a particular case. In contrast, if the voluntary invocation of federal court jurisdiction by the state does not waive claims of immunity to which the state could otherwise maintain in state court, state attorneys have little risk by removing a case to federal court. Finally, if there is a distinction between immunity from suit and immunity from liability as a minority of circuit courts have decided, including the Eleventh Circuit, removal could be a waiver of immunity or no waiver of immunity, depending on the facts of a particular case.

The three potential answers to this important and frequent question have been thoroughly examined by the courts of appeal. The conflict among the circuits continues to put litigants and states with identical issues on different paths with respect to immunity and its waiver in the federal courts. States are frequently sued in state courts for violations federal law. A definitive and clear waiver-by-removal rule that is unequivocal and easily applied will prevent the unfairness and inconsistency that *Lapides* tried

to avoid. The Court should grant the petition to remove the uncertainties and inconsistencies that are occurring in the lower courts.

B. The Lower Courts Have Fully Developed the Dispute for Resolution by the Court and It Is Unlikely That There Will Be Additional Development in the Courts of Appeal.

The three potential answers to the important question presented have been thoroughly explored by at least eleven of the courts of appeal. The majority of circuit courts that have considered the *Lapides* question have chosen to adopt a blanket waiver-by-removal rule. This approach has been taken by the Second, Seventh, Ninth, Tenth, and Federal Circuits. The First, Fourth, and D.C. Circuits have taken one of the two minority approaches and limited *Lapides*. These courts of appeal have held that the waiver of immunity should only apply to situations where the state actor had waived its immunity in state court. The other minority approach has been taken by the Third, Fifth and Eleventh Circuits. These courts of appeal have adopted a hybrid approach and divide immunity from suit and immunity from liability, allowing the State to retain one while waiving the other.

Decisions by the remaining circuits will likely join one of the three approaches taken by the other circuits that have already thoroughly examined the question presented. It is unlikely that any further decisions by the courts of appeal will shed any additional light on the issue presented. The conflict between the courts of appeal on the issue presented is fully developed and ready to be resolved.

C. Uniformity in the Resolution of Claims of Immunity After Removal to Federal Court Will Produce the Consistently and Fairness That the *Lapides* Ruling Attempted to Achieve.

The Court warned in *Lapides* about the very scenario that has developed due to the circuit split. The Court cautioned in its unanimous decision in *Lapides*, that there is a potential for “inconsistency, anomaly, and unfairness” where states are allowed to submit its case for resolution within the jurisdiction of the federal courts and, if advantageous to its litigation strategy, deny the federal courts’ jurisdiction to resolve the case. *Lapides*, 535 U.S. at 619-623, 122 S.Ct. at 1643-1646. The diverse split in the circuit courts of appeal has had significant consequences for individual litigants and the States, and been inconsistent and unfair to both. Individual litigants are not on equal footing throughout the states on the application of sovereign immunity to their federal claims. States are also not being treated with “equal dignity”, a fundamental principle of our legal system. *Brown v. Fletcher’s Estate*, 210 U.S. 82, 89 (1908). The Court has a long line of precedent that a state’s voluntary and affirmative conduct in litigation can result in a waiver of its sovereign immunity. *Clark v. Barnard*, 108 U.S. 436, 447 (1983); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 681, n. 3 (1999). The Court has consistently found that the state may timely assert its sovereign immunity and successfully receive its protections, however, the failure to timely assert its claim of immunity can result in its waiver. The

Court has also consistently held that a state's voluntary invocation of the federal court's jurisdiction will result in a waiver of its immunity. The Court should grant certiorari to resolve the circuit split and insure consistency in all cases involving waiver of immunity based on a state's removal to federal court.

In *Lapides*, the Court prevented the State of Georgia from submitting its case for resolution within the jurisdiction of the federal courts and, as part of its litigation strategy, attempt to deny the federal courts' jurisdiction to resolve the case after removal from the state court. *Lapides*, 535 U.S. at 619-623, 122 S.Ct. at 1643-1646. Individual litigants and every state need clarity on the waiver of immunity rule after removal. This question arises frequently in the federal courts and uncertain outcomes have occurred because of the three separate approaches being taken by the circuit courts of appeal. The Court should grant this petition to remove the uncertainty and insure consistency in all federal courts.



CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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