No. 19-191

IN THE

Supreme Court of the United States

ASHLEY WILCOX PAGE, *Petitioner*,

v.

TODD L. HICKS, ET AL., *Respondents*.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), this Court ruled that a State's removal of a case to federal court constitutes a waiver of the State's Eleventh Amendment immunity from suit in a federal forum. The *Lapides* Court expressly did not reach the question of the scope of a State's waiver by removal in a situation where the State's underlying sovereign immunity has not been waived or abrogated in state court. Since *Lapides* was decided, every court of appeals to consider that question has concluded that there is no waiver of the State's underlying sovereign immunity from liability in those circumstances.

Did the Eleventh Circuit correctly conclude that a State's removal of a case to federal court constituted a waiver of Eleventh Amendment immunity from suit in a federal forum, but did not constitute a waiver of the broader immunity from liability that the State would have enjoyed in state court?

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REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied. As a threshold matter, this case is moot. The Eleventh Circuit held that Petitioner's complaint failed to state any valid federal claims, and it affirmed the district court's dismissal of Petitioner's state-law claims. Petitioner does not challenge those rulings. As a result, Petitioner has no remaining viable claims in this case, so the petition does not involve a live controversy that this Court's review would affect.

Even if the case were not moot, review should be denied because the Eleventh Circuit's ruling on the question presented does not conflict with the decision of any other court of appeals. Every circuit to expressly consider the question that this Court left open in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), has held that a State does not waive its underlying sovereign immunity from liability that it had in state court by removing a case to federal court. The Eleventh Circuit's decision on that question is plainly correct. Neither this Court's precedents nor logic supports the conclusion that a State forfeits its substantive sovereign immunity from liability that it enjoys in state court if it removes a case to federal court.

I. This case is moot.

The petition should be denied because this case is moot. "Article III of the Constitution limits federal court-jurisdiction to 'cases' and 'controversies.'" *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669

(2016). There is "[n]o principle … more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

A "basic principle" of Article III is "that a justiciable case or controversy must remain 'extant at all stages of review, not merely at the time the complaint is filed.'" *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "'[T]hroughout the litigation,' the party seeking relief 'must have suffered, or be threatened with, an actual injury traceable to the defendant and *likely to be redressed by a favorable judicial decision*.'" *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)) (emphasis added). If a case "becomes moot at any point during the proceedings," it is "'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

Federal courts have "no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them].'" *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)); *accord Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (cautioning

that courts must "avoid advisory opinions on abstract questions of law" (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969))). And because this Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial," it must "decide[ ]" questions "in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

This case is moot because Petitioner, in the wake of the Eleventh Circuit's decision, has no viable claims remaining.

Petitioner's operative complaint asserted two federal-law claims and three state-law claims against the Board of Trustees of the University of Alabama and three University employees. Pet. App. at 75a–80a. The district court dismissed Petitioner's federal claims and declined to exercise supplemental jurisdiction over the state-law claims. *Id.* at 40a–44a.

As for the state-law claims, the Eleventh Circuit affirmed the district court's exercise of its discretion in declining to exercise supplemental jurisdiction over those claims. *Id.* at 3a n.2. Petitioner does not challenge that ruling in her petition.

The Eleventh Circuit also affirmed the dismissal of the federal-law claims—not only on the basis of sovereign immunity, but also due to Petitioner's failure to state a claim upon which relief could be granted. The Eleventh Circuit agreed that sovereign immunity barred the claims against the Board and against the individual Respondents in their official capacities. *Id.* at 5a–6a. But, importantly, the

court also affirmed the dismissal of Petitioner's federal claims on the merits, holding that Petitioner "failed to state a procedural-or substantive-due process claim" against the individual Respondents in either "their individual or official capacities." *Id.* at 6a–10a. Petitioner does not challenge that merits ruling in her petition. Because there is no basis to distinguish the viability of the federal-law claims against the Board from the viability of the federal-law claims against the individual Respondents, no viable claims remain against any of the Respondents. As a result, this Court's review of the question presented would have no effect on the outcome of this case.

This Court's ruling in *Lapides* confirms the conclusion that this case no longer presents a live controversy. In *Lapides*, the petitioner brought a federal claim and various state-law claims against the State defendant. 535 U.S. at 616. The petitioner's federal-law claim was "not … a valid federal claim against the State." *Id.* at 617. The question about the scope of the waiver of Eleventh Amendment immunity as a result of removal was not moot at the certiorari-petition stage only because the petitioner's "state-law tort claims against the State remain[ed] pending in Federal District Court." *Id.* at 618. As this Court expressly explained, only due to that fact did this Court have the "legal power" to answer the question presented. *Id.*

The opposite is true here. Because the Eleventh Circuit affirmed the district court's dismissal of the state-law claims, there are no remaining state-law claims to rescue Petitioner from mootness.

II. There is no circuit split that warrants this Court's review.

This case implicates no circuit split requiring this Court's review. In *Lapides*, this Court concluded that a State waives its Eleventh Amendment immunity from suit in a federal forum if it removes a case from state court to federal court. 535 U.S. at 624. The State's "voluntar[y] invo[cation]" of federal jurisdiction, this Court explained, "amounted to a waiver of its Eleventh Amendment immunity." *Id.* at 619–20. But the Court left open the question of what effect a State's removal to federal court would have "in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617–18.

An urban myth has since arisen that the circuits are split over the question that *Lapides* left unresolved. *See, e.g.*, *Stroud v. McIntosh*, 722 F.3d 1294, 1300–01 (11th Cir. 2013); David Kanter, *Removal Plus Timely Assertion: A Better Rule for the Intersection of Removal and State Sovereign Immunity*, 105 Geo. L.J. 531, 533 (2016). No such circuit split exists.

Nine circuits have considered the question *Lapides* left open and that is presented here[1]—whether a State by removing a case to federal court waives a substantive sovereign immunity defense that

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[1] Read literally, the question presented in the petition was already answered in *Lapides*. Pet. at i. Respondents have re-formulated the question presented to reflect the actual issue in this case.

it would have had in state court. Each circuit has arrived at the same conclusion—that there is no waiver in those circumstances:

- First Circuit: *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011) (Because the State's "sovereign immunity defense is equally as robust in both the state and federal court," "there is nothing unfair about allowing the state to raise its immunity defense in the federal court after having removed the action.");

- Second Circuit: *Beaulieu v. Vermont*, 807 F.3d 478, 490 (2d Cir. 2015) (The State's removal of a case to federal court "barr[ed] Defendants from objecting under the Eleventh Amendment to the federal court's power to impose judgment," but "did not constitute a waiver of [its] general sovereign immunity to private actions" that "applie[d] in both state and federal courts.");

- Third Circuit: *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 198 (3d Cir. 2008) (Although "voluntary removal waives a State's immunity from suit in a federal forum, the removing State retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability.");

- Fourth Circuit: *Stewart v. North Carolina*, 393 F.3d 484, 490 & n.5 (4th Cir. 2005) (The State, "having not already consented to suit in its own courts, did not waive sovereign

immunity by voluntarily removing the action to federal court for resolution of the immunity question.");

- Fifth Circuit: *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005) ("[W]hen Texas removed this case to federal court it voluntarily invoked the jurisdiction of the federal courts and waived its immunity from suit in federal court. Whether Texas has retained a separate immunity from liability is an issue that must be decided according to that state's law.");

- Eighth Circuit: *Church v. Missouri*, 913 F.3d 736, 742–43 (8th Cir. 2019) ("[N]either logic nor precedent supports the proposition that a state waives its general state sovereign immunity by removing an action from state court to federal court." (quoting *Beaulieu*, 807 F.3d at 486));

- Tenth Circuit: *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014) ("A state does not gain an unfair advantage asserting in federal court an affirmative defense it would have had in state court. Accordingly, we recognize that a state may waive its immunity from suit in a federal forum while retaining its immunity from liability.");

- Eleventh Circuit: *Stroud v. McIntosh*, 722 F.3d 1294, 1302 (11th Cir. 2013) ("We do not understand *Lapides* to require the state to

forfeit an affirmative defense to liability simply because it changes forums.");

- D.C. Circuit: *Watters v. Wash. Metro Transit Auth.*, 295 F.3d 36, 39, 42 n.13 (D.C. Cir. 2002) (explaining that the State defendants "ha[d] not waived immunity … in their own courts" and emphasizing that their "immunity does not arise solely from the Eleventh Amendment").

Although these courts took different approaches and emphasized different points in their analyses, they all reached the same outcome: Removal waives a State's Eleventh Amendment immunity from suit in federal court, but does not waive any underlying sovereign immunity from liability that the State enjoyed in state court.

Despite the agreement among the circuits that a State retains a sovereign immunity defense that it had in state court even if it removes a case to federal court, Petitioner insists that the courts of appeals are "deeply divided" over *Lapides*'s scope. Pet. at 8 & 11–15. Petitioner misreads or overstates the decisions of the courts of appeals. As an example of Petitioner's overreach, Petitioner contends that the Second Circuit has endorsed a "blanket waiver-by-removal rule." Pet. at 12. That is plainly wrong, as the *Beaulieu* decision—an opinion that Petitioner does not cite—makes emphatically clear. *See Beaulieu*, 807 F.3d at 488–90.

Petitioner also erroneously argues that the Seventh, Ninth, and Tenth Circuits have held that a State's removal constitutes a waiver of all sovereign

immunity, Pet. at 12–13, but Petitioner ignores decisions from those circuits that make clear that they have not rendered a blanket waiver-by-removal holding. Although Petitioner cites the Tenth Circuit's decision in *Estes v. Wyoming Dep't of Transportation*, 302 F.3d 1200 (10th Cir. 2002), Pet. at 13, she does not acknowledge that the Tenth Circuit more recently held that "consistent with our holding in *Estes*," "a state may waive immunity from suit while retaining immunity from liability for monetary damages." *Trant*, 754 F.3d at 1173.

Petitioner's reliance on the Seventh Circuit in *Board of Regents of University of Wisconsin System,* 653 F.3d 448 (7th Cir. 2011), and the Ninth Circuit in *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), to manufacture a circuit split is also misplaced. Pet. at 12. Again, in a decision that Petitioner does not cite, the Seventh Circuit has made clear that it has never weighed in on the scope of waiver by removal in this context. Whether "a state waive[s] the immunity it would have in state court by removing a suit to federal court," the Seventh Circuit emphasized, is "a question that we have not yet had occasion to answer." *Hester v. Ind. State Dep't of Health*, 726 F.3d 942, 949 (7th Cir. 2013). And the Ninth Circuit has made the same point. That court explained that *Embury* "did not explicitly consider whether [*Lapides*] applied when a State defendant retained its immunity from suit in state court." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1019 n.11 (9th Cir. 2016). And as a result, "the question whether *Lapides*'s rule applies when a State defendant has not consented to

suit in its own courts remains unresolved in this circuit." *Id.*[2]

Respondents are not alone in concluding that no circuit split exists on the question presented. The Second Circuit debunked the existence of a genuine conflict among the circuits on this question. *See Beaulieu*, 807 F.3d at 486–90. Writing for that court, Judge Leval undertook a thorough survey of the allegedly conflicting decisions of the various circuits and found the purported split to be illusory.

In reaching its conclusion that no circuit split exists, the Second Circuit considered the same cases that Petitioner now advances to support her erroneous contention that there is a split. *Id.* at 487–89. Analyzing those decisions, the Second Circuit explained that the First, Third, Fourth, Fifth, Eleventh, and D.C. Circuits had all concluded "that a state defendant's voluntary removal of a private suit to federal court does not by itself waive the state's general immunity from such a suit." *Id.* at 487. Although the Second Circuit acknowledged that the circuits "emphasiz[ed] different points" in reaching that "common result," it clarified that each "concur[red]" in the conclusion that a state defendant

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[2] *In re Regents of University of California*, 964 F.2d 1128 (Fed. Cir. 1992)—which predates *Lapides* by ten years—likewise creates no circuit split. That decision merely held that the State officials there, having invoked the jurisdiction of the federal courts, "bec[a]me subject to the Federal Rules, including the procedural efficiencies administered by the Multidistrict Panel." *Id.* at 1134–35.

that "has not waived its underlying state sovereign immunity" may "avail itself of removal to the federal court without sacrificing this immunity." *Id.* at 488.

And no other court of appeals, the Second Circuit explained, disagreed with that "common result." *Id.* Like Petitioner here, the plaintiff in *Beaulieu* pointed to the Seventh Circuit's decision in *Board of Regents of the University of Wisconsin System,* the Ninth Circuit's decision in *Embury*, and the Tenth Circuit's decision in *Estes*. *Id.* Those decisions, according to the *Beaulieu* plaintiff, held that removal to federal court also waives a State's general sovereign immunity. *Id.*

But the Second Circuit rejected that argument as a "misreading of the law of the relevant circuits." *Id.* None of those circuits, the Second Circuit explained, had held that removal to federal court "waive[s] the state's general sovereign immunity." *Id.* Instead, each of those courts simply applied the "generally accepted" rule that a State's removal of a case to federal court waives its Eleventh Amendment immunity from federal jurisdiction. *Id.*

Here's the bottom line: the decision below does not conflict with the decision of any other court of appeals. No circuit to consider the question has held that a State waives its sovereign immunity from liability that it enjoys in state court by removing a case to federal court. Unless and until a circuit reaches the opposite conclusion, this Court need not intervene simply because the circuits have "emphasiz[ed] different points in justifying their arrival at a common result." *Beaulieu*, 807 F.3d at

488. Because there is no genuine conflict between the circuits, the petition should be denied.

III. The decision below is correct.

Certiorari review is also unwarranted because the decision below is plainly correct.

The Eleventh Circuit recognized that, under *Lapides*, the State defendants had waived their Eleventh Amendment immunity from suit in federal court. Pet. App. at 5a–6a ("[N]o one contests that the Board waived its Eleventh Amendment immunity from suit by removing the case to federal court."). But "nothing in *Lapides*," the court emphasized, "suggests that a state waives any defense it would have enjoyed in state court—including immunity from liability for particular claims." *Id.* at 5a. And so removing the case to federal court "did not affect" the State defendants' "immunity from liability for monetary damages." *Id.* at 5a–6a & n.4.

That decision—like the decisions of every other circuit to consider the question—aligns with this Court's precedents and is both logical and fair.

The Eleventh Amendment prohibits the "Judicial power of the United States" from reaching "any suit" commenced against a State by citizens of another State or by the State's own citizens. *Lapides*, 535 U.S. at 618 (quoting *Hans v. Louisiana*, 134 U.S. 1, 11 (1890)); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004). The Eleventh Amendment "withdraw[s]" federal jurisdiction, making "an unconsenting State … immune from [private] suits brought in federal courts." *Puerto Rico Aqueduct &*

Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993) (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). And so "[a]bsent waiver, neither a State nor agencies acting under its control may 'be subject to suit in federal court.'" *Id.* (quoting *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 480 (1987) (plurality opinion)).

In *Lapides*, this Court considered whether a State's Eleventh Amendment immunity "from suit in federal court" is waived by the "State's act of removing a lawsuit from state court to federal court." 535 U.S. at 616. This Court held that waiver occurs in those circumstances, explaining that it would be "anomalous or inconsistent" for a State to invoke the federal courts' jurisdiction while simultaneously denying that the "Judicial power of the United States" extends to the suit. *Id.* at 619. That holding stemmed largely from concerns of fairness: Allowing States to retain their Eleventh Amendment immunity from suit after removal would grant them "unfair tactical advantages," create "seriously unfair results," and foster "problems of inconsistency and unfairness." *Id.* at 620–22.

But the States' Eleventh Amendment immunity from suit in federal court is not the same as—or coextensive with—their general sovereign immunity. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019) ("The 'sovereign immunity of the States' … 'neither derives from, nor is limited by, the terms of the Eleventh Amendment.'" (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999))). The Eleventh Amendment neither "define[s] the scope of the States' sovereign immunity" nor "explicitly

memorializ[es] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002); *see also id.* at 754 ("[T]he sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment."); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997) (recognizing a "broader concept of immunity, implicit in the Constitution," which is "evidenc[ed] and exemplif[ied]" in the Eleventh Amendment). As this Court has clarified, Eleventh Amendment immunity is just "one particular exemplification" of the States' sovereign immunity. *Fed. Maritime Comm'n*, 535 U.S. at 753.

Indeed, the States' sovereign immunity predates the Eleventh Amendment and is broader than the Amendment's text. *See id.* at 752; *Alden*, 527 U.S. at 728 (noting the "settled doctrinal understanding" that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself").

The States' sovereign immunity derives from common law. *Alden*, 527 U.S. at 715–27. At the founding, "the States considered themselves fully sovereign nations," *Hyatt*, 139 S. Ct. at 1493, and "they entered the Union 'with their sovereignty intact,'" *Fed. Maritime Comm'n*, 535 U.S. at 751 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)); *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011); *see also Alden*, 527 U.S. at 713 ("[T]he founding document 'specifically recognizes the States as sovereign

entities.'" (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996))).

"An integral component" of the States' sovereignty was their "immunity from private suits," *Hyatt*, 139 S. Ct. at 1493, which was considered "central to [their] sovereign dignity," *Alden*, 527 U.S. at 715. "The founding generation," this Court has explained, "thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Id.* at 748 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)); *see also Hans*, 134 U.S. at 16 ("The suability of a state, without its consent, was a thing unknown to the law."). The States' traditional sovereign immunity was preserved in the constitutional design. *See Hyatt*, 139 S. Ct. at 1496 ("[T]he Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." (quoting *Alden*, 527 U.S. at 724)).

The States' broader sovereign immunity does not just render the States immune from suit in federal court but also protects them from substantive liability. *See Fed. Maritime Comm'n*, 535 U.S. at 766 ("Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability."). That understanding accords with the "residuary and inviolable sovereignty" that the States retained after independence. *Alden*, 527 U.S. at 715 (citing The Federalist No. 39, at 245); *see also Hyatt*, 139 S. Ct. at 1493. As this Court has explained,

"regardless of the forum," a private suit against a nonconsenting State "present[s] 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. at 505).

As the Eleventh Circuit recognized, a State may invoke its underlying state sovereign immunity even if it has waived through removal to federal court its Eleventh Amendment immunity from the jurisdiction of the federal courts. Pet. App. at 5a–6a.

That decision (and the decisions of every court of appeals to decide the question) accords with *Lapides*. The Court there was concerned that permitting States to regain in federal court an immunity from suit that they had waived in state court could allow them to "achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. Not so here. A State gains no "unfair tactical advantage" by asserting in federal court the same sovereign immunity defense that it could assert in state court. And "nothing in *Lapides* suggests that a state waives any defense it would have enjoyed in state court—including immunity from liability for particular claims." Pet. App. 5a. As a result, "neither logic nor precedent" supports the conclusion "that a state waives its general state sovereign immunity by removing an action from state court to federal court." *Beaulieu*, 807 F.3d at 486.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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