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

REPLY BRIEF OF PETITIONER

MARK G. MONTIEL, SR.
COUNSEL OF RECORD
MARK G. MONTIEL, P.C.
6752 TAYLOR CIRCLE
MONTGOMERY, AL 36117
(334) 356-1899
MMONTIEL@MGMPC.NET

JACQUELYN H. WESSON
WESSON & WESSON, LLC
212 MAIN STREET
WARRIOR, AL 35180
(205) 590-1128

MARK G. MONTIEL, JR.
MONTIEL HODGE, LLC
643 MAGAZINE ST. STE 405
NEW ORLEANS, LA 70130
(504) 323-5885

OCTOBER 18, 2019 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

REPLY BRIEF OF PETITIONER

Ignoring innumerable decisions by the lower federal courts that have acknowledged and addressed the significant split among the circuit courts of appeals interpreting *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), the Respondents now contend that it is based on an "urban myth." (BIO.5)[1]. Incredibly, the Respondents argue that there is no split among the courts of appeal that needs to be resolved by the Court, rejecting over seventeen years of jurisprudence, including the decision by the Eleventh Circuit in *Stroud v. McIntosh*, 722 F.3d 1294 (11th Cir. 2013).

Additionally, for the very first time, the Respondents now incorrectly contend that this case is moot. However, the opinion by the Eleventh Circuit does not remotely moot the petition for certiorari. The Petitioner sought monetary damages and injunctive relief, and if successful on appeal, the Petitioner could recover on her claims for monetary damages against the Respondents, should the Court determine that Eleventh Amendment immunity was waived by removal. The Respondents have failed to meet the heavy burden for establishing mootness. As the Court recently held in *Mission Product Holdings v. Tempnology, LLC*, if "there is any chance of money changing hands," the suit remains live. 139 S.Ct. 1652, 1660 (2019).

---

[1] "BIO" refers to the Respondent's Brief in Opposition. "Pet. App." refers to the appendix to the Petition.

This case is not moot and the Court should grant certiorari to resolve the significant split among the courts of appeal on the extent and scope of the waiver of immunity under the Court's decision in *Lapides*.

I. THIS CASE IS NOT MOOT.

In their response requesting that certiorari be denied, the Respondents for the first time contend that this case is moot. This case is not moot.

Page originally brought her case in state court. (Pet. App. 16a). In her original complaint, later amended in federal court after removal by the defendants, Page alleged violations of state and federal law against the Board of Trustees and against the individual defendants in their individual and official capacities. (Pet. App. 61a-82a). Page requested monetary damages and injunctive relief against all of the defendants—specifically, for her lost tuition and for reinstatement in the Nursing Anesthesia program. (Pet. App. 3a-5a). All the defendants consented to the filing of the notice of removal to federal court and voluntarily invoked the jurisdiction of the federal court. (Pet. App. 83a-86a). After removal, the defendants moved to dismiss the amended complaint, asserting that the defendants were entitled to Eleventh Amendment immunity, sovereign immunity, state agent immunity, and qualified immunity, and in the alternative, the defendants argued that the amended complaint failed to state a federal claim. (Pet. App. 12a). Page responded to the motion to dismiss and contended that the defendants had waived their Eleventh Amendment immunity by removing the case from state to federal court. (Pet. App. 5a-6a).

The district court dismissed a Large Part of the Plaintiff's Case For Lack of Jurisdiction on Eleventh Immunity Grounds. (Pet. App. 41a). The Eleventh Circuit affirmed the district court's dismissal and held that under its interpretation of *Lapides*, removal did not affect the defendants' immunity from liability for monetary damages. (Pet. App. 4a-6a; 10a).

Generally, the burden of demonstrating mootness lies with defendant. *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 190 (2000). Under well-established law, the Court may dismiss a case for mootness only if "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Service Employees*, 567 U.S. 298 (2012) (slip op., at 7). Here, Page sued the Respondents for both monetary damages and injunctive relief, specifically, for her lost tuition and for reinstatement in the Nursing Anesthesia program. (Pet. App. 3a-5a). Claims for monetary damages, "if at all plausible, ensure a live controversy." *Mission Product Holdings, Inc. v. Tempnology, LLC.*, 139 S.Ct at 1660. In evaluating claims for mootness, "nothing so shows a continuing stake in a dispute's outcome as a demand for dollars and cents." *Id.* A "case is not moot so long as a claim for monetary damages survives." *See* 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p.2 (3d ed. 2008) (Wright & Miller). "Ultimate recovery on that demand may be uncertain or even unlikely for any number of reasons;" however, "[I]f there is any chance of money changing hands [the plaintiff's] suit remains live." *Mission Product Holdings, Inc.*, 139 S.Ct at 1660.

Page asserted federal and state claims requesting compensation for monetary damages caused by the actions of the defendants. (Pet. App. 19a-20a). Neither the district court nor the court of appeals reached the merits of Page's claims for monetary relief against the Board of Trustees or individual defendants in their official capacities due to a lack of jurisdiction and immunity under the Eleventh Amendment. (Pet. App. 4a-6a; 41a). Page seeks this Court's review of the dismissal for lack of jurisdiction under the Eleventh Amendment. Should the Court determine that a waiver of Eleventh Amendment immunity occurred upon removal, Page's claims for monetary relief against the Board of Trustees and individual defendants in their official capacities would be reinstated. Page would also move forward with her remaining claims. Page may face an uncertain or difficult path to monetary recovery, but the mere possibility that money *could* change hands ensures that her claims remain live and viable. Page was damaged monetarily by the defendants' various unlawful actions, including the use of an evaluation performed on another student to dismiss her from the Nursing Anesthesia program, without any notice whatsoever, and pursuant to policies and customs that caused her dismissal from school without any pre-deprivation process. (Pet. App. 4a-6a; 10a). Page's plausible claims for monetary relief ensure a live controversy.

Respondents contend that the case is moot "because Petitioner, in the wake of the Eleventh Circuit's decision, has no viable claims remaining." (BIO.3-4). Respondents ignore the Court's decisions in *Mission Product Holdings, Inc.* and in *Chafin*. The court of appeals did not reach the merits of the

Petitioner's claims, most of which had been dismissed without prejudice by the district court under Eleventh Amendment immunity. (Pet. App. 4a-6a; 41a). None of Page's federal or state claims against the Board of Trustees or the individual defendants in their official capacities for the claims for monetary damages were resolved on the merits by the district court. (Pet. App. 4a-6a; 41a). Instead, the federal claims were dismissed without prejudice for lack of jurisdiction based on the Respondents' assertion of immunity under the Eleventh Amendment. (Pet. App. 4a-6a; 41a). Additionally, the state law claims were dismissed by the district court without prejudice because the district court declined to exercise supplemental jurisdiction over those claims. (Pet. App. 40a). Therefore, if Page prevails on her arguments that Eleventh Amendment immunity was in fact waived by removal under *Lapides*, nearly the entire district court order dismissing Page's claims for monetary damages will be set aside. As a result, Page's claims remain viable and are not moot.

Finally, the Respondents argument that the *Lapides* decision "confirms the conclusion that this case no longer presents a live controversy" is misplaced and based on a false premise. (BIO.4). In *Lapides*, the district court determined that Eleventh Amendment immunity was waived by the state's removal from state court, and held that the federal court had jurisdiction to resolve each of Page's claims. *Lapides*, at 616. The district court, thereafter, dismissed each of Page's federal claims on the merits. *Id.*

Here, the district court and court of appeals each determined that there was no waiver of Eleventh Amendment immunity by removal and held that the

federal court lacked jurisdiction to resolve specific federal claims against the Board of Trustees and individual defendants in their official capacities involving monetary damages. (Pet. App. 4a-6a; 41a). Page has appealed this specific issue as an erroneous interpretation of this Court's *Lapides* decision.

This Court's power to review a court of appeals decision to dismiss for lack of jurisdiction is well established. "There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely." *Nixon v. Fitzgerald*, 457 U.S. 731, 778 n. 23 (1982) citing (*Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)). If this court lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court. *Nixon v. Fitzgerald*, 457 U.S. 731, 778 n. 23 (1982).

Petitioner's request for monetary damages alone nearly guarantees that the instant case is not moot. The lower courts failed to reach the merits of this case, dismissing most of the Petitioner's claims on Eleventh Amendment grounds, unlike *Lapides*. As such, *Lapides* is entirely distinguishable and inapplicable to the facts of this case with regard to mootness. Finally, the existence of a dismissal from the lower courts is not evidence of mootness. Judicial review of a decision to dismiss for lack of jurisdiction is appropriate for review by the Court. Page's claims remain live and her claims are clearly not moot.

II. THERE IS A CLEAR AND SIGNIFICANT SPLIT AMONG THE COURTS OF APPEAL INTERPRETING *LAPIDES*.

The Respondents boldly and incorrectly assert that this "case implicates no circuit split requiring this Court's review." (BIO.5). Respondents outlandishly suggest that an "urban myth has since arisen that the circuits are split over the question that *Lapides* left unresolved." (BIO.5). However, the courts of appeals including the Eleventh Circuit, see it differently than Respondents. As articulated by the Eleventh Circuit in *Stroud v. McIntosh*, the court of appeals are divided over the meaning of *Lapides'* second limitation—those cases in which the state removed the case to federal court but did not relinquish its sovereign immunity in its own courts. *Stroud v. McIntosh*, 722 F.3d 1294 (11th Cir. 2013).[2] The Eleventh Circuit in *Stroud* succinctly explained the circuit split as follows:

> But the circuits divide over the meaning of *Lapides's* second limitation—that it does not control cases in which the state has not relinquished its sovereign immunity in its own courts against the claim in question. On one hand, three circuits (the First and Fourth Circuits and the D.C. Circuit) distinguish *Lapides* on that basis, holding that a state did not waive sovereign immunity by removing a case because, unlike Georgia in *Lapides*, the state had not waived its immunity in its own courts. *See Bergemann*, 665 F.3d at 341; *Stewart*, 393 F.3d at 488-89;

---

[2] Counsel of Record for Respondents in this case before the Court also served as appellate counsel for the defendants in the proceedings before the Eleventh Circuit in *Stroud v. McIntosh*.

Watters v. Washington Metro. Area Transit Auth., 295 F.3d 36, 42 n. 13 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 922, 123 S.Ct. 1574, 155 L.Ed.2d 313 (2003). On the other hand, three circuits (the Seventh, Ninth, and Tenth) read *Lapides's* broad reasoning to establish the general rule that a state's removal to federal court constitutes a waiver of immunity, regardless of what a state waived in its own courts. *See Bd. of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 461 (7th Cir. 2011); *Embury*, 361 F.3d at 564-65; *Estes*, 302 F.3d at 1204-06.

Two circuits (the Third and Fifth) occupy something of a middle ground. *See Lombardo*, 540 F.3d 190; *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236 (5th Cir. 2005), *cert. denied sub nom. Texas v. Meyers*, 550 U.S. 917, 127 S.Ct. 2126, 167 L.Ed.2d 862 (2007). These courts conclude that *Lapides*'s reasoning informs the answer to the question of whether a state has waived its immunity-based objection to suit in a federal forum—and only that question. But sovereign immunity, they say, encompasses more than this narrow immunity from federal jurisdiction; specifically, a state that waives its forum-based immunity may still have immunity from liability for particular claims. *See Lombardo*, 540 F.3d at 198-200; *Meyers*, 410 F.3d at 252-55. That underlying immunity from liability is unaffected by the state's voluntary invocation of the federal forum. *See Lombardo*, 540 F.3d at 200; *Meyers*, 410 F.3d at 255.

Stroud, 722 F.3d at 1300-1301.

In *Stroud*, the Eleventh Circuit chose to follow the approach taken by the Third and Fifth Circuits. *Id.* at 1301. The Eleventh Circuit held that sovereign immunity was a divisible concept and although the state defendants' removal to federal court waived its immunity-based objection to a federal forum, the state defendants retained its immunity from liability for a violation of the ADEA. *Id.* at 1301. The Eleventh Circuit followed its own precedent under *Stroud* in this appeal; therefore, the court of appeals rejected the Page's argument that Eleventh Amendment immunity was waived by removal. A different approach has been taken by several other circuit courts of appeal.

The court of appeals split is demonstrated by examining other cases decided subsequent to *Lapides*. Two federal courts of appeals have squarely addressed the waiver of immunity by removal issue and decided that a state waives its immunity from suit based on a federal-law claim by removing the case from state to federal court. *See Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004) ("We conclude that the rule in *Lapides* applies to federal claims as well as to state claims. . . . Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original complaint, or to state law claims only."); *Estes v. Wyoming Dep't. of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002) (explaining that by removing an ADA claim to federal court the state waived its sovereign immunity even if it removed the case solely "to challenge the jurisdiction of the federal forum.").

One federal court of appeals, *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005), has taken a

completely opposite approach from the Seventh and Ninth Circuits. In *Stewart v. North Carolina*, the state of North Carolina had not waived immunity from suit in its own courts. The Fourth Circuit found it improper to rely "exclusively" on *Lapides*, reasoning that the Court in *Lapides* reserved judgment as to whether removal constituted waiver outside its exact situation. *Id.* at 490. The *Stewart* court found that sovereign immunity was not waived by removal to federal court and attempted to explain why *Lapides* fell under the principle but *Stewart* did not. The Fourth Circuit found that the State's conduct in *Lapides* fell under the general rule requiring waiver of immunity because the state of Georgia sought to achieve an unfair tactical advantage by regaining through removal the immunity it had abandoned previously; whereas, North Carolina in *Stewart* merely sought to "employ removal in the same manner as any other defendant facing federal claims." *Id.* Obviously, the Fourth Circuit approach is in clear conflict with the approach of the Seventh and Ninth Circuits.

CONCLUSION

Petitioner's case is not moot and the circuits remain starkly 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 this 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.

For the foregoing reasons, the Court should grant the petition for Writ of Certiorari.

Respectfully submitted,

MARK G. MONTIEL, SR.
COUNSEL OF RECORD
MARK G. MONTIEL, P.C.
6752 TAYLOR CIRCLE
MONTGOMERY, AL 36117
(334) 356-1899
MMONTIEL@MGMPC.NET

JACQUELYN H. WESSON
WESSON & WESSON, LLC
212 MAIN STREET
WARRIOR, AL 35180
(205) 590-1128

MARK G. MONTIEL, JR.
MONTIEL HODGE, LLC
643 MAGAZINE ST. STE 405
NEW ORLEANS, LA 70130
(504) 323-5885

COUNSEL FOR PETITIONER

OCTOBER 18, 2019