No.

In The
Supreme Court of the United States

ANTONIO PASSARO, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ET AL.,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Lapides v. Board of Regents of University System of Georgia*, this Court held that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter ([t]here of state law) in a federal forum." 535 U.S. 613, 624 (2002). But the Court reserved deciding "the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-618. In the 17 years since *Lapides*, the courts of appeals have divided over that recurring issue—presented squarely in this case.

The question presented is:

Whether, in the context of a federal claim brought in state court where the state would enjoy sovereign immunity, a state's voluntary removal to federal court waives sovereign immunity.

PARTIES TO THE PROCEEDINGS

Petitioner Antonio Passaro, Jr. was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Commonwealth of Virginia and Virginia Department of State Police were defendants in the district court and appellees in the court of appeals.

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INTRODUCTION

In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), an individual brought suit against the State of Georgia in state court alleging violations of federal and state law. The State, in turn, voluntarily removed the suit to federal court and invoked Eleventh Amendment immunity. Noting that the state-law claims could have proceeded in state court, this Court held that "the State's act of removing a lawsuit from state court to federal court waives this immunity." *Id.* at 616. But the Court reserved deciding "the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-618.

In the 17 years since *Lapides*, as the court of appeals expressly acknowledged in this case, the circuits have splintered three ways in answering that important and recurring question. This Petition presents a clean vehicle to resolve the well-developed conflict. Neither states nor the individuals seeking relief against them (like Petitioner) should be subject to differing outcomes by the happenstance of the circuit in which a particular state is located. This Court's intervention is both warranted and overdue.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 935 F.3d 243. The district court's opinion (App., *infra*, 22a-33a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 16, 2019. Passaro timely filed a petition for rehearing en banc, which was denied on September 16, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Eleventh Amendment to the U.S. Constitution provides:

> 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.

U.S. CONST. amend XI.

STATEMENT OF THE CASE

A. Legal Framework

1. "[T]he Constitution *** preserve[d] the States' traditional immunity from private suits." *Alden v. Maine*, 527 U.S. 706, 724 (1999). In *Chisholm v. Georgia*, 2 U.S. 419 (2 Dall.) (1793), however, this Court held "that a State was liable to suit by a citizen of another State or of a foreign country." *Edelman v. Jordan*, 415 U.S. 651, 662 (1974). The Eleventh Amendment soon after repudiated *Chisholm*, thereby "confirm[ing], rather than establish[ing], sovereign immunity as a constitutional principle." *Alden*, 527 U.S. at 728-729. Consistent with that understanding of the Eleventh Amendment's purpose, this Court held in *Hans v. Louisiana*, 134 U.S. 1 (1890), that sovereign

immunity extends to suits in federal court not only by citizens of other states, but also a state's own citizens. *Lapides*, 535 U.S. at 616.

A state's sovereign immunity "is not absolute." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). "Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment," *id.*, *i.e.*, "to remedy and to deter violation of rights guaranteed thereunder," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). In addition, "a State may waive its sovereign immunity." *College Sav. Bank*, 527 U.S. at 670.

2. In *Lapides*, this Court resolved a disagreement among the courts of appeals regarding the circumstances under which a state's removal of a case from state court to federal court constitutes a waiver of sovereign immunity.

The Court recounted that "more than a century ago [it] indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity," and that it "subsequently held *** that a State waives any immunity *** respecting the adjudication of a claim that it voluntarily files in federal court." 535 U.S. at 619 (second ellipsis in original) (internal quotation marks omitted). The Court also explained that it "has made clear in general that where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh

Amendment." *Id.* (internal quotation marks omitted). After all,

> [i]t would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand.

Id.

"[S]ee[ing] no reason to abandon the general principle[s]" just stated, 535 U.S. at 620, the Court unanimously held "that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum," *id.* at 624. Because the context in *Lapides* involved "state-law claims, in respect to which the State ha[d] explicitly waived immunity from state-court proceedings," the Court did not address the effect of "a valid federal claim against the State" or "the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-618.

B. Factual And Procedural History

1. Petitioner Antonio Passaro, Jr. is a former Virginia State Police special agent. At the time he joined in 1997, and throughout the relevant period, the Virginia State Police Department made numerous representations about its commitment to compliance, subject to enforcement actions, with federal and state

anti-discrimination laws—including the Americans with Disabilities Act ("ADA"). For example, the Department provided employees a handbook stating that the Commonwealth is "'committed to providing equal employment opportunity' regardless of 'disability' and 'complies with federal and state equal employment opportunity laws.'" App., *infra*, 9a. And the Commonwealth put up a poster in its workplaces explaining to employees like Passaro that "'if you feel you have been discriminated against,' the EEOC is one of 'the resources available to assist you.'" *Id.*

In 2008, Passaro was transferred to a High Tech Crimes Unit, where he investigated child-pornography cases. That placement required Passaro to view graphic and highly disturbing pictures and videos of abuse on a regular basis. Four years later, "a doctor diagnosed Passaro with post-traumatic stress disorder arising from his frequent exposure to images of child pornography at work." App., *infra*, 4a. Passaro sought, but was denied, a transfer from the High Tech Crimes Unit. *See id.* at 3a-4a.

In 2013, Passaro learned of a recommendation that he be demoted from special agent to trooper. Two days later, consistent with the Department guidance referenced above, he filed a complaint with the Equal Employment Opportunity Commission. Passaro asserted, *inter alia*, a failure to provide a reasonable accommodation for his post-traumatic stress disorder. Passaro was fired the next month. App., *infra*, 4a.

2. Passaro brought suit against Respondents Commonwealth of Virginia and Virginia State Department of Police (collectively, "the Commonwealth") in Virginia state court under Title I

of the ADA and Title VII of the Civil Rights Act of 1964. The Commonwealth voluntarily removed the case to federal district court. App., *infra*, 5a.

The district court dismissed the ADA claim. It accepted the Commonwealth's "conten[tion] that [Passaro's] suit *** violate[s] the state's sovereign immunity, which is preserved by the Eleventh Amendment." App., *infra*, 25a.

The district court noted the allegations that the Virginia State Police "holds itself out as an 'EEO Employer' because the Virginia Department of Human Resources Management (DHRM) prohibits discrimination against state government employees, including disability discrimination," and "that DHRM publishes handbooks and displays posters that advise state employees and the public of their rights under the ADA." App., *infra*, 26a. But the district court determined that such statements by the Commonwealth did not constitute consent to be sued. *Id.* at 27a.

The district court then rejected Passaro's argument that, under *Lapides*, the Commonwealth had waived sovereign immunity by removing the case to federal court. Applying the Fourth Circuit's decision in *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005), the district court understood that *Lapides*'s "holding was limited 'to the context of state-law claims, *in respect to which the State has explicitly waived immunity from state-court proceedings*.'" App., *infra*, 27a (quoting 535 U.S. at 617). And because "the commonwealth of Virginia has not waived its Eleventh Amendment immunity from ADA litigation in state courts," the district court found that "*Lapides* does not

apply here, and [the Commonwealth] can claim Eleventh Amendment Immunity from the ADA claims." *Id.* at 28a-29a.[1]

3. The Fourth Circuit affirmed the dismissal on sovereign immunity grounds. As a threshold matter, the Fourth Circuit found *Stewart*'s holding—"that where a state retains its sovereign immunity from suit in state court, it does not lose that immunity by removing the case to federal court"—to "foreclose[]" Passaro's waiver-by-removal argument "unless [he] can also show that the Commonwealth has waived its immunity from the Title I claim in state court." App., *infra*, 7a-8a. In adhering to that legal test, the Fourth Circuit recognized that "other courts of appeals have split on whether to adopt *Stewart*'s holding." *Id.* at 8a.

The Fourth Circuit next held that the Commonwealth had not waived its immunity from claims brought under Title I of the ADA. In the Fourth Circuit's view, it was not enough that the Commonwealth had made various statements "to the effect that it intends to abide by its obligations under Title I of the ADA." App., *infra*, 8a-9a (listing as example "employee handbook stat[ing] that Virginia is 'committed to providing equal employment opportunity' regardless of 'disability' and 'complies

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[1] Passaro's Title VII claims are currently before the district court, having been initially barred on other (preclusion) grounds but then resurrected by the Fourth Circuit. *See* App., *infra*, 11a-20a. Although the district court recently stayed litigation of those claims pending this Petition, their disposition is wholly independent of the ADA claims and the immunity issue presented to this Court.

with federal and state equal employment opportunity laws'").

The Fourth Circuit denied rehearing en banc. App., *infra*, 34a.

REASONS FOR GRANTING THE WRIT

In the decision below, the Fourth Circuit clung to an overly narrow view of waiver—permitting the Commonwealth to seek dismissal as immune immediately upon removal—on the question that this Court reserved in *Lapides*: whether a state's voluntary removal of a suit to federal court waives sovereign immunity if the state retained immunity in state court. In holding categorically that such removal bars Passaro's ADA claim, the Fourth Circuit acknowledged that (i) other courts of appeals understand *Lapides* to require waiver regardless of the circumstances of the voluntary removal, and (ii) yet other courts of appeals follow a "hybrid approach" in which voluntary removal waives a state's immunity from suit, but not immunity from liability. The development of such widespread and varied disagreement in the 17 years since *Lapides*—implicating up to ten courts of appeals and three-quarters of the states—demonstrates the need for this Court's intervention.

Review makes particular sense in this case because the circuit conflict centers on the Fourth Circuit's decision in *Stewart* adopting the no-waiver view. The two courts of appeals aligning themselves with the Fourth Circuit deem *Stewart* to set forth the most persuasive reading of *Lapides*; the three courts of appeals finding waiver of state sovereign immunity—full stop—disagree with *Stewart*; and even

the four courts of appeals that have invented a "hybrid approach" that permits states to retain immunity from liability (functionally no different from immunity from suit) fault *Stewart* for misconstruing the principles animating *Lapides*.

That most courts of appeals have rejected the Fourth Circuit's approach is unsurprising. The reasons *Lapides* found the voluntary removal at issue there to constitute waiver of sovereign immunity apply regardless of whether a state previously waived immunity in the initial state-court proceeding. Indeed, contrary to the Fourth Circuit's focus on whether the state effected removal to gain an unfair advantage, this Court was explicit that clear jurisdictional rules cannot be predicated on a state's removal motives. The decision below cannot be squared with the reasoning of *Lapides*, and both states and individual plaintiffs alike lack clarity as to when a state's voluntary removal to federal court waives sovereign immunity. This Court should grant certiorari.

I. THE COURTS OF APPEALS ARE IN OPEN CONFLICT OVER THE SCOPE OF THE WAIVER-BY-REMOVAL RULE

1. In the wake of *Lapides*, "[t]he contrast between [its] narrow holding and its broad reasoning *** sparked a debate in [the] circuits." *Stroud v. McIntosh*, 722 F.3d 1294, 1300 (11th Cir. 2013). That debate has failed to produce consensus. To the contrary, several courts of appeals—including the Fourth Circuit in this case, App., *infra*, 8a—have acknowledged that "the challenge of interpreting *Lapides* has divided the courts of appeals."

Bergemann v. Rhode Island Dep't of Envtl. Mgmt., 665 F.3d 336, 342 (1st Cir. 2011); *see Stroud*, 722 F.3d at 1300; *Lombardo v. Pennsylvania Dep't of Pub. Welfare*, 540 F.3d 190, 197 n.5 (3d Cir. 2008).

Three entrenched camps have emerged. As summarized by the Fourth Circuit below:

> In *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005), we held that where a state retains its sovereign immunity from suit in state court, it does not lose that immunity by removing the case to federal court. *Id.* at 490. As Passaro points out, the other courts of appeals have split on whether to adopt *Stewart*'s holding: some have followed *Stewart*, others have rejected it, and still others have adopted a supposed "middle ground" (although this middle ground is hard to distinguish, in its practical effect, from our approach in *Stewart*).

App., *infra*, 7a-8a.

More specifically, the First, Fourth, and D.C. Circuits "have concluded that removal does not waive a state's sovereign immunity to a claim unless the state previously had waived its immunity to such a claim in state court proceedings." *Bergemann*, 665 F.3d at 342 (1st Cir.) (citing *Stewart*, 393 F.3d at 490 (4th Cir.); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002)).

At the other end of the spectrum, the Seventh, Ninth, and Tenth Circuits "take the position that, regardless of the circumstances, removal always waives immunity." *Bergemann*, 665 F.3d at 342 (citing

Board of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc., 653 F.3d 448, 461 (7th Cir. 2011); *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004); *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002)).

Meanwhile, the Second, Third, Fifth, and Eleventh Circuits "have charted a middle course, holding that removal of federal claims generally does not waive immunity from payment of money damages but does waive immunity from suit." *Bergemann*, 665 F.3d at 342 (citing *Lombardo*, 540 F.3d at 198-200 (3d Cir.); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 252-255 (5th Cir. 2005)); *see Beaulieu v. Vermont*, 807 F.3d 478, 486-490 (2d Cir. 2015) (surveying case law and adopting hybrid approach); *Stroud*, 722 F.3d at 1300-1301 (11th Cir.) (providing same breakdown and "agree[ing] with the conclusions of the Third and Fifth Circuits"). But in practice, for reasons discussed below (pp. 12-13, 18-20, *infra*), that course likewise leads to a dismissal on immunity grounds.

2. That this case squarely presents the well-developed conflict among the courts of appeals is beyond dispute. Comparing and contrasting the decision below, the Fifth Circuit's decision in *Meyers*, and the Tenth Circuit's decision in *Estes* helps distill the concrete and direct nature of the conflict.

a. In this case, the Fourth Circuit—confronting an ADA claim—recognized at the outset that "state sovereign immunity bars all claims by private citizens against state governments and their agencies, except where Congress has validly abrogated that immunity or the state has waived it." App., *infra*, 7a. Congressional abrogation was not an available theory

for Passaro because in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), this Court held that "Congress exceeded its authority" in attempting "to abrogate state sovereign immunity from lawsuits under Title I of the ADA." App., *infra*, 7a.

Turning to waiver, the Fourth Circuit recounted that it had held in *Stewart* that, to come under *Lapides*'s waiver-by-removal rule, a plaintiff must "show that the [state] has waived its immunity *** in state court." App., *infra,* 7a. The Fourth Circuit then surveyed the circuit conflict and remarked that "[n]othing in these [conflicting] out-of-circuit cases makes us inclined to revisit *Stewart*; in any event, we are powerless to overturn *Stewart*." *Id.* at 8a. It thus dismissed Passaro's claim as barred by sovereign immunity. The Fourth Circuit's subsequent denial of Passaro's petition for rehearing en banc, *id.* at 34a, confirms that it has no intention of reexamining *Stewart*.

b. In setting forth its hybrid approach—shared by the Second, Third, and Eleventh Circuits—the Fifth Circuit held that *Stewart* "is not persuasive because its rationale misconstrues important principles animating *Lapides*." *Meyers*, 410 F.3d at 249. In the Fifth Circuit's view, *Lapides*'s reasoning requires waiver of state sovereign immunity from *suit* upon voluntarily removal, but still permits assertion of sovereign immunity from *liability* in the federal forum if applicable in state court. Thus, as applied to the ADA claim at issue there, "when 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." *Id.* at 255. But

"[w]hether Texas has retained a separate immunity from liability" was a different issue. *Id.*

Distinguishing between immunity from suit and immunity from liability, however, makes no functional difference—and, as explained later (pp. 18-20, *infra*), makes no analytical sense in the state sovereign immunity context. In such cases, the state "*remains* immune *** notwithstanding its removal of the case" to federal court. *Stroud*, 722 F.3d at 1303 (emphasis added); *see Lombardo*, 540 F.3d at 200 (remanding with instructions to dismiss based on liability immunity).

That is why the Fourth Circuit characterized the "middle ground" approach as "hard to distinguish, in its practical effect, from [its] approach in *Stewart*." App., *infra*, 8a. Despite advancing a different rationale, the Second, Third, Fifth, and Eleventh Circuits—like the First, Fourth, and D.C. Circuits—would immediately dismiss an ADA claim upon removal on the basis of state sovereign immunity.

c. *Estes*, by contrast, demonstrates that Passaro's ADA claim would have survived in the Tenth (as well as the Seventh and Ninth) Circuit. As in this case, the Tenth Circuit was confronted with an ADA claim originally brought in state court, where the state had preserved its sovereign immunity. As in this case, the state voluntarily removed to federal court. And as in this case, because this Court had declared Congress's abrogation under the ADA invalid, the Tenth Circuit "proceed[ed] to consider whether [the state's] removal of the case to federal court constitutes a waiver of its sovereign immunity." 302 F.3d at 1203.

Unlike in this case, however, the Tenth Circuit concluded that the state "ha[d] waived its sovereign immunity for the ADA claim." 302 F.3d at 1204. That conclusion, the Tenth Circuit explained, followed from *Lapides*'s reasoning and "[t]he jurisprudence in this area," which "'stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.'" *Id.* at 1206 (quoting *College Sav. Bank*, 527 U.S. at 681 n.3). Accordingly, the Tenth Circuit remanded for consideration of the ADA claim on the merits. *See id.* at 1206-1207.

3. Although one court of appeals (the Second Circuit) has attempted to explain away the circuit conflict—as the Commonwealth presumably will attempt to do in this case—the conflict is real and persistent.

At a minimum, the Second Circuit recognizes that "there has *** been some confusion in the Circuit Courts as to the meaning of *Lapides*, and its impact on cases in which a state that has not previously waived its general immunity to a private action voluntarily removes the action to federal court." *Beaulieu*, 807 F.3d at 488. Although the Second Circuit asserts that the Seventh, Ninth, and Tenth Circuit decisions discussed above do not contribute to the circuit conflict, *see id.* at 488-490, courts of appeals have since continued to acknowledge the relevance of those decisions—including while citing *Beaulieu*. *See Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1019 & n.11 (9th Cir. 2016) ("[C]ourts are divided 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.").

Indeed, just days ago, the Ninth Circuit noted that the "circuits' approaches to interpreting *Lapides* are not uniform" and then confirmed its own position: "A State defendant that removes a case to federal court waives its immunity from suit on all federal-law claims brought by the plaintiff." *Walden v. Nevada*, --- F.3d ---, 2019 WL 5199557, at *4 n.2, *5 (9th Cir. Oct. 16, 2019). Plainly, the courts of appeals continue to believe that a circuit conflict remains and, more importantly, reach conflicting results on identical facts.

* * *

In sum, under the decisions of seven courts of appeals, 21 states and the District of Columbia enjoy immunity even when voluntarily invoking federal court jurisdiction via removal. Meanwhile, under the decisions of three other courts of appeals, 18 states do not. Such disparate treatment cries out for this Court's review.

II. THE FOURTH CIRCUIT'S DECISION IS INCOMPATIBLE WITH THIS COURT'S REASONING IN *LAPIDES*

1. The rule the Fourth Circuit adopted in *Stewart* and applied in this case—namely, that *Lapides* countenances waiver of sovereign immunity only where the state, through voluntary removal to federal court, would otherwise regain the ability to assert previously abandoned immunity—is incorrect on the merits. As courts of appeals adopting *both* alternative approaches have recognized, "the Fourth Circuit's

Stewart decision [i]s an outlier that 'misconstrues important principles animating *Lapides*,'" and the "majority" of "circuits *** read[] *Lapides* to state a more general rule." *Board of Regents*, 653 F.3d at 461 (quoting *Meyers*, 410 F.3d at 249); *see Meyers*, 410 F.3d at 249 ("[W]e conclude that [*Stewart*] is not persuasive[.]").

a. *Lapides* built upon the century-old precept that "a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity," as well as precedent "ma[king] clear in general that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" 535 U.S. at 619 (quoting *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)). This Court reasoned that those established principles encompass removal: when a state "voluntarily agree[s] to remove [a] case to federal court," it likewise "voluntarily invoke[s] the federal court's jurisdiction." *Id.* at 620. Because there is "[n]othing special about removal"—or, for that matter, "about [Lapides's] case"—the Court held that the "general legal principle requiring waiver ought to apply." *Id.*

A contrary rule, the Court further explained, would be untenable:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim

> Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.

535 U.S. at 619.

b. According to the Fourth Circuit, *Lapides*'s waiver-by-removal rule does not apply unless (as in that case) the state waived immunity prior to removal. That prior waiver matters (so says the Fourth Circuit) because *Lapides* prohibits only a state's attempt "to *regain* immunity that it had abandoned previously"; if a state "merely s[eeks]" to "employ removal in the same manner as any other defendant facing federal claims," no unfairness results. *Stewart*, 393 F.3d at 490.

That rationale runs headlong into *Lapides*. For starters, "a state is *not* 'like any other defendant' as *Stewart* maintains." *Meyers*, 410 F.3d at 249 (emphasis added). In comparison to ordinary defendants, "[a] state possesses sovereign immunity that can be used 'to achieve unfair tactical advantages.'" *Id.* (quoting *Lapides*, 535 U.S. at 614).

It makes no difference, moreover, whether removal actually causes unfairness in a particular case. "*Stewart* *** misunderstands that the voluntary invocation principle as explained by *Lapides* rests on a concern for preventing the *potential* for unfair tactics, not just upon the need to sanction the *actual achievement* of an unfair tactical advantage." *Meyers*, 410 F.3d at 249. For essentially the same reason, *why*

a state "chose to employ the removal device," *Stewart*, 393 F.3d at 490, is irrelevant. As *Lapides* makes explicit, "[a] benign motive *** cannot make the critical difference," for an "interpretation of the Eleventh Amendment that finds waiver in the litigation context rests *** not upon a State's actual preference or desire." 535 U.S. at 620-621.

At bottom, motives, which "are difficult to evaluate," cannot be the touchstone of a "jurisdictional rule[]," which "should be clear." *Lapides*, 535 U.S. at 621. Instead, the "focus" must be "on the litigation act the State takes that creates the waiver." *Id.* at 620. Here, "that act—removal—is clear," and a rule "that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter *** in a federal forum" is also "a clear one, easily applied by both federal courts and the States themselves." *Id.* at 620, 623-624.

2. The "hybrid approach" fares no better. The courts of appeals embracing this approach make much of a distinction between immunity from suit and immunity from liability. But none points to a single decision of this Court providing that those facets of immunity can be severed when it comes to state sovereign immunity.

As this Court has recognized, state sovereign immunity necessarily and inextricably encompasses both immunity from suit and immunity from liability (including monetary damages). *See Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002) ("Sovereign immunity does not merely constitute a defense to monetary liability or even to all

types of liability. Rather it provides an immunity from suit."). A waiver of immunity from suit, therefore, does not leave intact some separate immunity from liability. For state sovereign immunity purposes, there is neither functionally nor analytically any difference between the two.

Significantly, *Chisholm* was so offensive—and Congress's repudiation of it through the Eleventh Amendment so swift—not simply because it "subject[ed] sovereign States to actions at the *suit* of individuals," but because permitting such suits "creat[ed] new and unheard of *remedies*" that could not be reconciled with the founding generation's basic (and soon-after vindicated) understanding of the Constitution. *Alden*, 527 U.S. at 720 (emphases added) (quoting *Hans*, 134 U.S. at 12). Similarly, when Congress abrogates state sovereign immunity under the Fourteenth Amendment, it provides not just a bare right to sue, but also a "remedy." *Kimel*, 528 U.S. at 81. Or to use the parlance of the hybrid approach, "what is involved is only the question whether the States can be subjected to *liability* in suits brought *** by private persons." *Garrett*, 531 U.S. at 969 (Kennedy, J., concurring) (emphasis added).

Distinguishing between immunity from suit and immunity from liability in the present waiver context thus has no historical or doctrinal grounding. And it would be empty formalism as well: if the state has waived immunity from liability, then it necessarily has waived immunity from suit; conversely, if the state has not waived sovereign immunity from liability, any waiver of immunity from suit is meaningless because the claim must still be dismissed on sovereign immunity grounds. In short, state

sovereign immunity from suit and state sovereign immunity from liability travel together and produce the same result. That is what makes the hybrid approach "hard to distinguish, in its practical effect, from [the] approach in *Stewart*," App., *infra*, 8a, and equally inconsistent with *Lapides*.

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE

The significance of the question presented is beyond cavil. This Court has accepted numerous invitations to clarify the scope of state sovereign immunity—including just last Term in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019). This case implicates similar weighty interests. As discussed (pp. 3-4, *supra*), when deciding *Lapides*, this Court reserved the question presented here. As many as ten courts of appeals, grappling with a lack of certainty over how far the reasoning of *Lapides* extends, have since adopted one of three settled positions in an attempt to answer that question. The confusion continues to have real consequences for litigants, as demonstrated by the days-old Ninth Circuit decision coming to the opposite result as the decision below. *Walden*, --- F.3d ---, 2019 WL 5199557.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 29, 2019