No. 19-565

In the Supreme Court of the United States

ANTONIO PASSARO, JR., PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a State that has a valid sovereign immunity defense when a claim is initially brought in state court automatically waives that immunity by removing the underlying case to federal court to obtain resolution of claims against which the State lacks immunity in either state or federal court.

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INTRODUCTION

Petitioner seeks review of a decision that respected Virginia's sovereign immunity from suit under the Americans with Disabilities Act of 1990 (ADA) notwithstanding the Commonwealth's decision to remove the underlying case to federal court. Further review is unwarranted for three reasons.

First, the Fourth Circuit did not dispose of all of petitioner's claims, but rather remanded petitioner's non-ADA claims to the district court for further proceedings. That interlocutory posture alone "furnishe[s] sufficient ground for the denial of" certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Second, there is no conflict currently warranting this Court's review. Although petitioner asserts a three-way split among the courts of appeals, he concedes that any divergence in reasoning between two of the three camps is not outcome-determinative. Of the remaining circuits, two do not hold that removal alone waives a State's sovereign immunity defense. Only the Ninth Circuit has arguably adopted the rule petitioner advocates and it did so just days before the petition was filed. Further percolation is thus appropriate to determine whether the current lopsided and underdeveloped conflict might one day merit this Court's attention.

Third, the decision below is faithful to this Court's precedents, including *Lapides* v. *Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002).

Rather than prolonging this case to confirm that both lower courts properly dismissed petitioner's ADA claims, this Court should do so (if ever) in a case where a State's immunity defense was erroneously denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–21a) is reported at 935 F.3d 243. The opinion of the district court (Pet. App. 22a–33a) is unpublished. A later decision of the district court is not published in the *Federal Supplement* but is available at 2018 WL 3097321.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2019. A petition for rehearing was denied on September 16, 2019 (Pet. App. 34a). The petition for a writ of certiorari was filed on October 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Petitioner is a former trooper with the Virginia Department of State Police (Department) whose employment was terminated in March 2013. Pet. App. 4a. Petitioner challenged his termination in state grievance proceedings, which ultimately proved unsuccessful. *Id.* at 5a.

2. In November 2016—while his appeals from the state grievance proceedings were pending—petitioner filed suit against both the Department and the

Commonwealth of Virginia itself (collectively, the Commonwealth) in state court. Pet. App. 5a. The complaint alleged that the Commonwealth had violated two federal statutes—Title I of the ADA and Title VII of the Civil Rights Act of 1964 (Title VII)—as well as Virginia state law. See Pet. App. 23a.

Under this Court's precedents, the Commonwealth had a valid sovereign immunity defense to petitioner's ADA claims, but not his Title VII claims. This Court has squarely held that Title I of the ADA does not validly abrogate a State's immunity from private suits for damages. See *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 360 (2001).[1] In contrast, this Court has held "that Congress may authorize private suits against nonconsenting States pursuant to its . . . enforcement power" under Section 5 of the Fourteenth Amendment, *Alden* v. *Maine*, 527 U.S. 706, 756 (1999), and that Congress validly exercised that power in enacting Title VII, see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 447–48 (1976).

3. Seeking a federal forum for resolution of petitioner's Title VII claims, "[t]he Commonwealth timely removed the case to federal district court, asserting federal question jurisdiction based on the Title VII claims." Pet. App. 5a. The Commonwealth then moved to dismiss the ADA claims based on sovereign immunity

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[1] In the courts below, petitioner argued that statements in various publications and a provision of state law had waived the Commonwealth's ability to assert sovereign immunity to his ADA claims. The lower courts rejected that factbound argument, see Pet. App. 8a–11a, 26a–27a, and petitioner does not renew it here.

and the Title VII claims as inadequately pled. *Id.* at 23a–24a.

The district court granted the Commonwealth's motion to dismiss in part and denied it in part. Pet. App. 22a–33a. Noting that the Commonwealth "has not waived its . . . immunity from ADA litigation in state courts," *id.* at 29a, the district court concluded that the Commonwealth had not lost its immunity defense simply by removing the case to federal court. *Id.* at 28a–29a (citing *Stewart* v. *North Carolina*, 393 F.3d 484 (4th Cir. 2005)). As for petitioner's remaining claims, the district court concluded some were inadequately pled while others were adequately pled, and permitted petitioner to amend his complaint. *Id.* at 29a–33a.

At summary judgment, the Commonwealth argued (among other things) that petitioner's Title VII claims were claim-precluded by the state grievance proceedings. Pet. App. 6a. The district court agreed, concluding that "the claims decided against [petitioner] in the prior judgment arose out of the same conduct as the claims in the present case, and the [Commonwealth had] not waived the benefit of claim preclusion." *Passaro* v. *Virginia*, No. 2:17cv48, 2018 WL 3097321, at *1 (E.D. Va. June 21, 2018). The district court accordingly granted summary judgment to the Commonwealth. *Id.*

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a–21a. Like the district court, the court of appeals concluded that the Commonwealth had not waived its sovereign immunity

from petitioner's ADA claims by removing the case to federal court. *Id.* at 7a–8a. But the court of appeals held that the district court had erred in applying claim preclusion to bar petitioner's Title VII claims because it could not "conclude . . . on the [appellate] record . . . that [petitioner] could have asserted a Title VII claim for money damages as part of the" state grievance proceedings. *Id.* at 15a–16a. The court of appeals specifically declined to address whether the Commonwealth would have other defenses to petitioner's Title VII claims, including issue preclusion or a "more limited claim-preclusion argument." *Id.* at 19a. Instead, the court of appeals "remand[ed]" the case to the district court "for further proceedings consistent with [its] opinion." *Id.* at 20a.

5. Petitioner sought rehearing, which the court of appeals denied without recorded dissent. Pet. App. 34a.

ARGUMENT

Petitioner contends (Pet. 8–20) that this Court should grant review to decide whether, by removing the underlying action to federal court, the Commonwealth automatically waived the sovereign immunity defense it would have had against petitioner's ADA claims had the case proceeded in state court. Further review is unwarranted. *First*, the interlocutory posture of this case means that this Court's intervention would be premature. *Second*, the only actual conflict is between the Ninth Circuit and eight others, and even that lopsided split is extremely recent and would benefit from further percolation. *Finally*, if this Court's

review becomes necessary, the Court should await a decision where a State was wrongfully denied its immunity rather than prolonging litigation against one whose immunity was rightly respected.

1. This Court's review would be premature because of the case's interlocutory posture.

The decision from which petitioner seeks review did not dispose of all of his claims. Instead, the court of appeals remanded for further proceedings on petitioner's Title VII claims. Pet. App. 20a. The case is thus in an interlocutory posture, a fact that, by itself, "furnishe[s] sufficient ground for the denial of" certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"). If the district court or the court of appeals ultimately grants relief on petitioner's Title VII claims, petitioner will be able to obtain much of the same relief he seeks on his ADA claims. If the lower courts ultimately reject petitioner's Title VII claims, petitioner will have another opportunity to raise all of the arguments that he seeks to press here. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting that the Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). And if the parties are able to settle their dispute, the immunity

issue will be moot. This Court's "long-established rule against piecemeal appeals," *Andrews* v. *United States*, 373 U.S. 334, 340 (1963), thus counsels against review at this point.

2. In any event, there is currently no conflict warranting this Court's intervention. All but one of the circuits to have addressed the question would conclude that the Commonwealth remains immune from damages on petitioner's ADA claims. And although a recent Ninth Circuit decision suggests an outcome-determinative difference, that decision was issued only days before the petition was filed and is the subject of a currently pending request for rehearing *en banc*.

a. Four courts of appeals—specifically, the First, Second, Fourth, and D.C. Circuits—have held that, where a State "ha[s] not consented to suit in its own courts," the State "d[oes] not waive sovereign immunity by voluntarily removing the action to federal court for resolution of the immunity defense." *Stewart* v. *North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005); accord *Beaulieu* v. *Vermont*, 807 F.3d 478, 486 (2d Cir. 2015) (stating that "neither 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"); *Bergemann* v. *Rhode Island Dep't of Environmental Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011) (stating 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"); *Watters* v. *Washington Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002)

(concluding that this Court's holding in *Lapides* v. *Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), "does not apply" in situations where States "have not waived immunity . . . in their own courts").

b. Petitioner notes that various other circuits—specifically, the 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." Pet. 11 (quoting *Bergemann*, 665 F.3d at 342); accord *Stroud* v. *McIntosh*, 722 F.3d 1294, 1302 (11th Cir. 2013); *Lombardo* v. *Pennsylvania, Dep't of Public Welfare*, 540 F.3d 190, 200 (3d Cir. 2008); *Meyers ex rel. Benzing* v. *Texas*, 410 F.3d 236, 254–55 (5th Cir. 2005). But petitioner concedes that, "in practice," that middle course "leads to" the same result reached by the court below: "a dismissal on immunity grounds." Pet. 11.[2] Differences in approach that lead ultimately to the same place is not the stuff of which a conflict warranting this Court's review is made.

c. Petitioner next suggests (Pet. 10–11) that the decision below conflicts with decisions of the Seventh and Tenth Circuits. But petitioner simply ignores a

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[2] Although petitioner locates the Second Circuit within this "middle course" group (Pet. 10–11), that court has stated that "neither 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." *Beaulieu*, 807 F.3d at 486. The parties' disagreement about how to classify the Second Circuit's approach is of no moment because, under either rationale, a State would be entitled to dismissal on immunity grounds.

more recent decision by the Tenth Circuit indicating that he would lose in that circuit as well and a more recent decision by the Seventh Circuit emphasizing that it has not resolved the question on which petitioner seeks review here.

Petitioner insists that *Estes* v. *Wyoming Department of Transportation*, 302 F.3d 1200 (10th Cir. 2002), "demonstrates that [his] ADA claim would have survived in the Tenth . . . Circuit." Pet. 13. But the petition for a writ of certiorari does not even mention a published Tenth Circuit decision from 12 years later that directly refutes that claim. In *Trant* v. *Oklahoma*, 754 F.3d 1158 (10th Cir. 2014), the Tenth Circuit specifically adopted the approach of the Third, Fifth, and Eleventh Circuits, holding "that a state may waive its immunity from suit in a federal forum *while retaining its immunity from liability*." *Id.* at 1173 (emphasis added) (citing *Meyers*, 410 F.3d at 253). Indeed, *Trant* specifically distinguished the court's earlier holding in *Estes* based on the difference between "immunity from suit" from "immunity from liability," *id.*, that petitioner elsewhere attacks as "empty formalism" and "meaningless" in practice, Pet. 19.[3]

Petitioner's claimed conflict with the Seventh Circuit (Pet. 10–11) fares no better. For one thing, the Seventh Circuit decision that petitioner cites—*Board of Regents of the University of Wisconsin System* v.

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[3] Any argument that *Trant* conflicts with *Estes* would, of course, be a matter for the Tenth Circuit rather than this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Phoenix Int'l Software, Inc., 653 F.3d 448, 461 (7th Cir. 2011) (*Phoenix*)—itself makes clear that it addressed a different question than the one presented here: whether a State that chooses to initiate litigation in federal court *as a plaintiff* "waiv[es] its sovereign immunity against compulsory counterclaims that meet the requirements of [Federal Rule of Civil Procedure] 13(a)." *Id.* at 471.

To be sure, *Phoenix* also contains language that could be read to sweep more broadly. See Pet. 11 (citing *Phoenix*, 653 F.3d at 461). But in a published decision issued just two years later, the Seventh Circuit took pains to emphasize (in an opinion by the same judge who authored the court's decision in *Phoenix*) that it had "not yet had occasion to answer" the question at issue in this case: "Does a state waive the immunity it would have in state court by removing a suit to federal court?" *Hester* v. *Indiana Dep't of Health*, 726 F.3d 942, 949 (7th Cir. 2013). The court also specifically addressed its own previous decision in *Phoenix*, explaining that it "does not answer the question . . . because . . . [*Phoenix*] said nothing about whether the state would have been immune from the [federal] claims in state court, nor did [it] address how this hypothetical state-court immunity would affect immunity in federal court." *Id.* at 950. Concluding that it was unnecessary to "plunge into these delicate topics in a case where the answers ultimately d[id] not matter," the Seventh Circuit stated that it would "save them for another day." *Id.* at 951.

d. That leaves only one court on the other side of the ledger: the Ninth Circuit. Yet, even there,

petitioner leads off his discussion with a decision that did not address the issue in this case and closes it with one so recent that it is still subject to a pending petition for rehearing.

Petitioner begins (at 11) with *Embury* v. *King*, 361 F.3d 562 (9th Cir. 2004). But that decision *specifically reserved* the very question at the heart of this case: "[W]hether a removing State defendant remains immunized from federal claims that Congress failed to apply to the States through unequivocal and valid abrogation of their . . . immunity." *Id.* at 566 n.20; see *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 360 (2001) (holding that Title I of the ADA does not validly abrogate state sovereign immunity).

In fact, the Ninth Circuit did not "extend the holding of *Embury* to cover all federal-law claims" until October 16, 2019—thirteen days before this petition was filed. *Walden* v. *Nevada*, 941 F.3d 350, 358 (9th Cir. 2019). And even that decision failed to distinguish between a State's *Eleventh Amendment immunity* (which applies only in federal court) and *state sovereign immunity* (which is not so limited). See *id.* at 354 (alternatively describing the question before the court as involving "[t]he existence of sovereign immunity under the Eleventh Amendment" and "whether Nevada waived its sovereign immunity"); *id.* at 358 (similar). As other circuits have recognized, however, that distinction is critical because "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Stewart*, 393 F.3d at 487 (quoting

Alden v. *Maine*, 527 U.S. 706, 713 (1999)); accord *Beaulieu*, 807 F.3d at 485–86 (stating that the plaintiffs' waiver argument "misunderstands the difference between Eleventh Amendment immunity and the broader state sovereign immunity at issue here"). Given that ambiguity, it is far from clear that the Ninth Circuit will rigidly enforce the rule it appeared to adopt in *Walden*. And *Walden* itself is so new that it was—as of the date of this filing—the subject of a still-pending petition for rehearing. 18–15691 Docket entry No. 44 (9th Cir. Nov. 20, 2019). This Court's intervention is unnecessary to resolve a conflict that is so lopsided, recent, and undeveloped, and one that could still go away on its own.

3. Further review is also unwarranted because the decision below was correct and properly respected the Commonwealth's sovereign immunity. If it proves necessary for the Court to resolve this issue, it should do so in a case where a lower court improperly denied a State immunity's protections rather than prolong litigation in one where it was properly respected.

In *Lapides* v. *Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), the Court addressed a narrow and specific question: "[W]hether a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court[.]" *Id.* at 617 (internal quotation marks and citation omitted; second bracket in original). The Court further emphasized that it was "limit[ing]" its "answer to the context of state-law claims, in respect to which the State has explicitly waived

immunity from state-court proceedings." *Id.* And the Court specifically emphasized that it was *not* "address[ing]" the specific issue here: "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 617–18 (emphasis added); see Pet. App. 10a (concluding that "the Commonwealth has not waived its sovereign immunity from private lawsuits under Title I of the ADA in either state or federal court"). Because "the narrow holding of *Lapides* does not apply to this case," *Watters*, 295 F.3d at 42 n.13, the Fourth Circuit's decision cannot—and does not—conflict with *Lapides*.

Nor is the reasoning of all but one of the court of appeals to have addressed this question "incompatible" with *Lapides*. Pet. 15. Unlike *Lapides*, this case is not about the Eleventh Amendment (which limits the jurisdiction of the federal courts), it is about state sovereign immunity (which applies in both state and federal court). See *Alden*, 527 U.S. at 713, 722 (stating that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment"). For that reason, this case does not implicate the "anomal[y]" identified in *Lapides*, which arises when a State "invoke[s] federal jurisdiction" and then immediately relies on a defense that is uniquely available in federal court to defeat a claim that would otherwise be valid in state court. *Lapides*, 535 U.S. at 619.

For similar reasons, respecting a State's sovereign immunity post-removal neither produces nor threatens

the sort of "seriously unfair results" that animated the Court's decision in *Lapides*. 535 U.S. at 619. In *Lapides*, the State was seeking to improve its situation by asserting a defense that would not have been available had the case remained in state court. But as other courts have recognized, a State gains no "unfair tactical advantage," *id.* at 621, by continuing to assert a defense (state sovereign immunity) that would have been available to it in state court—it merely preserves a defense it never waived in the first place. See *Trant*, 754 F.3d at 1173. Where, as here, a State is not seeking "to *regain* immunity that it had abandoned previously," *Stewart*, 393 F.3d at 490, "removal [does] not change the level of the playing field," *Bergemann*, 665 F.3d at 342.

Nor is the majority rule unclear or difficult to administer, as petitioner claims. Pet. 18. That rule requires no assessment of the State's "motives," "preference[s]," or "desire[s]." *Lapides*, 535 U.S. at 620–21. Instead, the federal court is asked to resolve the same questions that arise when a plaintiff files suit directly in federal court: Whether Congress validly abrogated state sovereign immunity and, if not, whether the State has waived that immunity through its actions. There is nothing exotic or confusing about a jurisdictional analysis federal courts conduct every day.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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