No. 19-565

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

REPLY BRIEF FOR THE PETITIONER

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The Commonwealth agrees that this case squarely presents the question left open in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), and that a circuit conflict 17 years in the making straddles (at least) nine courts of appeals. The Commonwealth's bid to narrow the split cannot be reconciled with the widely held and contrary understanding of the courts of appeals. And given that most of those courts have eschewed the Fourth Circuit's approach in this case, the Commonwealth's defense on the merits rings hollow. Elimination of pervasive confusion and irreconcilable rulings over the scope of *Lapides*'s waiver-by-removal rule is long overdue, and this case provides an ideal vehicle for doing so. Certiorari should be granted.

I. THE COMMONWEALTH ACKNOWLEDGES A CIRCUIT CONFLICT

1. a. The courts of appeals—including the Fourth Circuit in this very case, Pet. App. 8a—have repeatedly and expressly acknowledged a three-way split on the question presented. Pet. 9-11. To provide just a few examples:

- "[T]he 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).
- "This *** question *** has divided our sister circuits: Does a state waive the immunity it would have in state court by removing a suit to federal court? *** The courts of appeals have interpreted *Lapides* differently." *Hester v. Indiana State Dep't of Health*, 726 F.3d 942, 949-950 (7th Cir. 2013).

- "[T]he circuits divide over the meaning of *Lapides*[.]" *Stroud v. McIntosh*, 722 F.3d 1294, 1300 (11th Cir. 2013).
- "As a result of the tension between *Lapides*'s express limitations on its own holding and [its] general language, courts 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." *Walden v. Nevada*, 941 F.3d 350, 356 n.2 (9th Cir. 2019) (alteration in original).

At a minimum, the Commonwealth concedes there is an "actual conflict *** between the Ninth Circuit and eight others." BIO 5. As to those "eight others," the Commonwealth also recognizes a "[d]ifference[] in approach." BIO 8. No more is needed to appreciate that the question presented has percolated amply through (by the Commonwealth's own count) *nine* courts of appeals without consensus—and notably, with a majority finding the Fourth Circuit's approach to be an outlier. Pet. 15-16 (discussing disagreement with *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005)).

b. That well-acknowledged circuit conflict, even as parsed by the Commonwealth, warrants a grant of certiorari. But the Commonwealth's characterization is too parsimonious, and its efforts to pick off a few circuits is unavailing.

As explained in the Petition (at 13-14), the Tenth Circuit in *Estes v. Wyoming Department of Transportation* held that a state waived (otherwise-

retained) sovereign immunity when it voluntarily removed a claim under Title I of the Americans with Disabilities Act (ADA) from state to federal court. 302 F.3d 1200, 1206-1207 (10th Cir. 2002). The Commonwealth does not dispute that *Estes* is on all fours with this case—with the critical exception of the result. That *Estes* does *not* "lead *** to the same place" as the decision below is surely "the stuff of which a conflict warranting this Court's review is made." BIO 8.

Trant v. Oklahoma, 754 F.3d 1158 (10th Cir. 2014), cannot (and does not) undo the holding of *Estes*. That case concerned whether a plaintiff had Article III standing to bring a state-law claim for violation of the Oklahoma Open Meetings Act. Although the state "consented to [federal-court] removal and expressly reserved its sovereign immunity as to *future* claims," it did not do so for "existing claims, including [the plaintiff's] claim for back pay." *Id.* at 1173-1174. That result followed from—rather than being in derogation of—*Estes*, which held that "removal of a federal law claim act[s] as an unequivocal waiver of immunity from suit in federal court." *Id.* at 1173. Whether the state might still assert "immunity from liability for money damages" was a separate issue to be determined on remand. *Id.* at 1173-1174.[1]

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[1] To the extent the Seventh Circuit's decisions arise in other (closely related) circumstances or decline to address the question presented, a well-developed circuit conflict would still remain. In any event, the Commonwealth admits that *Board of Regents of the University of Wisconsin System v. Phoenix International Software, Inc.*, 653 F.3d 448, 460-471 (7th Cir. 2011), "contains language that could be read" to have adopted the *Estes* rule. BIO

The Commonwealth also downplays (BIO 10-12) the significance of the Ninth Circuit's decision in *Walden* as having newly stated that court's position. But *Walden* hardly wrote on a blank slate. The Ninth Circuit recounted that *Embury v. King* had "previously held that a State's removal of a suit from state to federal court waives state sovereign immunity from suit on certain federal-law claims," and simply "extend[ed] *Embury*'s 'removal means waiver' rule" to the case before it. 941 F.3d at 352-353, 357 (citing 361 F.3d 562 (9th Cir. 2004)).

Nor does *Walden*'s recent vintage evince an "underdeveloped" circuit conflict. BIO 11-12. To the contrary, *Walden* is just the latest in a long line of decisions confirming that "circuits' approaches to interpreting *Lapides* are not uniform." *Walden*, 941 F.3d at 356 n.2; *see* pp. 1-2, *supra*. As the Petition details (at 14-15)—not "ignores" (BIO 8-10)—the allegedly intervening Seventh and Tenth Circuit decisions the Commonwealth favors have not turned the circuit conflict's tide. *Walden* itself continues to list those circuits as embracing "a more general rule" of waiver by removal. 941 F.3d at 356 n.2 (citing *Board of Regents*, 653 F.3d at 460-471 (7th Cir.); *Estes*, 302 F.2d at 1205 n.1, 1206 (10th Cir.)).

The same is true of Nevada's newly filed rehearing petition in *Walden*. While touting that petition, the Commonwealth neglects to mention that Nevada itself recognizes a deep conflict treating the

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10. Similarly, *Hester* substantiates both the existence of a circuit conflict and the inclusion of *Estes* as "suggesting that by removing to federal court, a state waives *any* immunity that it would have had in state court." 726 F.3d at 949-950.

Seventh and Tenth Circuits—in *Board of Regents* and *Estes*, respectively—as having "read *Lapides* to create a rule that a state's removal to federal court results in a blanket waiver." Nevada Reh'g Pet. 8, No. 18-15691 (9th Cir. Nov. 20, 2019), ECF No. 44. Thus, even if the Ninth Circuit were to grant rehearing and undo its *Embury* rule, the circuit conflict would not "go away on its own." BIO 12.

No wonder, then, that academic writings continue to describe *Lapides* as spawning a longstanding trichotomy:

> [W]hether a state waives its sovereign immunity by removing a case from state court to federal district court when it retains immunity in state court (for either state or federal law claims) is an unresolved issue. The circuits are divided on this question *** [and] have generally taken three approaches[.]"

Jessica Wagner, Note, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 VA. L. REV. 549, 553 (2016) (footnote omitted); *see also, e.g.*, David Kanter, Note, *Removal Plus Timely Assertion: A Better Rule for the Intersection of Removal and State Sovereign Immunity*, 105 GEO. L.J. 531, 532-533 & n.7 (2017) ("The Court [in *Lapides*] did not resolve whether removal also constitutes waiver even when immunity has not been statutorily waived as to any claim brought in the state forum. The circuits have split in answering that question.") (footnote omitted).

In the end, the Commonwealth cannot avoid what courts of appeals, states, and scholars have all accepted for years (and still do): a pervasive circuit

conflict on the question presented. Only this Court can eliminate the disparate application of *Lapides*'s waiver-by-removal rule.

2. The Commonwealth's merits defense of the Fourth Circuit's approach—the Commonwealth is silent as to the viability of the "hybrid approach," Pet. 18-20—reinforces the stark circuit conflict. In its view (BIO 12-13), *Lapides*'s reasoning is fact-bound. *Lapides*'s reach, however, is the crux of the disagreement between the courts of appeals. The "majority" of "circuits *** read[] *Lapides* to state a more general rule" of waiver and consider "the Fourth Circuit's *Stewart* decision *** an outlier that 'misconstrues important principles animating *Lapides*.'" *Board of Regents*, 653 F.3d at 461 (quoting *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 249 (5th Cir. 2005)); *see* Pet. 15-16. Courts of appeals therefore openly disagree with the Commonwealth's position that the Fourth Circuit's approach "cannot—and does not—conflict with *Lapides*." BIO 13.

That disagreement extends to the Commonwealth's contention that the Fourth Circuit's rule, which focuses upon whether a state regains the ability to assert previously abandoned immunity, is neither "unclear" nor "difficult to administer." BIO 14. Among the reasons that courts have found *Stewart* "not persuasive" is that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Meyers*, 410 F.3d at 249 ("In other words, the voluntary invocation principle applies generally in all cases for the sake of consistency[.]").

The Commonwealth attempts to drive a wedge between Eleventh Amendment immunity and

sovereign immunity. But such a dichotomy cannot be found in *Alden v. Maine*'s statement that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." BIO 13 (quoting 527 U.S. 706, 722 (1999)). As *Alden* elsewhere makes clear, the Eleventh Amendment "confirmed" a pre-existing "sovereign immunity as a constitutional principle," rather than "established" a separate sovereign immunity. 527 U.S. at 728-729.

Equally unpersuasive is the Commonwealth's insistence that the (supposed) "distinction" between Eleventh Amendment immunity and sovereign immunity "is critical," and that "this case is not about the Eleventh Amendment." BIO 11, 13. That is the opposite of what the Commonwealth told the Fourth Circuit below (in its main argument heading no less): "Passaro's ADA claims are barred *by the Eleventh Amendment*." C.A. Br. 10, No. 18-1789 (4th Cir. Oct. 29, 2018), ECF No. 15 (emphasis added).

II. THIS CASE IS AN INDISPUTABLY CLEAN VEHICLE FOR RESOLVING A RECURRING QUESTION OF IMPORTANCE

1. The Commonwealth does not dispute the importance of the question presented. It contends, however, that this Court's review should be limited to cases in which a state's sovereign immunity is not "respected." BIO 12.

The significance of the question presented cannot turn on whether a state wins or loses. The self-serving notion that only states are entitled to seek review of sovereign immunity rulings in this Court not only flies

in the face of past practice, *e.g.*, *Lapides*, 535 U.S. at 617 (reviewing decision that "State retained the legal right to assert its immunity, even after removal"), but also gives short shrift to the interests of individuals who endure discrimination at the hands of states.

2. The Commonwealth also identifies no vehicle defect. Instead, the Commonwealth spills much ink discussing Passaro's wholly separate *Title VII* claim—not at issue here, Pet. 7 n.1—and casting this case as "interlocutory." BIO 3-7. Such arguments are generally weak bases to deny certiorari to begin with: "In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court." 17 EDWARD H. COOPER & VIKRAM D. AMAR, FEDERAL PRACTICE AND PROCEDURE § 4036 (3d ed. 2019).

This case is particularly far removed from the types of "premature" (BIO 6) rulings that this Court declines to review. Although the Fourth Circuit remanded Passaro's Title VII claim to the district court, that claim is distinct from the ADA claim that gives rise to the sovereign immunity question. For starters, Title VII liability is grounded in discrimination based on national origin, and ADA liability is grounded in discrimination based on disability. The Commonwealth blithely suggests that Passaro "will be able to obtain much of the same relief he seeks on his ADA claims" under Title VII. BIO 6. But because Title VII and the ADA employ different burden-shifting approaches, relief that would be available to Passaro if he prevailed under the latter might well be foreclosed if he prevailed only on the former. *See, e.g.*, *Gentry v. East W. Partners Club*

Mgmt. Co., 816 F.3d 228, 233-234 (4th Cir. 2016) (explaining "that Title VII's 'motivating factor' standard cannot be read into Title I of the ADA" and that courts "may not award monetary damages or reinstatement" to prevailing plaintiffs in some cases under Title VII's "motivating factor" burden-shifting framework). And while the Commonwealth speculates (BIO 6-7) that Passaro might simply settle this suit, the need for the Commonwealth to defeat not one but two discrimination claims would affect the calculus appreciably.[2]

In any event, there is nothing "interlocutory" about the dismissal of Passaro's ADA claim on sovereign immunity grounds. The decision below conclusively bars Passaro from pursuing that claim at the threshold and as a matter of law, while all agree that the Commonwealth can assert no "valid sovereign immunity defense" to the Title VII claim. BIO 3. Accordingly, the argument that Passaro can pursue his ADA claim in light of the Commonwealth's removal to federal court survives regardless of what happens to the Title VII claim. Delaying this Court's review would neither ripen nor obviate the question presented.

* * *

The petition for a writ of certiorari should be granted.

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[2] Moreover, the district court—on the parties' *joint* motion—stayed remand proceedings until the case "is finished at the Supreme Court." Minute Entry 1, No. 2:17-cv-48 (E.D. Va. Oct. 3, 2019), ECF No. 51.

Respectfully submitted.

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