No. _____

In the Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

MARJORIE MEYERS, *ET AL.*;
UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

AMY WARR
Assistant Solicitor General

RANCE L. CRAFT
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

QUESTION PRESENTED

In *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), the Court held that, when a State removes to federal court a claim for which it has waived its sovereign immunity in state courts, the State cannot then invoke the Eleventh Amendment to avoid suit. The Court expressly reserved the question whether a State still possesses immunity from suit when it removes claims for which the State's sovereign immunity has *not* been waived by the State or abrogated by Congress. Is *Lapides*'s waiver-by-removal rule limited to state-law claims for which the State has waived its sovereign immunity in state court, as the Fourth, Seventh, and District of Columbia Circuits have held, or does *Lapides*'s waiver-by-removal rule extend to all claims generally, as the Fifth, Ninth, and Tenth Circuits have held?

PARTIES TO THE PROCEEDING

Petitioners are the State of Texas, the Texas Department of Transportation, and Michael W. Behrens, successor to William G. Burnett as Executive Director of the Texas Department of Transportation.

Respondents are Marjorie Meyers (by next friend Edgar C. Benzing), Helen Elkin, Ruth H. Davis, and Phillip Greenberg, on behalf of themselves and all others similarly situated, and the United States of America.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Constitutional Provision Involved 2

Statement 2

Reasons for Granting the Petition 6

I. The Circuits Disagree over the Proper Scope of *Lapides*'s Waiver-By-Removal Rule. 8

II. The Court Should Grant Certiorari to Resolve This Conflict. 12

A. Whether Removal Waives the States' Underlying Sovereign Immunity from Suit—in Addition to Their Immunity from Suit in a Federal Forum—Is a Question of Fundamental Importance to the States. 12

1. The ability to remove federal-question cases is an important right for all defendants—including States—and furthers significant federal interests. 12

2. States cannot intelligently exercise their right to remove as long as the scope of the immunity waived by removal remains undecided. 14

B. Further Development in the Courts of Appeals Is Unwarranted. 15

C. Delay in Resolving This Issue Unduly Prejudices the States. 16

III. The Court of Appeals's Extension of *Lapides* Is Not Supported by the Court's Eleventh-Amendment Precedent or *Lapides*'s Rationale. 17

A. A State's Immunity from Litigating in Federal Court—Recognized by the Eleventh Amendment—Is a Distinct Component of the State's Inherent Sovereign Immunity That May Be Separately Waived. 17

B. Allowing the State to Assert Its Underlying Immunity from Suit After Removal Does Not Present the Concerns of Inconsistency and Unfairness That Animated *Lapides*. 20

Conclusion 22

TABLE OF AUTHORITIES

Cases

Alden v. Maine, 527 U.S. 706 (1999) 16, 19

Boone v. Pa. Office of Vocational Rehab.,
373 F. Supp. 2d 484 (M.D. Pa. 2005) 8, 11

Boone v. Pa. Office of Vocational Rehab.,
No. 06-3240 (CA3) (filed June 30, 2006) 11

Boys Markets, Inc. v. Retail Clerks Union, Local 770,
398 U.S. 235 (1970) 13

Brown v. Fletcher's Estate, 210 U.S. 82 (1908) 16

Chicago, Rock Island, & Pac. Ry. Co. v. Martin,
178 U.S. 245 (1900) 15

El Paso Natural Gas Co. v. Neztsosie,
526 U.S. 473 (1999) 13

Embury v. King, 361 F.3d 562 (CA9 2004) 5, 10, 11

Estes v. Wyo. Dep't of Transp., 302 F.3d 1200
(CA10 2002) 5, 10, 11

Fidtler v. Pa. Dep't of Corr., 55 Fed. Appx. 33
(CA3 2002) 11

Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.,
260 U.S. 261 (1922) 21

Klingler v. Dir., Dep't of Revenue, 455 F.3d 888 (CA8 2006) 20

Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002) . . . . . *passim*

Meyers v. Texas, 410 F.3d 236 (CA5 2005) 2, 9

Meyers v. Texas, 454 F.3d 503 (CA5 2006) 2

Michigan v. Long, 463 U.S. 1032 (1983) 13

Neinast v. Texas, 217 F.3d 275 (CA5 2000) 4

Omosegbon v. Wells, 335 F.3d 668 (CA7 2003) 9, 10

Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II), 465 U.S. 89 (1984) 18, 19

Stewart v. North Carolina, 393 F.3d 484 (CA4 2005) 5, 9, 15, 16, 20-22

Watters v. Wash. Metro. Area Transit Auth., 295 F.3d 36 (CADC 2002) 9, 10

Willingham v. Morgan, 395 U.S. 402 (1969) 13

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. XI 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1441(a) 12

28 U.S.C. §1441(b) 12

28 U.S.C. §1442 13

42 U.S.C. §§12131-12165 3

28 C.F.R. §35.130(f) 3, 20

TEX. CIV. PRAC. & REM. CODE §101.057 14

TEX. TRANSP. CODE §504.201 3

TEX. TRANSP. CODE §681.002 3

TEX. TRANSP. CODE §681.003(b)(3) 3

TEX. TRANSP. CODE §681.005(1) 3

TEX. TRANSP. CODE §681.006(a)(2)(B) 3

Other Authorities

Brief for the United States as Amicus Curiae,
Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002), 2001 WL 1673411 . . . . . 8, 19

Steven H. Steinglass, *Removing § 1983 Actions to Federal Court*, *in* 1 SECTION 1983 LITIGATION IN STATE COURTS (2006) 8

CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (3d ed. 2005) 21

No. _____

In the Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,
v.

MARJORIE MEYERS, *ET AL.*;
UNITED STATES OF AMERICA
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

This case provides an ideal vehicle for the Court to answer a significant question that it reserved in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002): whether the waiver-by-removal rule announced in that case applies only to state-law claims for which the State has waived its immunity from suit in state court or, instead, extends to any federal or state claim. The six circuits that have addressed this question are evenly divided. And, given that there are only two possible answers to the question, further percolation in the circuits will not advance development of the issue. Meanwhile, States in circuits that have not addressed the issue cannot know whether removal of a case will deprive them of a dispositive defense, and thus cannot make informed litigation decisions. The Court should grant certiorari to resolve the circuit conflict and bring certainty to this area of law.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 410 F.3d 236 (CA5 2005). The order of the court of appeals denying the petition for panel rehearing and rehearing en banc (Pet. App. 49-51) is reported at 454 F.3d 503 (CA5 2006). The district court's orders dismissing the suit (Pet. App. 36-43) and denying Meyers's motion to alter or amend the judgment (Pet. App. 44-48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2005. Pet. App. 1. The order of the court of appeals denying the petition for panel rehearing and rehearing en banc was entered on June 29, 2006. *Id.*, at 49. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States 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

The underlying suit challenges Texas's five-dollar fee for disabled-parking placards as violating a regulation implementing Title II of the Americans with Disabilities Act (ADA). The State contended, and the district court agreed, that Title II is not a valid abrogation of the State's sovereign immunity as applied to this suit. The court of appeals held, however, that it was unnecessary to reach this issue because the State had waived its immunity from suit when

it removed this case to federal court. In so holding, the court of appeals joined two other circuits in extending the waiver-by-removal rule announced in *Lapides* to all claims—not just state-law claims for which a State has already waived its immunity in state court. Three other circuits have limited *Lapides* to this latter set of claims. The Court should grant certiorari to resolve this circuit conflict and bring uniformity to an issue of great importance to the States.

1. Texas law provides two means of access to parking spaces for persons with physical disabilities: specialty license plates and parking placards. TEX. TRANSP. CODE §§504.201, 681.002. Unlike the license plates, the placards are not permanently attached to a vehicle, but hang "on the rearview mirror of the vehicle's front windshield." *Id.*, §681.006(a)(2)(B). A placard, unlike a license plate, allows a person with a disability to access reserved parking spaces when he is driving a vehicle other than his own or is being driven in a vehicle with no specialty license plate.

Texas law prescribes unique design specifications for placards, including "a hologram designed to prevent the reproduction of the placard or the production of a counterfeit placard." *Id.*, §681.002. Although the State charges the same amount for both specialty license plates and standard license plates, *see id.*, §504.201, it charges five dollars for a placard, *see id.*, §681.003(b)(3), "to defray the cost of providing the . . . placard," *id.*, §681.005(1).

2. Respondents Meyers, Elkin, Davis, and Greenberg (collectively, "Meyers") filed this class action in state court against the State of Texas, the Texas Department of Transportation, and the Department's Executive Director (collectively, "the State"). Pet. App. 2. Meyers alleges that Texas's five-dollar fee for disabled-parking placards violates 28 C.F.R. §35.130(f)—a regulation under Title II of the ADA, 42 U.S.C. §§12131-12165—and seeks declaratory relief, injunctive relief, monetary damages, costs, and attorneys' fees. Pet. App. 3-4, 37. The State removed the case to

federal court and moved to dismiss based on its sovereign immunity from suit. *Id.*, at 4.[1]

Meyers argued that the State had waived its immunity from suit by removing the case to federal court and, regardless, that Title II of the ADA abrogated the State's immunity. *Id.*, at 39-40. The district court rejected Meyers's arguments and dismissed the suit, holding that the State did not waive its immunity from suit by removing the case and that Title II was not a valid abrogation of the State's immunity as applied to Meyers's claims. *Id.*, at 39-41. Meyers filed a motion for reconsideration, which the district court denied. *Id.*, at 44-48. Meyers appealed. *Id.*, at 4.

3. The court of appeals reversed and remanded on the sole ground that, under *Lapides*, the State had waived its immunity from suit by removing the case to federal court. *Id.*, at 32, 34. Acknowledging that the Court had limited its holding in *Lapides* to the removal of state-law claims for which the State had waived its immunity in state court, *id.*, at 8, the court of appeals nevertheless concluded that *Lapides*'s waiver-by-removal rule should extend to *all* claims:

> "[W]e believe that *Lapides*'s interpretation of the voluntary invocation principle, as including the waiver-by-removal rule, applies generally to *any* private suit which a state removes to federal court. There is no evident basis in law or judicial administration for severely limiting those general

---

1. The State had previously removed the case, but the district court remanded, determining that the Tax Injunction Act barred federal jurisdiction over the suit. Pet. App. 4. Subsequently, the court of appeals lifted that jurisdictional bar in *Neinast v. Texas*, 217 F.3d 275, 279 (CA5 2000), in which it held that the Tax Injunction Act was inapplicable to a placard-fee suit like this one. Pet. App. 4. In light of this new precedent, the State once again removed the case. *Id.* Meyers then filed a motion to remand, which the district court denied. *Id.*, at 37-38, 41.

> principles . . . to a small sub-set of federal cases including only state-law claims in respect to which a state has waived immunity therefrom in state court." *Id.*, at 9 (emphasis added).

The court of appeals explained that this extension of *Lapides* to all claims was necessary "to eliminate the *potential* of unfairness by the enforcement of clear jurisdictional rules having genuine preventive effect," regardless of whether the State actually achieves any unfair advantage by removing a case containing federal or state claims for which its immunity has not been waived or abrogated. *Id.*, at 23.

In so holding, the court of appeals noted that it was joining the Ninth and Tenth Circuits in extending *Lapides*'s waiver-by-removal rule to federal-law claims. *Id.*, at 18 (citing *Embury v. King*, 361 F.3d 562, 564 (CA9 2004), and *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1206 (CA10 2002)). The court also expressly disagreed with the Fourth Circuit's decision in *Stewart v. North Carolina*, 393 F.3d 484 (CA4 2005), which had limited *Lapides* to state-law claims for which a State has already waived immunity from suit in state court. Pet. App. 20-22.

The court of appeals rejected the State's argument that removal of the case waived only the State's "forum immunity"—*i.e.*, its immunity from litigating in federal court—but did not waive the State's underlying sovereign immunity from Meyers's suit. *Id.*, at 23-28. The court reasoned that the State's immunity from suit was an indivisible whole that the State had waived entirely by removing the case. *See id.*, at 25-26.[2] Having held that the State waived its

---

2. In *dicta*, the court of appeals suggested that, after removal, a State would retain any immunity *from liability* afforded by state law, Pet. App. 28-32, but it did not explain how any such state-law principle could apply to defeat Meyers's federal ADA claim in federal court in light of the *Erie* doctrine and the Supremacy Clause.

immunity from suit, the court noted that it was unnecessary to review the district court's decision that Congress did not validly abrogate this immunity in Title II of the ADA. *Id.*, at 33.

The court of appeals denied rehearing and rehearing en banc. *Id.*, at 50.[3]

REASONS FOR GRANTING THE PETITION

The circuits are divided on the question that the Court reserved in *Lapides*: whether the waiver-by-removal rule applies to claims for which the State contends that its sovereign immunity from suit has neither been waived nor validly abrogated.

The conflict is clear and deep. The Fourth, Seventh, and District of Columbia Circuits have all limited *Lapides*'s waiver-by-removal rule to state-law claims for which the State has waived its immunity in state court. For all other claims, in those circuits, a State's removal of a case waives only its forum immunity—its privilege not to litigate in federal court—but not any underlying sovereign immunity from suit it may have. By contrast, the Fifth,

---

3. In a short opinion accompanying this order, the court of appeals reiterated its *dicta* that the State could assert any immunity from liability it had under Texas law to defeat Meyers's Title II claims on the merits, but, again, it did not explain how state law might apply to those claims. Pet. App. 50. The court also restated that it had not reached the issue of whether Title II of the ADA validly abrogates the State's sovereign immunity. *Id.* The court then listed the abrogation issue among those that it was remanding "for further proceedings." *Id.* But there are no further proceedings to be had on the abrogation issue, given that (1) the court of appeals held that the State did not have any immunity to be abrogated, having already waived that immunity by removing the case, and (2) in any event, the district court has already held—twice—that Title II did not validly abrogate the State's sovereign immunity as applied to this suit, *id.*, at 40, 46-47, and Meyers had specifically challenged that decision in her appeal, Resp. C.A. Br. 43-44.

Ninth, and Tenth Circuits have extended *Lapides*'s waiver-by-removal rule to all claims, holding that a State's removal waives its immunity from suit *in toto—i.e.*, its forum immunity plus the entirety of its underlying sovereign immunity. Because six circuits have now taken sides in a debate that has only two possible answers, no further percolation is needed in the lower courts. The question is already fully developed and ripe for the Court's resolution.

The consequences of this debate for the States are significant. The eighteen States in the circuits that have extended *Lapides*'s waiver-by-removal rule to all claims unfairly face a Hobson's choice between relinquishing their underlying sovereign immunity and foregoing a federal forum while States in those circuits that have limited *Lapides* are not burdened by this dilemma. And the uncertainty that prevails in the circuits that have not addressed this question prejudices the twenty-four States in those jurisdictions as well. When these States are sued in state court for alleged violations of federal law and have a substantial claim of immunity, they cannot make an informed decision about removal. They can remain in state court and forego federal-court adjudication of important questions of federal law, or they can remove and risk the loss of a potentially case-determinative defense. The quandary for all States is only compounded when cases include multiple divergent claims and individual state-employee defendants whose interests must be factored into the decision whether to remove. The Court should resolve this question so that all States stand on equal footing when it comes to removal and can make these important litigation decisions fully cognizant of the repercussions.

Finally, the extension of *Lapides*'s waiver-by-removal rule is unfounded. Although removal understandably waives a State's objection to litigating in federal court, it should not deprive a State of the right to assert a defense of underlying sovereign immunity when the State could have asserted the defense in state court. The

United States urged this precise position in *Lapides* itself, explaining that a State's "removal of a case effects a waiver of its immunity from suit in a federal forum" but does not "waive any defenses that would have been available to the State in state court," such as "[t]he constitutional right not to be sued at all." Brief for the United States as Amicus Curiae at 22, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (No. 01-298), 2001 WL 1673411, at *22.

The Court's decision in *Lapides* sensibly prevents a State from regaining by removal an immunity it never had in state court. But the Fifth Circuit's decision skews the balance achieved in *Lapides* to the opposite extreme, putting the States at a substantive disadvantage when they choose a federal forum. The Court should grant certiorari to vindicate the principle animating *Lapides*: that the procedural device of removal should be neutral as to the substance of the claims, conferring no substantive advantages or disadvantages *vis à vis* the state courts.

I. THE CIRCUITS DISAGREE OVER THE PROPER SCOPE OF *LAPIDES*'S WAIVER-BY-REMOVAL RULE.

As the Fifth Circuit, other courts, and commentators have all acknowledged, the circuits are split over the question expressly reserved by the Court in *Lapides*: whether a State waives its immunity from suit by removing a federal or state claim as to which its underlying sovereign immunity has not already been waived or abrogated. *See, e.g.*, Pet. App. 20-22 (disagreeing with Fourth Circuit's refusal to extend *Lapides* to all claims); *Boone v. Pa. Office of Vocational Rehab.*, 373 F. Supp. 2d 484, 492 (M.D. Pa. 2005) (observing that "the issues the Supreme Court did not decide in *Lapides* have generated much discussion in the federal courts of appeals" and cataloguing the divergent decisions); Steven H. Steinglass, *Removing § 1983 Actions to Federal Court*, *in* 1 SECTION 1983 LITIGATION IN STATE COURTS §24:9 n.8 (2006) (noting that "[i]t is unclear, however, how *Lapides* will apply to

federal claims and to state law claims on which states have not waived their sovereign (as contrasted to Eleventh Amendment) immunity" and citing *Stewart* and *Meyers* as exemplifying the confusion).

The Fourth, Seventh, and District of Columbia Circuits have limited *Lapides* to its specific holding that a State's removal of a case waives its immunity from suit for claims as to which the State has waived its underlying sovereign immunity in state court. *Stewart v. North Carolina*, 393 F.3d 484, 488-90 (CA4 2005); *Omosegbon v. Wells*, 335 F.3d 668, 673 (CA7 2003); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (CADC 2002). The Fourth Circuit explained that the Court's focus in *Lapides* was "consistency, fairness, and preventing States from using the [Eleventh] Amendment 'to achieve unfair tactical advantages.'" *Stewart*, 393 F.3d, at 490 (quoting *Lapides*, 535 U.S., at 621). Toward that end, *Lapides*'s waiver-by-removal rule precludes a State from "regaining" immunity it had abandoned in state court by removing the case to federal court and invoking the Eleventh Amendment. *See id.* But where the State's underlying sovereign immunity has not been waived or abrogated, the Fourth Circuit discerned "nothing inconsistent, anomalous, or unfair about permitting [a State] to employ removal in the same manner as any other defendant facing federal claims." *Id.* Under these circumstances, the Fourth Circuit observed, the State is merely seeking "to have the sovereign immunity issue resolved by a federal court rather than a state court." *Id.*

Thus, the Seventh Circuit has recognized that "there is an extra layer to our sovereign immunity analysis" in removed cases. *Omosegbon*, 335 F.3d, at 673. In that circuit, *Lapides* is not controlling unless the court first determines that the State would not have been immune from suit in state court. *Id.* The District of Columbia Circuit has likewise declined to find a waiver of immunity under *Lapides* where the removing state defendants "have

not waived immunity . . . in their own courts." *Watters*, 295 F.3d, at 42 n.13.[4]

By contrast, the Fifth, Ninth, and Tenth Circuits have extended application of *Lapides*'s waiver-by-removal rule beyond claims for which a State has waived its sovereign immunity in state court. Pet. App. 9; *Embury v. King*, 361 F.3d 562, 564 (CA9 2004); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1203-06 (CA10 2002). In this case, the Fifth Circuit explained that the rule "applies generally to any private suit which a state removes to federal court" and is not limited "to a small sub-set of federal cases including only state-law claims in respect to which a state has waived immunity therefrom in state court." Pet. App. 9. In the Fifth Circuit's view, this blanket application of the rule is needed "to eliminate the *potential* of unfairness," regardless of whether a State actually achieves any unfair advantage by removing a federal or state claim for which its immunity has not been waived or abrogated. *Id.*, at 23.

---

4. In this case, the Fifth Circuit erroneously described these decisions from the Seventh and District of Columbia Circuits as inapposite. Pet. App. 19 n.14, 20. The court asserted that, in *Omosegbon*, the Seventh Circuit never "indicated that it would reach a different result if the state had not waived immunity in state courts or if the case had also involved federal-law claims." *Id.*, at 20. Not so. In fact, the Seventh Circuit explicitly stated: "*Before* we find the rule announced in *Lapides* to be controlling here, we *must first* satisfy ourselves that Indiana's state-law immunity rules would have allowed an Indiana court to hear Dele's state-law contract claim had this lawsuit not been removed to federal court." 335 F.3d, at 673 (emphases added). The court of appeals also believed that the District of Columbia Circuit's "remarks about waiver by removal" in *Watters* "were not relevant to its decision." Pet. App. 19 n.14. To the contrary, the *Watters* court felt compelled to address the waiver-by-removal issue *sua sponte* because *Lapides* was handed down while the case was pending. 295 F.3d, at 42 n.13.

In this regard, the Fifth Circuit noted that it was joining the Ninth and Tenth Circuits in extending *Lapides* to federal and state claims generally. *Id.*, at 18. The Ninth Circuit has held that "the rule in *Lapides* applies to federal claims as well as to state law claims," sharing the Fifth Circuit's assessment that "[n]othing in the reasoning of *Lapides* supports limiting the waiver . . . to state law claims only." *Embury*, 361 F.3d, at 564.[5] And the Tenth Circuit has also held that a State's removal of a federal-law claim waives its immunity from suit, even if the federal claim is otherwise an invalid abrogation of the State's immunity (*e.g.*, Title I of the ADA). *Estes*, 302 F.3d, at 1203-06. Thus, in these Circuits, the act of removal waives not only the State's "forum immunity," but also its underlying immunity from suit—an immunity it would have retained had the suit remained in state court or been originally filed in federal court.[6]

---

5. Although the Ninth Circuit held that *Lapides*'s waiver-by-removal rule extends to federal-law claims generally, it reserved the question whether the rule would apply to federal claims predicated upon an invalid abrogation of the States' immunity—*e.g.*, the ADEA—because no such claims were presented in that case. *Embury*, 361 F.3d, at 566 n.20.

6. In an unpublished, non-precedential opinion, the Third Circuit has also held that *Lapides* extends to a State's removal of a federal-law claim. *Fidtler v. Pa. Dep't of Corr.*, 55 Fed. Appx. 33, 35 (CA3 2002). The issue is pending before the Third Circuit in another appeal. *Boone v. Pa. Office of Vocational Rehab.*, No. 06-3240 (CA3) (filed June 30, 2006). In that case, the district court held, contrary to *Fidtler*, that *Lapides* should not be extended beyond its holding, so that "whatever immunity a state enjoyed in state court remains with it after removal to federal court." *Boone*, 373 F. Supp. 2d, at 494.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS CONFLICT.

The question presented is of great consequence to the States. The scope of the waiver effected by removal influences daily decisions by state attorneys whether to remove suits against the State that include federal claims but are brought in state court. If removal waives only the State's forum immunity from suit in federal court, then the State can exercise its right to removal without fear of waiving any underlying immunity from suit it may have enjoyed in state court. But if removal waives the State's immunity from suit in its entirety, then States must undertake a very careful and delicate balancing of their (and any co-defendants') desire for federal-court expertise against the loss of an important defense. *See* Part II.A., *infra*.

The two potential answers to this important question have already been thoroughly explored by six courts of appeals, making further percolation unnecessary. Moreover, the conflict among these circuits untenably puts States of equal dignity on different footing with respect to their immunity in the federal courts. And the uncertainty that prevails in the remaining circuits keeps almost half of the States in the dark about the consequences of removing a case with immunity defenses. For these reasons, the Court should grant the petition. *See* Part II.B., *infra*.

A. Whether Removal Waives the States' Underlying Sovereign Immunity from Suit—in Addition to Their Immunity from Suit in a Federal Forum—Is a Question of Fundamental Importance to the States.

1. The ability to remove federal-question cases is an important right for all defendants—including States—and furthers significant federal interests.

Like all other defendants, States have the right to remove federal-question cases. 28 U.S.C. §§1441(a), (b). One reason

defendants take advantage of that right is to avail themselves of the federal courts' expertise in resolving questions of federal law, which comports with why Congress enacted §1441. As the Court has observed:

> "The legislative history of the federal question removal provision is meager, but it has been suggested that its purpose was the same as original federal question jurisdiction, enacted at the same time in the Judiciary Act of 1875, namely, to protect federal rights and to provide a forum that could more accurately interpret federal law." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 247 n.13 (1970) (internal citations omitted).

Through the removal statutes, "Congress thus expressed an unmistakable preference for a federal forum." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999) (considering removal pursuant to the Price-Anderson Act). And, particularly for questions of immunity, federal-court adjudication can be desirable. *Cf. Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (in a case removed under 28 U.S.C. §1442, noting that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court").

Moreover, the determination of federal-law questions by courts with special expertise enhances the consistency of federal law, which the Court has recognized as a critical interest. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("[I]t cannot be doubted that there is an important need for uniformity in federal law . . . .").

Finally, removal facilitates the participation of the United States in the adjudication of important federal questions. When litigants challenge the validity or constitutionality of federal statutes and regulations in state court rather than federal court, there is no mechanism requiring notice to the Attorney General or Solicitor General. Thus, if defendants in those cases have a disincentive to

remove, it substantially increases the risk that the United States will not have a role in defending federal law from such challenges.

2. States cannot intelligently exercise their right to remove as long as the scope of the immunity waived by removal remains undecided.

States are frequently sued in state courts for alleged violations of federal law. Thus, they must regularly make the decision whether to remain in state court or remove to federal court.

But States in those circuits that have extended *Lapides*'s waiver-by-removal rule to all claims face a dilemma: forego the federal-law expertise offered by the federal forum or lose their defense of immunity from suit entirely. And the presence of multiple claims—some subject to a sovereign-immunity defense and some not—may greatly complicate the decision whether to remove. For example, a State that is defending claims of defamation under state law and violation of the family-leave provisions of the federal Family and Medical Leave Act (FMLA) would have to carefully weigh its desire for federal court expertise in the FMLA against the waiver of its underlying sovereign immunity from suit for the defamation claim that it may have enjoyed in state court, *see* TEX. CIV. PRAC. & REM. CODE §101.057 (providing, as a matter of state law, that the State's immunity from suit is not waived for intentional torts).

States in circuits that have not addressed the scope of *Lapides* likewise confront a difficult choice. When any claim in a case—whether a federal-law claim or a supplemental state-law claim—is subject to a defense of sovereign immunity, the State cannot know whether availing itself of the federal courts' expertise in federal law will result in the loss of its immunity from suit entirely. Only if these States knew whether they would in fact lose their underlying immunity from suit by removing could they make an intelligent, informed choice. Indeed, had Texas foreseen the decision below, it likely would not have removed this case, instead

surrendering the federal forum to which any other defendant would have been entitled.

The presence of individual state-employee defendants in a suit further complicates the decision whether to remove for all of these States, because such defendants often desire a federal forum for adjudication of their qualified-immunity defenses. Because, as a general rule, all defendants must consent to removal, *see Chicago, Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900), the State must undertake a careful balancing of the risks and benefits of removal for all defendants. Clarifying the precise scope of the risk to the important defense of sovereign immunity from suit would greatly decrease the guesswork and enable the States to make informed litigation decisions.

B. Further Development in the Courts of Appeals Is Unwarranted.

There are only two possible answers to the question presented. A State's removal of a case to federal court waives either (1) only its right not to be sued in a federal forum, or (2) that right plus its underlying sovereign immunity from suit (together comprising its immunity from suit *in toto*). In taking either side of this binary debate, six circuits have already thoroughly explored the question. *See* Part I, *supra*. Decisions by any additional circuits will join one side or the other but are unlikely to shed any further light on the substance of the controversy. The dispute is, therefore, fully developed and ready to be resolved.

Indeed, only the Court's intervention can resolve this conflict because the circuits' disagreement rests on fundamentally inconsistent interpretations of *Lapides*. The Fifth Circuit viewed *Lapides*'s reservation of other applications of the waiver-by-removal rule merely as the Court "circumspectly . . . not address[ing] any issue unnecessary to its decision," Pet. App. 9, and concluded that "the principles of voluntary invocation and waiver by removal as explained in *Lapides*" justified the extension of the

waiver-by-removal rule to all claims, *id.*, at 23. The Fourth Circuit likewise believed that "the principles animating *Lapides* shed light on the issue," but reached the opposite result from the Fifth Circuit. *Stewart*, 393 F.3d, at 489. The Fourth Circuit understood *Lapides*'s focus to be "consistency, fairness, and preventing States from using the [Eleventh] Amendment 'to achieve unfair tactical advantages.'" *Id.*, at 490 (quoting *Lapides*, 535 U.S., at 621). Finding no "risk of inconsistency and unfair tactical advantages" when a State removes a claim for which it is immune from suit in state court, the Fourth Circuit determined that "this case is very different from *Lapides*." *Id.* Whether the principles underlying *Lapides* mandate extension of the waiver-by-removal rule to all claims is ultimately a question that only the Court can answer.

C. Delay in Resolving This Issue Unduly Prejudices the States.

Uniformity in federal law is particularly important when, as here, the sovereign interests of all States are implicated. The Court has explained that, in our federal system, "immunity from private suits" is "central to [the] sovereign dignity" of the States. *Alden v. Maine*, 527 U.S. 706, 715 (1999). Another bedrock principle of our system is that "[t]he several states are of *equal* dignity." *Brown v. Fletcher's Estate*, 210 U.S. 82, 89 (1908) (emphasis added). The current conflict over the scope of *Lapides* undermines these precepts because, in six circuits, the States are *not* on equal footing with regard to removal's effect on the immunity from suit that inheres in their dignity as sovereigns. Certiorari is warranted to resolve this untenable disparity.

Moreover, any delay in finally resolving this question unduly prejudices the twenty-four States in the circuits that have not passed upon the issue. In the face of this Court's express reservation of the question and an even circuit split, these States simply cannot make an informed decision about removing a federal-question case that implicates sovereign-immunity defenses. *See* Part II.A.2, *supra*.

The Court should grant the petition to remove this uncertainty from a common litigation position.

III. THE COURT OF APPEALS'S EXTENSION OF *LAPIDES* IS NOT SUPPORTED BY THE COURT'S ELEVENTH-AMENDMENT PRECEDENT OR *LAPIDES*'S RATIONALE.

The court of appeals's conclusion that *Lapides*'s waiver-by-removal rule must be extended even to claims for which a State's underlying sovereign immunity has not been waived or abrogated rests on two erroneous precepts: (1) a State's immunity from litigating in a federal forum, recognized by the Eleventh Amendment, is indistinguishable from its inherent sovereign immunity from suit, and thus cannot be separately waived, *see* Pet. App. 23-28; and (2) failing to extend *Lapides* to this situation could produce the inconsistency and potential unfairness that the *Lapides* rule aims to avoid, *see id.*, at 21-23. Neither is correct.

A. A State's Immunity from Litigating in Federal Court—Recognized by the Eleventh Amendment—Is a Distinct Component of the State's Inherent Sovereign Immunity That May Be Separately Waived.

The court of appeals properly recognized that the different aspects of the State's immunity from suit—its immunity from private suits in general as well as its immunity from suit in federal court described by the Eleventh Amendment—inhere in the nation's structure and emanate from the States' sovereign status. *See* Pet. App. 25-26. However, from this principle the court of appeals drew an incorrect conclusion: that because these strands of the State's sovereign immunity have a single source, the State may not choose to waive one without the other. *See id.*, at 23-26. Thus, the court of appeals held that removal waives the State's immunity from suit in its entirety—rather than merely its immunity from litigating in the federal forum. *Id.* This conclusion was in error.

The Court has implicitly recognized that a State may waive the federal-forum component of its sovereign immunity without waiving its inherent sovereign immunity from suit *in toto*. In *Lapides* itself, the Court explicitly declined to consider "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." 535 U.S., at 617-18 (emphasis added). Similarly, the Court was careful to describe its ruling as follows: "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 (emphasis added). Thus, the Court indicated that the waiver of immunity from suit "in a federal forum" is a concept distinct from the waiver of "underlying sovereign immunity from suit." *Id.*, at 618.

Likewise, in *Pennhurst State School & Hospital v. Halderman*, the Court observed that "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." 465 U.S. 89, 99 (1984). This distinction, the Court noted, is reflected in the fact that "the Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts." *Id.*, at 100 n.9 (citations omitted). In other words, a State's right not to be sued in federal court—the right described by the Eleventh Amendment—implicates only the "where" aspect of the State's immunity; it does not implicate the "whether" aspect of the State's immunity.

This is precisely the position taken by the United States as an *amicus curiae* in *Lapides*. In its brief, the United States described Eleventh Amendment immunity as including "forum immunity"—*i.e.*, immunity from proceeding in federal court. But the United States carefully distinguished this "forum immunity" from a State's underlying sovereign immunity from suit:

> "Although a State's removal of a case effects a waiver of its immunity from suit in a federal forum, there are significant limits on the scope of that waiver. The Eleventh Amendment incorporates two forms of immunity. A State may choose not to be sued at all, or it may choose to be sued, but only in its own courts. *Pennhurst II*, 465 U.S. at 99. A removal of a case to federal court waives only forum immunity. By voluntarily and affirmatively selecting a federal forum for litigation of a case, the State consents to have a federal court rather than the state court decide the case. The act of removal, however, cannot be understood to waive any defenses that would have been available to the State in state court. The constitutional right not to be sued at all is just such a defense." Brief for the United States as Amicus Curiae at 22, *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (No. 01-298), 2001 WL 1673411, at *22.

Accordingly, the United States explained that, "to the extent that the State would have a sovereign immunity defense to constitutional claims in state court, *see Alden v. Maine*, 527 U.S. 706 (1999), its removal of the case to federal court would not waive that defense." *Id.*, at 23, 2001 WL 1673411, at *23.[7]

Therefore, although the State's removal of this case necessarily waived any objection it had to proceeding in federal court, the removal should not have waived its "underlying sovereign immunity from suit." *Cf. Lapides*, 535 U.S., at 617-18. Thus, that

---

7. The United States intervened in this case in the court of appeals, but, consistent with its position in *Lapides*, it did not support Meyers in urging the court of appeals to extend *Lapides* to this case. Rather, it limited its briefing and argument to the defense of the constitutionality of Title II of the ADA and its regulations, and expressed no position on the applicability of *Lapides*. *See* U.S. C.A. Br. 2.

defense to the Title II claims remained to be adjudicated by the district court, which in turn held that Congress, in enacting Title II, had not validly abrogated the State's sovereign immunity as applied to Meyers's suit. Pet. App. 40, 46-47.[8]

The court of appeals's own remand instructions on rehearing demonstrate the fallacy of its reasoning. That court remanded, *inter alia*, the issue "whether the ADA Title II on its face or as applied constitutionally abrogates the State's sovereign immunity," Pet. App. 50, inexplicably ignoring the fact that the district court had already ruled on this issue in the State's favor and that Meyers had appealed that ruling, *id.*, at 40, 46-47. Instead of reaching the issue that the district court resolved, the court of appeals held that the State had waived that defense of immunity from suit and suggested that the State retains only any state-law immunity from liability, *id.*, at 32—a concept of dubious applicability in this federal-question case in federal court.

B. Allowing the State to Assert Its Underlying Immunity from Suit After Removal Does Not Present the Concerns of Inconsistency and Unfairness That Animated *Lapides*.

Contrary to the court of appeals's analysis, allowing a State to assert its underlying sovereign immunity from suit after removing a case to federal court does not present any inconsistency or unfairness that justifies extending *Lapides* to this scenario. As the Fourth Circuit noted in *Stewart*, the unfairness in *Lapides* arose because the State had already chosen to waive its sovereign immunity from suit in state court but was attempting to "*regain* immunity by removing the case to federal court and invoking the Eleventh Amendment." 393 F.3d, at 488.

---

8. The Eighth Circuit has agreed with the district court that Title II of the ADA does not validly abrogate the States' immunity from suit as applied to a challenge to parking-placard fees under 28 C.F.R. §35.130(f). *Klingler v. Dir., Dep't of Revenue*, 455 F.3d 888, 892-97 (CA8 2006).

By contrast, in this case and in *Stewart*, the State raised the defense that its sovereign immunity from suit had never been validly waived or abrogated at all. Pet. App. 37, 45; 393 F.3d, at 490. Removing the case did not create or enhance this defense; it simply meant that the defense would be resolved by a federal court instead of a state court—as would happen with any other defense raised by a removing defendant. Thus, as the Fourth Circuit observed, there is "nothing inconsistent, anomalous, or unfair about permitting [the State] to employ removal in the same manner as any other defendant facing federal claims." *Stewart*, 393 F.3d, at 490.[9]

In this circumstance, the State gained no substantive advantage by removal. Rather, the State sought only to maintain the *status*

---

9. The Fifth Circuit suggested that the State's removal of this case unfairly enabled the State to obtain a second ruling on its sovereign-immunity defense. Pet. App. 22-23. But that is not the case. At the time of removal, the state trial court had already rejected that defense, and the State was actively pursuing an interlocutory appeal from that decision in state appellate court; after removal, the federal district court then dismissed the case on sovereign-immunity grounds. But again, this course of events is not due to any unique advantage the State has as a defendant or the fact that the issue at stake is an immunity defense. Rather, the case unfolded in this manner because (1) after the state court ruled on the State's immunity defense, the case became removable because of an intervening change in federal law, *see supra* at 4 n.1; and (2) it is well-settled that "[a]ny orders or rulings issued by the state court prior to removal are not conclusive in the federal action after removal." 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §3738 (3d ed. 2005); *see also Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co.*, 260 U.S. 261, 267 (1922) (holding that interlocutory state court orders are subject to reconsideration by a district court after removal). This principle would have applied to any state-court decision rejecting any defense raised by any removing defendant.

quo ante—retaining exactly the same defenses that would have been available in state court. Indeed, the only unfair consequence following the court of appeals's decision is that now the State, unlike any other defendant, is effectively denied the federal statutory right of removal if it wants to assert a defense that would be exactly the same in state and federal court.

Such inconsistency and unfairness could be eliminated by adopting the Fourth Circuit's holding in *Stewart* and the United States' position in *Lapides*: that removal waives only a State's immunity from suit in a federal forum, but not its underlying sovereign immunity from suit. This principle guarantees that neither party gains a substantive advantage through removal. Moreover, it comports with the Court's call in *Lapides* for clear jurisdictional rules. *See* 535 U.S., at 621.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General
for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

AMY WARR
Assistant Solicitor General

RANCE L. CRAFT
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

September 2006