No. 06-462

In The Supreme Court of the United States

STATE OF TEXAS, TEXAS DEPARTMENT OF TRANSPORTATION, and MICHAEL W. BEHRENS in his capacity as Executive Director of the Texas Department of Transportation,

Petitioners,

vs.

MARJORIE MEYERS, HELEN ELKIN, RUTH H. DAVIS, and PHILLIP GREENBERG on behalf of themselves and all others similarly situated, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STEPHEN R. SENN
PETERSON & MYERS, P.A.
Post Office Box 24628
Lakeland, FL 33802
(863) 683-6511

J. HAMPTON SKELTON
SKELTON, WOODY, ET AL.
Post Office Box 1609
Austin, TX 78767
(512) 651-7000

ROBERT G. FEGERS
Counsel of Record
ROBERT G. FEGERS, P.L.
Post Office Box 7692
Winter Haven, FL 33883
(863) 294-2898

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the particular circumstances of this case, is a State immune from suit on claims the State removed to federal court, even though the State would not have been immune on the same claims had the case remained in state court?

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STATEMENT OF THE CASE

Marjorie Meyers, Helen Elkin, Ruth H. Davis, and Phillip Greenberg ("Respondents"), are individuals with serious mobility impairments who have paid for placards allowing use of accessible parking. In order to receive such placards, Respondents are required by Texas law to pay a fee. Respondents contend that requiring a fee for placards allowing use of accessible parking violates Title II of the Americans With Disabilities Act, 42 U.S.C. § 12132 ("Title II").[1]

Respondents filed suit in state court challenging the fee requirement for placards. In September of 1997, Petitioners removed the case to the United States District Court for the Western District of Texas. The federal court sua sponte remanded the action to state court on the ground that the placard fee is a state tax, and that federal jurisdiction was therefore barred by the Tax Injunction Act, 28 U.S.C. § 1341.

Back in state court, class certification was granted, and Petitioners' claim that the case was barred by sovereign immunity was rejected by the state trial court. Petitioners appealed these rulings to Texas' Third District Court of Appeals, where the case was briefed and oral argument scheduled. Before oral argument, on July 17, 2000 – nearly three years after suit was originally filed and over two years after the federal court's first order of remand to state court – Petitioners removed the case to

[1] Accord *Klingler v. Department of Revenue*, 455 F.3d 888 (8th Cir. 2006); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001); *Duprey v. Connecticut*, 28 F.Supp.2d 702 (D. Conn. 1998); *Thrope v. Ohio*, 19 F.Supp.2d 816 (S.D. Ohio 1998).

federal court for the second time. The basis asserted for the second removal was a ruling by the Fifth Circuit in a separate lawsuit, *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000), that the placard fee is not a tax.

Two days later, Petitioners moved to dismiss Respondents' claims as barred by the Eleventh Amendment to the Constitution of the United States. Respondents moved for remand, arguing that Petitioners' second removal of a previously removed and remanded case, taken over three years after suit was filed, and based on events external to the litigation, was improper. On April 16, 2001, the district court granted Petitioners' motion to dismiss.

On May 19, 2005, the Fifth Circuit reversed, relying on the holding in *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002), that Eleventh Amendment immunity from suit in federal court is waived by a state's decision to remove. (Pet. App. at 1-35). The Fifth Circuit rejected Petitioners' argument that *Lapides* should be narrowly limited to state law claims for which the state has waived its immunity. (Pet. App. at 9-23).

In denying Petitioners' motion for rehearing, the Fifth Circuit emphasized the limited nature of its ruling:

> The narrow holding in the instant case is that, under the Supreme Court's decision in *Lapides v. Bd. of Regents of Georgia*, 535 U.S. 613, 122 S.Ct. 1640 (2002), when a State removes to federal court a private state court suit based on a federal-law claim, it invokes federal jurisdiction and thus waives its unqualified right to object peremptorily to the federal district court's jurisdiction on the ground of state sovereign immunity. However, that waiver does not affect or limit the State's ability to assert whatever rights,

> immunities or defenses are provided for by its own sovereign immunity law to defeat the claims against the State finally and on their merits in the federal courts. In sum, Texas may assert its state sovereign immunity defense as defined by its own law as a defense against the plaintiffs' claims in the federal courts, but it may not use it to defeat federal jurisdiction or as a return ticket back to the state court system.

(Pet. App. at 50).

REASONS FOR DENYING THE WRIT

In *Lapides*, this Court unanimously announced the "clear" and "easily applied" rule that "removal is a form of voluntary invocation of a federal forum 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." 535 U.S. at 623-24. *Lapides* relied on a line of precedent concluding that Eleventh Amendment immunity is waived when a State invokes federal jurisdiction. *Id*. at 619-22. The Court was concerned that a State should not be permitted to invoke federal jurisdiction and simultaneously reject federal authority, and that unfairness would result from a different rule. *Id*. at 622-23. See also *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring).

Petitioners seek review to resolve an alleged circuit conflict regarding the scope of waiver by removal. The petition and the case law often confusingly refer to sovereign immunity generally, without distinguishing between a State's immunity from suit in federal court as protected by the Eleventh Amendment (sometimes referred to as

forum immunity), and the sovereign immunity that a State typically enjoys, even in its own state courts, as a matter of state sovereign immunity law. To understand why this case is not worthy of review, it is important to bear in mind the distinction between these two forms of immunity.

Petitioners' primary argument for review is that the decisions below conflict with decisions of the Fourth, Seventh, and D.C. Circuits. But the Fifth Circuit's decisions below do not conflict with any of the cases cited. All of the circuit decisions cited by Petitioners can readily be harmonized to honor one abiding principle: A State waives its federal forum immunity by removal to federal court, but does not lose its ability to assert any immunity defenses it would otherwise have had available if the case had remained in state court. To the limited extent that some circuits have expressed differing views regarding *Lapides*, the variations arise from dicta, from ambiguous passages, or are semantic in nature, and in any event have yet to prove outcome-determinative in any case. Because there is no direct conflict between the decisions below and any other court of appeals decision, Petitioners' primary argument for review fails.

Moreover, this case is not an ideal vehicle for deciding the question presented. First, the claims in this case would not be barred by sovereign immunity in state court, and so the question stated by the Petitioners is not presented. Even if Petitioners wish to assert a claim of immunity as a matter of Texas sovereign immunity law, the decision of the Fifth Circuit in its order on rehearing expressly preserves Petitioners' ability to assert such immunity as a defense in the federal court on remand. (Pet. App. at 50).

In addition, there is an antecedent jurisdictional issue regarding whether a second removal, years after the commencement of the action, and based solely upon a court decision in a separate suit, is a proper method of invoking federal jurisdiction. The second removal and subsequent delay and additional expense of litigation, added to the fact that Petitioners effectively seek reversal of a state court ruling that there is no sovereign immunity from Respondents' claims, heightens the unfairness concerns referenced in *Lapides* and renders this case atypical from run-of-the-mill removals. It also bears mention that the case as presently postured is interlocutory, and there is no momentous reason to rush forward Supreme Court review of a constitutional issue where the case may likely be resolved without need for such review.

Finally, the ultimate resolution of Petitioners' contentions would benefit from further review by the district and circuit courts, and time for informed commentary. Allowing percolation of this area of law presents no unfairness, as any state agency subjects itself to this issue only if it makes the voluntary decision to remove a case from its own state court system into federal court. And as the purported conflict does not appear likely to affect the ultimate result in any case, there is no prejudice to any state agency. For these reasons, this case does not present a matter of such tremendous consequence as to require consideration so soon after *Lapides*.

I. THERE IS NO CONFLICT

Petitioners' depiction of a conflict among the circuits does not withstand scrutiny. Petitioners argue that the Fourth, Seventh, and D.C. Circuits limit waiver-by-removal to state-law claims from which the state has waived its immunity in state court, and that in contrast the Fifth, Ninth, and Tenth Circuits hold "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." (Pet. at 7). A careful review of the cited circuit decisions, however, demonstrates that none are in clear and direct conflict with the decisions below, and that no circuit court has stated that waiver by removal extends beyond forum immunity to include waiver of immunity a State would otherwise enjoy in state court. There is no conflict.

The earliest case cited by Petitioners for the purported limited view of waiver by removal is *Watters v. Washington Metro. Area Transit Auth'y*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002). But in *Watters*, the D.C. Circuit did not reach the issue, because it had not been raised. As the opinion concludes in its footnote reference to the issue: "we see no reason to consider, sua sponte, an issue upon which neither this circuit nor the Supreme Court has yet opined." *Id*. An opinion which merely recognizes and declines to reach an issue is no proper basis for finding a conflict on the very issue which the opinion expressly declined to reach.

Omosegbon v. Wells, 335 F.3d 668, 673 (7th Cir. 2003), also involves claims under state law for which sovereign immunity had been abolished. *Id*. at 672-73. The issue in *Omosegbon* was exactly the same (state-law claims for

which sovereign immunity had been waived as a matter of state law) as the issue in *Lapides*. Given the perfect identity of the issue presented in *Omosegbon* with the issue resolved in *Lapides*, any suggestion in *Omosegbon* of a narrow interpretation of *Lapides* necessarily constitutes dicta, and is therefore not an appropriate basis for review by this Court.

In any event, the language from *Omosegbon* emphasized by Petitioners is best read as recognizing that *Lapides* directly controls only in cases involving claims for which immunity had been waived and so would present no bar in state court. *Id*. at 673 ("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."). Although Petitioners read this passage as indicating there would be no waiver otherwise, the Seventh Circuit does not state such a conclusion. Instead, the passage is most naturally read as meaning that if the state law claims were barred in state court, then the case would not be on all-fours with *Lapides*, and it would then be necessary to consider how *Lapides* applies. Because *Lapides* was found to be indistinguishable on the facts before it, the Seventh Circuit did not need to undertake this inquiry in *Omosegbon*.

The final circuit decision cited by Petitioners for the limited-waiver side of the alleged conflict is *Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2004). *Stewart* considered the application of *Lapides* to claims arising under state law which, in state court, would be barred by state-law sovereign immunity. *Id*. at 490. The Fourth Circuit concluded that: "by removing the case to federal

court and then invoking sovereign immunity[,] North Carolina did not seek to *regain* immunity that it had abandoned previously. Instead, North Carolina merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court." *Id*. Thus, *Stewart* stands for the unremarkable conclusion that a State is entitled to dismissal after removal if the claim is found on motion to dismiss to be barred by state sovereign immunity law that would have barred the claim in state court.

The rulings below do not conflict with *Stewart*. The present case involves claims that would not be barred in state court by Texas sovereign immunity law, whereas *Stewart* involved claims that would have been barred in state court by North Carolina sovereign immunity law. *Stewart* and the decisions below are entirely consistent in their ultimate outcomes in that under either authority state law sovereign immunity defenses (as opposed to Eleventh Amendment forum immunity) are not waived by removal. Under both authorities, state-law sovereign immunity issues may be decided in the federal court after removal in the same manner as such defenses would have been resolved had the case remained in state court. The Fifth Circuit made clear that waiver by removal: "does not affect or limit the State's ability to assert whatever rights, immunities or defenses are provided for by its own sovereign immunity law. . . ." (Pet. App. at 50). Thus, on the essential question presented by the conflict alleged in the petition – whether sovereign immunity as a matter of state law is waived in addition to forum immunity under the Eleventh Amendment – *Stewart* and the decisions below are in perfect accord.

The topics on which the Fifth Circuit took issue with *Stewart*'s rationale amount to semantics and nuances,

rather than the ultimate holdings in the cases. Petitioners take comfort in the Fifth Circuit's broad statement that *Stewart*'s "rationale misconstrues important principles animating *Lapides*." (Pet. App. at 21). But an examination of the examples given for this statement reveal difference only in semantics, rather than any kind of true conflict which might provide a basis for certiorari review. For one, the Fifth Circuit disapproved of the *Stewart* court's statement that a State is "like any other defendant." (Pet. App. at 21). This statement is criticized because other defendants lack the sovereign immunity protections that are, as recognized in *Lapides*, subject to abuse by state agencies. *Id*. The Fifth Circuit also disapproved the suggestion in *Stewart* that a state defendant's motivation is relevant to the consideration of whether there is a waiver, because the motive for removal was rejected as a relevant factor in *Lapides*. (Pet. App. at 22). The Fifth Circuit reads *Stewart* as countenancing "the waiver-by-removal rule as focused only on specific or comparative abuses such as attempting to 'regain' an 'abandoned' immunity." *Id*.

The differences reflected by these passages, and on which Petitioners' dire warnings depend, do not constitute a disagreement of sufficient substance to warrant review. A disagreement which is merely semantic or purely theoretical, and which does not lead to differing results, is not of sufficient moment to justify certiorari review. Both courts ultimately agree that removal waives only forum immunity, and that claims barred under state sovereign immunity law will continue to be barred by the same law after removal to federal court. Because *Meyers* and *Stewart* are so readily harmonized, no basis for granting certiorari to resolve conflict is presented.

The petition also cites *Embury v. King*, 361 F.3d 562 (9th Cir. 2004), as holding that waiver by removal extends to all claims generally. However, *Embury* does not indicate that state law sovereign immunity, as opposed to forum immunity under the Eleventh Amendment, is waived by removal. Indeed, *Embury* carefully reserved the question of whether a removing state defendant would be immune from federal claims if Congress had failed to constitutionally abrogate a State's immunity as to such claims. *Id*. at 566 n.20. Thus, the Ninth Circuit has not ruled that such substantive defenses (as opposed to forum immunity) are waived by removal.

It is also possible to read *Estes v. Wyoming Dep't of Transp.*, 302 F.3d 1200 (10th Cir. 2002) as using "sovereign immunity" as a commonly employed federal shorthand for forum immunity as protected by the Eleventh Amendment, exclusive of sovereign immunity as protected in state court under state law. Because it is not clear from *Estes* whether the Wyoming Department of Transportation asserted a claim of state-law sovereign immunity that would have been enforceable in state court, *Estes* also fails to establish a conflict regarding whether removal waives anything more than forum immunity.

In summary, Petitioners' claim of a "clear and deep" conflict (Pet. at 6) fails to withstand a careful reading of the authorities cited in the Petition. The circuit decisions issued since *Lapides* agree that removal waives forum immunity, but removal does not waive immunity that a State defendant would have enjoyed as a matter of state law in state court. Because there is no conflict, review should be denied.

II. THIS CASE IS AN UNSUITABLE VEHICLE FOR REVIEW

Even if there were conflict on the question presented, this case would be a poor vehicle for addressing the issue.

First, the question as stated in the petition is not properly presented in this case because in Texas state court Petitioners would have no immunity from Respondents' claims. Among other reasons why immunity would be no barrier in state court, Respondents' claims come within an established exception to sovereign immunity under Texas law allowing recovery of illegally collected fees. See *Austin Nat'l Bank v. Sheppard*, 123 Tex. 272, 71 S.W.2d 242, 246 (1934); *Camacho v. Samaniego*, 954 S.W.2d 811, 822 (Tex. App. – El Paso 1997).

The unsuitability of this case for resolving the question stated in the petition mirrors the unsuitability of *Lapides* to resolve issues beyond those presented by the particular circumstances presented in that case. *Lapides* directly controls cases in which no immunity would have applied in state court simply because that was the situation there presented. *Lapides*, 535 U.S. at 617 ("we must limit our answer to the context of state law claims, in respect to which the State has explicitly waived immunity from state-court proceedings"). Supreme Court review of the decisions below would present no opportunity to address the extent of waiver where a State would have been immune in state court because – just as in *Lapides* – Respondents' claims would not be barred by immunity in state court. Because there would be no state-law sovereign immunity barrier had Respondents' claim remained in state court, it would not be appropriate to use this case to

consider the effect of removal on claims that would otherwise be barred in state court.

Second, even if Petitioners argue that they would have been protected by immunity in state court and should not lose that immunity by removal, the Fifth Circuit's decisions expressly allow them to make this argument on remand in federal court. (Pet App. at 50). Petitioners may present whatever immunity defenses that would have been available to them in state court, although the cases cited above and the prior decision of the state court denying the plea to jurisdiction indicate that these defenses will not prevail. Accordingly, Petitioners have not lost any immunity defense that would have applied in state court, which is the linchpin of their argument for review.

Third, there is a difficult antecedent question regarding whether a second removal – taken after an earlier removal and remand and well beyond the thirty day period specified for removal – can effectively establish jurisdiction in federal court. The Fifth Circuit allows a second removal to be taken when subsequent pleadings or events reveal a new ground for removal, and such events warranting an otherwise untimely removal may include an order entered in a separate lawsuit. See *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001). The separate order prompting Petitioners to remove this case prior to oral argument in the Texas appellate court was a decision of the Fifth Circuit in a separate challenge to the placard fee, involving different Plaintiffs and different lawyers from the Respondents and lawyers in this case. *Neinast*, 217 F.3d at 279. In contrast with the Fifth Circuit, most courts have concluded that a court decision in a separate case does not provide an appropriate basis for reopening the opportunity to remove to federal court. See,

e.g., *Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772, 775 (9th Cir. 1990); *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234 (E.D. Mich. 1992); *Johansen v. Employee Benefit Claims, Inc.*, 668 F.Supp. 1294, 1297 (D. Minn. 1987); *Holiday v. Travelers Ins. Co.*, 666 F.Supp. 1286, 1290 (D. Minn. 1987). Because this presents a significant question involving the district court's removal jurisdiction, it should be addressed prior to reaching the question presented by the petition. See, e.g., *Bender v. Williamsport Sch. Dist.*, 475 U.S. 534 (1986). Unless this Court wishes to take on that jurisdictional question, it should deny review here.

Finally, the ricocheting that Respondents have suffered in being pulled from state to federal to state court, prevailing on key issues in state court, briefing those issues for anticipated success on appeal, and then being again removed to federal court shortly before the oral argument date in the state appellate court, followed by a dismissal from federal court, infuses this case with heightened grounds for concern over fairness and gamesmanship as discussed in *Lapides*, 535 U.S. at 619, 622, and in Justice Kennedy's concurring opinion in *Schacht*, 524 U.S. at 393-95. Respondents have suffered extraordinary delay and expense, and are forced to re-argue issues (sovereign immunity) on which Respondents had previously prevailed in state court. These circumstances render this case highly atypical, and therefore an unsuitable vehicle for Supreme Court review.

III. THERE IS NO PRESSING NEED FOR PRECIPITOUS REVIEW OF THE QUESTION PRESENTED

Contrary to the arguments made by Petitioners and their amici, there is no pressing need for immediate resolution of the uncertainties, if any, regarding the scope of *Lapides*. As discussed above in Section I, federal appellate decisions to date are easily harmonized to the effect that a State preserves the immunities it would enjoy in state court after removal, but loses its ability to assert forum immunity. We have found no case in which a federal court has clearly disallowed, solely because of removal, an immunity defense that would have been effective in state court.

States can easily avoid the risk from any uncertainty they perceive simply by defending themselves in their own state courts. Because the issue is raised only by voluntary action of the removing state agency, it is wholly within their power to avoid whatever injustice or potential for error that Petitioners and the amici believe may be risked by removal to federal court.

Because immunity defenses available in state court may be asserted in federal court after removal, there is no substantial prejudice suffered by state agency defendants who decide to remove. To the extent there is any difference in rationale among the Circuits, it would be advantageous to see if the law continues to evolve harmoniously. Thus far, nothing approaching the chaotic situation portrayed by Petitioners and amici has materialized.

This Court's decision in *Lapides* is only five years old. Since then, there have been no disagreements in the decisions of the Court of Appeals presenting any risk of differing outcomes in any particular case. For now, it

would be prudent to allow time for additional decisional authorities and informed commentary to guide this Court's ultimate review, and only then would review of the issue be prudent.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHEN R. SENN
PETERSON & MYERS, P.A.
Post Office Box 24628
Lakeland, FL 33802
(863) 683-6511

J. HAMPTON SKELTON
SKELTON, WOODY, ET AL.
Post Office Box 1609
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ROBERT G. FEGERS
Counsel of Record
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Post Office Box 7692
Winter Haven, FL 33883
(863) 294-2898

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