No. 06-462

In the Supreme Court of the United States

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

v.

MARJORIE MEYERS, *ET AL.*,
Respondents.

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

PETITIONERS' REPLY

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

RANCE L. CRAFT
Assistant Solicitor General

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

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. The Court of Appeals's Instruction That the State May Assert a State-Law Immunity from *Liability* on Remand Does Not Accommodate the State's Constitutional Right *Not To Be Sued at All*. 1

II. The Court Permits Interlocutory Review of Denials of Sovereign Immunity from Suit. 4

III. There Is a Clear Conflict Among the Circuits Regarding Whether Removal Waives Any Immunity from Suit That the State Could Have Asserted in State Court. 5

IV. There Are No Jurisdictional or Jurisprudential Barriers to Review of the Question Presented. 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

Ariel Land Owners, Inc. v. *Dring*,
351 F.3d 611 (CA3 2003) 10

Bd. of Trs. of the Univ. of Ala. v. *Garrett*,
531 U.S. 356 (2001) 4, 6

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

Calderon v. *Ashmus*, 523 U.S. 740 (1998) 3

Cent. Va. Cmty. Coll. v. *Katz*, 546 U.S. 356 (2006) 4

Cockfield v. *S.C. Dep't of Pub. Safety*, No. 4:05-277,
2007 WL 954131 (D.S.C. Mar. 27, 2007) 7

Crawford v. *Lexington-Fayette Urban County Gov't*,
No. 06-299-JBC, 2007 WL 101862
(E.D. Ky. Jan. 10, 2007) 8

Edelman v. *Jordan*, 415 U.S. 651 (1974) 3

Estes v. *Wyo. Dep't of Transp.*,
302 F.3d 1200 (CA10 2002) 6, 7, 9

Fed. Mar. Comm'n v. *S.C. State Ports Auth.*,
535 U.S. 743 (2002) 2

Fla. Prepaid Postsecondary Educ. Expense Bd. v. *Coll. Sav. Bank*, 527 U.S. 627 (1999) 4

Gen. Servs. Comm'n v. *Little-Tex. Insulation Co.*, 39 S.W.3d 591 (Tex. 2001) 3

Grubbs v. *Gen. Elec. Credit Corp.*, 405 U.S. 699 (1972) 10

Hunter v. *Bryant*, 502 U.S. 224 (1991) (*per curiam*) 2

Idaho v. *Coeur d'Alene Tribe of Id.*, 521 U.S. 261 (1997) 4

Kinnear v. *Tex. Comm'n on Human Rights*, 14 S.W.3d 299 (Tex. 2000) (*per curiam*) 3

Lapides v. *Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002) 1, 4, 6, 7, 9

Leatherman v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) 2

Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 2

Nev. Dep't of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) 4

Omosegbon v. *Wells*, 335 F.3d 668 (CA7 2003) 7, 9

P.R. Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 2, 3

Shaw v. *Phillips Crane & Rigging of San Antonio, Inc.*,
636 S.W.2d 186 (Tex. 1982) 10

Stewart v. *North Carolina*, 393 F.3d 484 (CA4 2005) 6-9

Tennessee v. *Lane*, 541 U.S. 509 (2004) 4

Wisc. Dep't of Corrs. v. *Schacht*, 524 U.S. 381 (1998) 3

Rules

FED. R. CIV. P. 8(c) 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) (No. 01-298), 2001 WL 1673411 . . . 1, 4

PETITIONERS' REPLY

The United States concedes that the question presented is "important," U.S. Br. Opp. 11, 23—an admission reinforced by the fact that 28 States and Puerto Rico have urged the Court to grant the petition, Virginia Br. 2-3. The United States also agrees that the State's position is correct on the merits. U.S. Br. Opp. 9, 11. Nevertheless, the United States and Meyers oppose certiorari primarily based on their strained attempts to reconcile the court of appeals's opinion with the State's position. But the court of appeals's instruction that a removing State still can assert any state-law immunity from *liability* does not preserve the right that the State seeks to vindicate here: the constitutional right not to be sued at all. In response to the uncertainty engendered by the conflicting circuit rules on this issue, Meyers suggests that States can avoid putting their immunity at risk simply by forgoing their statutory right to removal. Meyers Br. Opp. 14. That "modest proposal" only underscores the urgent need for the Court's review.

ARGUMENT

I. THE COURT OF APPEALS'S INSTRUCTION THAT THE STATE MAY ASSERT A STATE-LAW IMMUNITY FROM *LIABILITY* ON REMAND DOES NOT ACCOMMODATE THE STATE'S CONSTITUTIONAL RIGHT *NOT TO BE SUED AT ALL*.

As explained in the petition, Pet. 18-19, the State's argument on immunity-waiver by removal is identical to that asserted by the United States in *Lapides*: a State's removal of a case waives only its "forum immunity"—*i.e.*, "the State consents to have a federal court rather than the state court decide the case"; but removal does not "waive any defenses that would have been available to the State in state court," including "the 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 (emphasis added). The United States reaffirms that position in its response. U.S. Br. Opp. 10 n.2.

The court of appeals rejected that position, holding that the State's removal of this case "waived its immunity from suit" on Meyers's ADA claim. Pet. App. 32. Still, the United States contends that the court of appeals's decision "may accommodate [the State's] immunity claim" because it permits the State "on remand to assert a sovereign immunity from *liability* under the ADA." U.S. Br. Opp. 9, 13 (emphasis added); *see also* Meyers Br. Opp. 4, 12. The United States thus equates "the constitutional right not to be sued at all"—a right that the United States and the State agree survives removal—with the "immunity from liability" that the court of appeals would allow the State to raise on remand. U.S. Br. Opp. 14 (arguing that, in light of the court of appeals's remand to consider the State's immunity from liability, "it would be premature to conclude that the court of appeals has prevented petitioners from asserting on remand the very constitutional right not to be sued that they press before this Court").

But the "right not to be sued at all" and "immunity from liability" are materially distinct, as the Court has long recognized. *See, e.g.*, *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002); *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993); *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). And the differences between those immunities have important practical consequences for defendant States.

Because immunity from suit, unlike immunity from liability, protects the defendant from the "burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), the Court has repeatedly directed that a defendant's immunity from suit be resolved "at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *see also P.R. Aqueduct*, 506 U.S., at 145 (noting that benefit of sovereign immunity from suit would otherwise be mostly lost "as litigation proceeds past motion practice"). For the same reason, an adverse decision on immunity

from suit is immediately appealable under the collateral-order doctrine, whereas an adverse decision on immunity from liability is not. *P.R. Aqueduct*, 506 U.S., at 145.[1] Sovereign immunity from suit also "can be raised at any stage of the proceedings," *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998), while state-law immunity from liability is an affirmative defense that is waived if the State does not initially plead it, *see, e.g.*, *Kinnear* v. *Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (*per curiam*).[2] Finally, a State's immunity from suit and from liability are not always coterminous. For example, under Texas law, the State has immunity from suit, but not from liability, for contract claims. *Gen. Servs. Comm'n* v. *Little-Tex. Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). Thus, under the court of appeals's decision, the State would be immune from suit on a contract claim in a case originally filed in federal or state court, but, incongruously, it would have no immunity whatsoever against the same claim in a removed case.

In sum, because immunity from suit and immunity from liability are materially distinct defenses, the court of appeals's judgment that the State's removal of this case waived the former but not the latter does in fact deprive the State of a defense "that would have been

---

1. The United States is thus incorrect in asserting that "nothing in the court's decision forecloses an interlocutory appeal from a denial of immunity on remand." U.S. Br. Opp. 14 n.4.

2. The United States suggests this distinction is "of no moment" based on its incorrect analogy between Eleventh Amendment immunity from suit and a waivable affirmative defense. U.S. Br. Opp. 14 n.4. Although it is the State's burden to advance Eleventh Amendment immunity because the Court need not raise it *sua sponte*, *Wisc. Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998), a State may do so for the first time in the court of appeals or this Court, *Edelman* v. *Jordan*, 415 U.S. 651, 677-78 (1974), which is not true of affirmative defenses, *see* FED. R. CIV. P. 8(c).

available to the State in state court"—"the constitutional right not to be sued at all." Brief for the United States at 22, *Lapides*, 535 U.S. 613 (2002) (No. 01-298). The United States' and Meyers's suggestions to the contrary are incorrect and thus do not provide a basis for the Court to deny the petition.

II. THE COURT PERMITS INTERLOCUTORY REVIEW OF DENIALS OF SOVEREIGN IMMUNITY FROM SUIT.

Both Meyers and the United States urge the Court to deny review for the additional reason that the court of appeals's decision is interlocutory. Meyers Br. Opp. 5; U.S. Br. Opp. 15. But as the United States concedes, U.S. Br. Opp. 15, the Court routinely permits certiorari review of interlocutory judgments denying sovereign immunity from suit. *See, e.g.*, *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006); *Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); *Bd. of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627 (1999); *Idaho* v. *Coeur d'Alene Tribe of Id.*, 521 U.S. 261 (1997). The court of appeals's judgment that the State "waived its immunity from suit" by removing the case, Pet. App. 34, fits squarely within that precedent.

The United States' sole rejoinder on this point is that the State's immunity "has not been conclusively resolved" because the court of appeals's remand instructions permit the State to assert a state-law immunity from liability. U.S. Br. Opp. 15. As discussed previously, however, any such immunity is fundamentally distinct from the State's "constitutional right not to be sued at all." *See supra* Part I. That immunity from suit *has* been conclusively resolved, Pet. App. 34, and, consistent with the Court's immunity jurisprudence, presents an issue ripe for certiorari review.

III. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING WHETHER REMOVAL WAIVES ANY IMMUNITY FROM SUIT THAT THE STATE COULD HAVE ASSERTED IN STATE COURT.

Meyers and the United States endeavor to muddle the circuit conflict presented in the petition by pointing out that some of the decisions involve federal claims while others involve state-law claims, and that other circuits have not addressed the court of appeals's holding that state-law immunity from liability survives removal. Meyers Br. Opp. 6-10; U.S. Br. Opp. 16-18. Those distinctions are immaterial to the question presented. The relevant issue is whether a State's removal of a case to federal court precludes it from asserting an immunity *from suit* that it could have asserted in state court—regardless of whether the plaintiff's claim is state or federal or whether the State retains the qualitatively different defense of immunity from liability after removal. As to that question, the circuits are assuredly in conflict.

In this case, the court of appeals held that "Texas waived its immunity from suit by removal of this case to federal court." Pet. App. 34. As the United States notes, the court of appeals explained that this rule "applies as much to claims based on federal law as those based on state law." U.S. Br. Opp. 11; *see also* Pet. App. 9 (holding that "the waiver-by-removal rule applies generally to any private suit which a state removes to federal court"). The court of appeals further held that this rule "applies generally in all cases for the sake of consistency" regardless of whether the State had immunity from suit in state court. Pet. App. 22-23 (finding it irrelevant whether State's removal was attempt to regain immunity that it had waived in state court). The court of appeals thus concluded that, because "Texas waived its immunity from suit by removal of this case," the State's argument that Title II of the ADA did not validly abrogate its immunity *from suit* was moot. Pet. App. 33 ("Thus, we need not reach or decide whether the district court

erred in finding that Congress did not validly abrogate Texas's immunity from suit by ADA Title II.").

As the court of appeals recognized, its decision aligns with that of the Tenth Circuit in *Estes* v. *Wyoming Department of Transportation*, 302 F.3d 1200 (CA10 2002). Pet. App. 18. In *Estes*, the State removed an ADA Title I claim from state to federal court and then moved to dismiss that claim based on its sovereign immunity from suit. 302 F.3d, at 1202. The district court held that ADA Title I validly abrogated the State's immunity from suit. *Id.* The State filed an interlocutory appeal. *Id.* The Tenth Circuit acknowledged that, after the district court had rendered its decision, this Court held that ADA Title I did *not* validly abrogate States' immunity from suit, and thus *that* basis for the district court's denial of immunity from suit was incorrect. *Id.*, at 1203 (citing *Garrett*, 531 U.S., at 374 n.9). Nevertheless, the Tenth Circuit concluded that, under *Lapides*, the State's removal of the case to federal court *did* waive its immunity from suit for the ADA claim. *Id.*, at 1204. In sum, as in this case, the Tenth Circuit held that the act of removal precluded the State from asserting immunity from suit even though it could have done so in state court.

By contrast, the Fourth Circuit has held that a State can remove a case to federal court and still raise any immunity from suit that it could have asserted in state court. *Stewart* v. *North Carolina*, 393 F.3d 484, 488-90 (CA4 2005). In *Stewart*, the Fourth Circuit held that, after removing the case, North Carolina still was entitled to assert any immunity from suit it possessed in state court to obtain dismissal of claims in federal court. 393 F.3d, at 490 (observing that "North Carolina merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court"). Although only state-law claims were at issue in *Stewart*, nothing in the decision limits its holding to such claims. *Id.* ("We therefore hold that North Carolina, having not already consented to suit in its own courts, did not waive sovereign immunity by voluntarily

removing the action to federal court for resolution of the immunity question."); *see also Cockfield* v. *S.C. Dep't of Pub. Safety*, No. 4:05-277, 2007 WL 954131, at *15 (D.S.C. Mar. 27, 2007) (applying *Stewart* to find immunity from suit on federal §1981 claim in removed case).[3]

Similarly, the Seventh Circuit has held that removal leaves a State's sovereign immunity from suit intact. *Omosegbon* v. *Wells*, 335 F.3d 668, 673 (CA7 2003). In that case, the court determined that *Lapides*'s waiver-by-removal rule applied only to bar a State's objection to litigating "in a federal forum." *Id.* That limitation in *Lapides* interposed an "extra layer to our sovereign immunity analysis": determining whether the State could have asserted an immunity from suit in state court. *Id.* (holding that "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"). That "extra layer" is absent from the Fifth and Tenth Circuits' analyses because those courts hold that removal waives not only the State's objection to litigating in federal court, but also the State's immunity from suit, and thus, the existence of any immunity from suit in state court is irrelevant. Pet. App. 22-23, 33; *Estes*, 302 F.3d, at 1204.

This conflict requires no further percolation. A State either can assert immunity from suit after removal or it cannot. The decisions discussed above have thoroughly explored this binary question. The added value of other circuits lining up on either side of this

---

3. For that reason, Meyers is incorrect that the court of appeals's express disagreement with *Stewart* was limited to "semantics and nuances." Meyers Br. Opp. 8. On the key issue of whether a State can assert immunity from suit after removal, the court of appeals found the existence of immunity from suit in state court to be irrelevant, Pet. App. 22-23, whereas the Fourth Circuit found it dispositive, 393 F.3d, at 490.

debate—if any—is significantly outweighed by the detriment to jurists and litigants that persists while this issue remains unresolved. District courts continue to struggle with the conflicting directives on this important question. *See, e.g.*, *Crawford* v. *Lexington-Fayette Urban County Gov't*, No. 06-299-JBC, 2007 WL 101862, at *4-*6 (E.D. Ky. Jan. 10, 2007) (rejecting *Meyers* and following *Stewart*); *Boone* v. *Pa. Office of Vocational Rehab.*, 373 F. Supp. 2d 484, 492-94 (M.D. Pa. 2005) (cataloguing the divergent circuit decisions and following *Stewart*). Meanwhile, most States are unfairly burdened by either a conditional access to federal courts or, in circuits that have not addressed this issue, an inability to make informed decisions about removal. Virginia Br. 3-4.

IV. THERE ARE NO JURISDICTIONAL OR JURISPRUDENTIAL BARRIERS TO REVIEW OF THE QUESTION PRESENTED.

The United States incorrectly surmises that, to reach the question presented, the Court must first resolve the constitutional issue of whether Title II of the ADA validly abrogates the State's immunity from suit as applied to this case, and thus, under the constitutional-avoidance doctrine, the Court must also decide the antecedent statutory questions of whether Meyers's suit states a claim under Title II and whether the Tax Injunction Act bars federal jurisdiction. U.S. Br. Opp. 18-23. But that is not the case.

Although the United States correctly observes that the State's phrasing of the issue at times appears to presuppose that the Title II abrogation is not valid, U.S. Br. Opp. 18, 19-20, the State does not suggest that a court must decide the constitutional question of abrogation *before* application of the waiver-by-removal rule. Indeed, under the constitutional-avoidance doctrine, it should not do so. Rather, the State is arguing only that, after removal of a case, it still should be able to *assert* any immunity from suit—not merely liability—that it might have asserted in state court. Pet. 6 (phrasing question presented as "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" (emphasis added)). The court of appeals held that the State could not do this, ruling that the act of removal alone waived any immunity from suit that the State might have asserted, and that it thus was unnecessary to address the State's argument that Title II of the ADA did not validly abrogate its immunity from suit. Pet. App. 33. By contrast, the Fourth Circuit held in *Stewart* that a State could remove a case to have the issue of immunity from suit "resolved by a federal court rather than a state court." 393 F.3d, at 490. *That* is the essential conflict for which the State seeks review.

Stated differently, the State simply seeks an extension of *Lapides* to all cases. Removal should "waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum." 535 U.S., at 624. But to the extent that a State possesses or lacks immunity from suit for a claim in the case, that status should remain unchanged upon removal. Accordingly, the defendant States in *Lapides* and *Omosegbon* could not regain the immunity from suit that they indisputably did not have in state court. But if a defendant State would have been entitled to assert an immunity from suit in state court—as in this case, *Estes*, and *Stewart*—it should be able to raise that same immunity from suit in federal court, obtain an early ruling on that immunity via a motion to dismiss, and bring an interlocutory appeal if the ruling is adverse. *See* Pet. 22.

Resolution of this issue thus does not require the Court to resolve the constitutional question of abrogation under Title II of the ADA, but only to address the scope of the federal common-law voluntary-invocation rule. Indeed, if the State were to prevail on the merits, the appropriate relief would be for the Court to remand the case to the court of appeals to allow *that* court to take up the possible abrogation of the State's immunity from suit—which the district court had resolved in the State's favor, Pet. App. 40, and Meyers had raised on appeal, *id.*, at 4. For that reason, the

constitutional question of abrogation, and the statutory issues antecedent to that question, are not barriers to certiorari review.

As another purported vehicle problem, Meyers incorrectly avers that the Court would have to resolve whether the State's immunity from suit was subject to a state-law exception allowing suits to recover illegally collected fees. Meyers Br. Opp. 11. Again, however, the Court does not have to resolve whether the State *has* immunity from suit; rather, the relevant question is whether the State can *assert* immunity from suit following removal. In any event, Meyers's argument fails because the claimed exception waives the State's immunity only from *state-law* actions to recover illegal taxes and fees, *see Shaw* v. *Phillips Crane & Rigging of San Antonio, Inc.*, 636 S.W.2d 186, 188 (Tex. 1982), whereas Meyers's suit contains only a federal ADA claim, Pet. App. 37.

Finally, Meyers wrongly contends that the Court would have to confront "a significant question involving the district court's removal jurisdiction": whether the court of appeals properly allowed removal after the initial thirty-day period based on a subsequent decision in a separate but related case. Meyers Br. Opp. 12-13. It is well settled that timeliness of removal is a procedural defect, not a jurisdictional one, and thus may be waived. *See Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 702-03 (1972); *Ariel Land Owners, Inc.* v. *Dring*, 351 F.3d 611, 614 (CA3 2003). Meyers waived this issue by not raising it in the court of appeals. *See generally* Meyers C.A. Br. And, in this posture, the only relevant question as to removal jurisdiction is whether the district court would have had original jurisdiction over the case. *Grubbs*, 405 U.S., at 702. Because this is an ADA claim, that is undisputed.

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

DAVID S. MORALES
Deputy Attorney General
for Civil Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

RANCE L. CRAFT
Assistant Solicitor General

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

April 2007