No. 06-462

In the Supreme Court of the United States

STATE OF TEXAS, ET AL., PETITIONERS

v.

MARJORIE MEYERS, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the State's removal of a case to federal court waives the State's immunity from suit in federal court, but not any other aspect of its sovereign immunity, including its substantive immunity from liability.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 410 F.3d 236. The order of the court of appeals denying the petition for rehearing (Pet. App. 49-51) is reported at 454 F.3d 503. The orders of the district court dismissing the case for lack of jurisdiction (Pet. App. 36-41), and denying the motion to alter or amend the judgment (Pet. App. 44-48), are unreported.

JURISDICTION

The court of appeals entered its judgment on May 19, 2005. A petition for rehearing was denied on June 29, 2006 (Pet. App. 49-51). The petition for a writ of certiorari was filed on September 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et *seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political power-

> lessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

b. Congress charged the Attorney General with issuing regulations to implement the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R. Pt. 35. Those regulations, Congress further directed, "shall

include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36 App. A, § 4.1.2(5); see 28 C.F.R. 35.151(c) (incorporating standards).[1] Each space must be "designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, §4.6.4. Accessible parking must also be provided in existing facilities when necessary to assure that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150.

At issue in this case is a general regulatory prohibition that forbids public entities from "plac[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treat-

[1] The regulations permit public entities subject to Title II to select between those standards and the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19, Subpt. 101-19.6, App. A (2002). See 28 C.F.R. 35.151(c). With respect to parking requirements, the two sets of standards are virtually identical. See 41 C.F.R. Pt. 101-19, Subpt. 101-19.6, App. A, § 4.1.1(5) (2002); 41 C.F.R. 102-76.65 (adopting 36 C.F.R. Pt. 1191, App. C, § 208.2).

ment required by the Act or this part." 28 C.F.R. 35.130(f).

2. In order to provide access to handicap parking spaces, Texas law provides qualifying drivers handicap license plates at the same price that is charged for all other license plates issued by the State. Individuals with disabilities who do not drive or who otherwise desire a portable means of access to handicap parking spots can obtain a handicap parking placard. To obtain such a placard, however, state law requires individuals to pay a fee of $5 and to renew the placards every four years. Funds collected from the fees are deposited in the state highway fund to defray the cost of providing the placards. Pet. App. 3; Tex. Transp. Code Ann. §§ 681.002, 681.005 (West 1999); *id.* § 681.003 (Supp. 2006); see generally *Neinast* v. *Texas*, 217 F.3d 275, 277 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001).

Marjorie Meyers and three other named plaintiffs (collectively, "Meyers") filed a class action lawsuit in Texas state court challenging the placard fee as violating Title II of the ADA and the regulation prohibiting the imposition of surcharges, 28 C.F.R. 35.130(f). Petitioners removed the case to federal court, see 28 U.S.C. 1441 (2000 & Supp. IV 2004); 28 U.S.C. 1446, but the district court remanded the case on the ground that the Tax Injunction Act, 28 U.S.C. 1341, barred federal jurisdiction. The Texas state court then denied petitioners' motion to dismiss on sovereign immunity grounds, holding that Title II validly abrogated "all state immunities." Pet. App. 3-4; *Meyers* v. *Texas*, No. 97-09093 (Tex. Dist. Ct. Mar. 28, 2000), slip op. 7-8.

3. Petitioners appealed to the Texas court of appeals. While that appeal was pending, petitioners again removed the case to federal court based on the Fifth Circuit's decision in *Neinast*, *supra*, which had held that the Tax Injunction Act did not bar federal jurisdiction over challenges to Texas's parking placard fee. Pet. App. 4; see *Neinast*, 217 F.3d at 277-279.

Petitioners then moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(1) on the sole ground that the suit was barred by Eleventh Amendment immunity. Pet. App. 4. Relying on this Court's decision in *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), the district court granted the motion. Pet. App. 36-41, 42-43. The court held that Title II of the ADA was not a proper exercise of Congress's legislative power under Section 5 of the Fourteenth Amendment and thus did not validly abrogate Texas's Eleventh Amendment immunity. *Id.* at 39-40. In so ruling, the court took "issue with the procedural tactics used by the State to achieve this result," *id.* at 40, but concluded that dismissal was compelled "under current Eleventh Amendment jurisprudence," *id.* at 41.

Meyers moved for reconsideration on the ground, *inter alia*, that the claims for declaratory and injunctive relief against state officials in their official capacity should be permitted to go forward under *Ex parte Young*, 209 U.S. 123 (1908). See Pet. App. 34, 45. The district court denied the motion, holding that Title II was unconstitutional in its entirety. *Id.* at 46-47.

4. Meyers appealed, and the United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Title II of the ADA's abrogation of Eleventh Amendment immunity.

The court of appeals reversed. Pet. App. 1-35. Based on this Court's intervening decision in *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), the court of appeals held that petitioners' removal of the case to federal court waived the State's "immunity from suit" under the Eleventh Amendment. Pet. App. 2. The court rejected petitioners' argument that *Lapides* "does not apply to [a] suit based on federal-law claims." *Id.* at 7. The court acknowledged (*id.* at 8-9, 12) that the Court in *Lapides* limited its decision "to the context of state-law claims," because the case "d[id] not present a valid federal claim against the State," 535 U.S. at 617. The court of appeals nevertheless concluded that the principle of waiver recognized in *Lapides* "should apply equally to state and federal claims," Pet. App. 17, because "it [would be] anomalous or inconsistent for a state to both invoke federal jurisdiction and claim immunity from federal suit in the same case," *id.* at 10. The court then concluded that "there is nothing special about the present case or its removal that would justify our taking it out from under the general legal principle requiring waiver." *Id.* at 12.

Having concluded that *Lapides*'s "voluntary invocation principle" for waiving Eleventh Amendment immunity applies to both state-law and federal-law claims, Pet. App. 9-23, the court rejected petitioners' argument that there is "an Eleventh Amendment immunity separate and apart from state sovereign immunity" that would immunize it from suit in federal court, *id.* at 26. The court reasoned that "the states have no other sovereign immunity from suit than that which they brought intact into the union," *ibid.*, and thus found "no support for [petitioners'] theory that state sovereign immunity

is composed of two separate immunities from suit," *id.* at 28.

The court, however, agreed with petitioners that the State enjoyed an additional and distinct immunity that could be asserted in the suit on remand. In the court's view, "a sovereign enjoys two kinds of immunity that it may choose to waive or retain separately—immunity from suit and immunity from liability." Pet. App. 28. In so holding, the court rejected petitioners' argument that the Constitution itself "prescribes a specific rigid structure for each state's sovereign immunity," explaining that such an approach would "conflict[] with the first principles of our federation." *Ibid.* Rather, because each State "retain[s] the individual sovereignty it enjoyed before the union, the structure of the Constitution allows for variation between the nature and structure of each state's immunities from suit and liability," and, indeed, "the patterns of sovereign immunities maintained by the states vary considerably." *Id.* at 28-29.

The Fifth Circuit accordingly held that it "must look to the law of the particular state in determining whether it has established a separate immunity against liability for purposes of waiver." Pet. App. 29. The court concluded that, while petitioners' removal of the case "waived its immunity from suit in federal court," "[w]hether Texas has retained a separate immunity from liability is an issue that must be decided according to that state's law." *Id.* at 32; see *id.* at 35.

5. The court denied petitioners' petition for rehearing and rehearing en banc. Pet. App. 49-51. The court explained that its decision reflected only a "narrow holding" that the voluntary invocation rule recognized in *Lapides* applies to federal-law claims as much as to state-law claims, and thus that removal waived petition-

ers' "unqualified right to object peremptorily" to federal court jurisdiction. *Id.* at 50. The court stressed, however, that such waiver

> does not affect or limit the State's ability to assert whatever rights, immunities or defenses are provided [f]or by its own sovereign immunity law to defeat the claims against the State finally and on their merits in the federal courts.

Ibid. The court concluded that, under its decision, Texas remains free to "assert its state sovereign immunity as defined by its own law as a defense against the plaintiffs' claims in the federal courts." *Ibid.* The court held only that petitioners "may not use [sovereign immunity] to defeat federal jurisdiction or as a return ticket back to the state court system." *Ibid.*

ARGUMENT

The United States agrees with petitioners that a State's removal of a case to federal court waives that State's Eleventh Amendment immunity from suit in a federal court, but does not waive defenses that would have been available to the State in state court, including the constitutional right not to be sued at all. See U.S. Br. at 22, *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002) (No. 01-298). However, this Court's review of that question in this case at this time is not warranted for four reasons. First, the Fifth Circuit's decision is, by its terms, "narrow" (Pet. App. 50), and does not appear to be materially inconsistent with petitioner's position and, in fact, the proceedings on remand may accommodate petitioners' immunity claim. Second and relatedly, the basic immunity issue itself has not been definitively resolved by the lower courts and thus is interlocutory as it comes to this Court. Third, the asserted conflict in the

circuits is neither concrete nor mature. Fourth, there are a number of distinct jurisdictional and jurisprudential barriers that make this case a poor vehicle in which to review the important question that petitioners present.[2]

1. a. In *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), this Court held that "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. The Court limited its decision, however, to "the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.* at 617. The Court expressly reserved the questions whether removal would waive immunity for "a valid federal claim against the State" or for "a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-618.

Petitioners now seek this Court's review of that latter question—whether the act of removal waives a

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[2] In a letter to this Court dated December 1, 2006, the United States explained that it had intervened in the litigation, pursuant to 28 U.S.C. 2403, solely to defend the constitutionality of Title II's abrogation of Eleventh Amendment immunity, and thus had not previously taken a position on the questions resolved by the court of appeals or presented by the petition. The United States noted, however, that it did take the position in its amicus brief in *Lapides* that a State's removal of a case to federal court effects only a waiver of its immunity from suit in a federal forum, but that the act of removal does not waive defenses that would have been available to the State in state court, including the constitutional right not to be sued at all. That remains the position of the United States. The United States is filing this brief in response to this Court's letter of December 15, 2006, requesting that a response be filed.

State's immunity for federal-law claims where "sovereign immunity has *not* been waived by the State or abrogated by Congress." Pet. i, 6. As the United States explained in its amicus brief (at 22) in *Lapides*, *supra* (No. 01-298), the United States agrees that a State's removal of a case to federal court effects a waiver only of the State's immunity from suit in a federal forum. The act of removal does not waive any other immunity-based defenses that would have been available to the State in state court, including assertion of the constitutional right not to be sued at all on the ground that immunity for the claim has not been waived or abrogated in any forum—state or federal. See *ibid.*

This Court's review of that important question is not warranted in this case, however, because it is not clear that the court of appeals' decision materially diverges from petitioners' position. The bulk of the court of appeals' decision is devoted to establishing that the rule of waiver adopted in *Lapides* (*i.e.*, waiver of forum immunity) applies as much to claims based on federal law as those based on state law. See Pet. App. 5-23. Indeed, the court's decision on rehearing underscored that its "narrow holding" in the case was limited to resolution of that question. *Id.* at 50. In addition, petitioners appear to agree that the *Lapides* waiver rule does not turn upon the source of law—state or federal—on which a plaintiff's claim rests. Instead, the critical distinction on which petitioners rely, and for which they seek this Court's review, is whether the State's immunity from suit for the federal claim has been waived in state court. See, *e.g.*, Pet. i, 6-8, 14-15, 18-20.

b. The court of appeals went on to hold that the federal Constitution does not establish two distinct immunities from suit—one immunity, embodied in the Eleventh

Amendment, from suit in a federal court, and one generalized immunity from suit in any court. Pet. App. 25-26. Petitioners are correct that, at least standing alone, that aspect of the court of appeals' decision is in some tension with the conception of state sovereign immunity implicitly assumed in *Lapides*.

But the immediately ensuing portion of the court of appeals' opinion (see Pet. App. 28-29) suggests that the court held only that petitioners erred in arguing that the federal Constitution itself presupposes and prescribes those dual aspects of state sovereign immunity without regard to state law. See, *e.g.*, *id.* at 29 ("[C]ourts must look to the law of the particular state in determining whether it has established a separate immunity against liability for purposes of waiver."). In that respect, there is force to the court of appeals' decision. Other than the Eleventh Amendment's constraint on the power of *federal* courts, the Constitution does not dictate principles of state sovereign immunity. The Constitution accepts that the States entered the Union "with their sovereignty intact," *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (quoting *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)), but the Constitution does not dictate the content of that preexisting sovereignty nor does it insist that States homogenize their sovereign immunity law. See Pet. App. 29 n.22 (noting the varying forms of sovereign immunity adopted by different States); see also *Northern Ins. Co.* v. *Chatham County*, 126 S. Ct. 1689, 1693 (2006).

It thus appears that the court of appeals took exception not to petitioners' argument that they retain some form of sovereign immunity distinct from the waiver of Eleventh Amendment immunity, but rather to petition-

ers' contention that "the Constitution prescribes a specific rigid structure for each state's sovereign immunity," Pet. App. 28, and thus that federal law itself requires that the State have two distinct immunities from suit. Consistent with that narrow understanding of its decision, the court of appeals went on to hold that petitioners remain free on remand to assert a sovereign immunity from liability under the ADA—contingent only on a determination that state law invests Texas with such additional forms of immunity. *Id.* at 32. Texas law, in fact, appears to track the very distinction between immunity from suit and immunity from liability that the court of appeals adopted in this case.[3] On rehearing, the court stressed again that petitioners remain free to assert on remand "*whatever rights, immunities or defenses* are provided [f]or by its own sovereign immunity." *Id.* at 50.

The court's decision, and in particular its decision on rehearing, thus explicitly leaves it open to petitioners to assert on remand "whatever rights [or] immunities" they retain under state law, including the right not to be sued at all. Pet. App. 50. The court of appeals held only that petitioners may not assert sovereign immunity to "defeat federal jurisdiction." *Ibid.* In other words, the court held that, by removing the case to federal court, petitioners agreed to have their remaining immunity

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[3] See, *e.g.*, *Texas Dep't of Parks & Wildlife* v. *Miranda*, 133 S.W.3d 217, 224 (Tex. 2004) ("Sovereign immunity includes two distinct principles, immunity from suit and immunity from liability."); *Texas Dep't of Transp.* v. *Jones*, 8 S.W.3d 636, 638 (Tex. 1999) ("Immunity from liability and immunity from suit are two distinct principles."); *Federal Sign* v. *Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997) ("Sovereign immunity embraces two principles: immunity from suit and immunity from liability.").

claims—including the claim that no suit may proceed—resolved by that federal court. That is consistent with *Lapides*. See *Lapides*, 535 U.S. at 620.

Petitioners argue (Pet. 20) that permitting the assertion of a state-law "immunity from liability" on remand is unhelpful because it is "a concept of dubious applicability in this federal-question case in federal court." But petitioners do not explain why a state sovereign "immunity from liability" is any more "dubious" than a state sovereign "immunity from suit." In either case, the ultimate question on remand (for purposes of immunity) will be whether Congress properly abrogated the State's immunity under Section 5 of the Fourteenth Amendment. The answer to that question does not turn on whether the State's asserted immunity is labeled an immunity from suit or an immunity from liability.[4]

In sum, while petitioners disagree with the court of appeals' conceptualization and characterization of its state sovereign immunity, 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. In fact, the court of appeals has expressly invited petitioners to raise on remand "whatever rights, immunities or de-

[4] That Texas law treats sovereign immunity from liability as an "affirmative defense" is of no moment. See *Miranda*, 133 S.W.3d at 224; *Jones*, 8 S.W.3d at 638; *Federal Sign*, 951 S.W.2d at 405. Eleventh Amendment immunity too is a "defense" that is waived unless affirmatively raised by the State. See *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998); see *id.* at 394-395 (Kennedy, J., concurring). Indeed, Eleventh Amendment immunity has been described as akin to personal jurisdiction, see *ibid.*, which is also a defense that must be affirmatively raised, see *Hoffman* v. *Blaski*, 363 U.S. 335, 344 (1960). In addition, nothing in the court's decision forecloses an interlocutory appeal from a denial of immunity on remand.

fenses" it retains. Pet. App. 50. Because "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), and the judgment at issue explicitly permits further examination of petitioners' assertion of sovereign immunity, this Court's intervention at this juncture is not warranted.

2. Relatedly, the decision is interlocutory. This Court generally declines to exercise its certiorari jurisdiction to review interlocutory decisions. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see also *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari, noting the interlocutory posture of the litigation), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review granted after final judgment).

While this Court permits interlocutory review of a denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), that case involved review of a decision conclusively rejecting the State's claim of immunity, *id.* at 141-142. By contrast, as discussed, the State's assertion of sovereign immunity in this case has not been conclusively resolved and may yet be resolved in petitioners' favor. Accordingly, review by this Court at this juncture is unwarranted under traditional principles counseling against review of interlocutory decisions. Should petitioners' assertion of a sovereign right not to be sued be rejected on remand (and should the other barriers to review outlined below be overcome), then this Court could consider anew whether this Court's review is warranted. Moreover, the Court's decision in that regard may be assisted by further consideration

below of Texas law on the scope of the State's sovereign immunity and the Fifth Circuit's potential application of its decision here in other cases.

3. There is no conflict in the circuits (see Pet. 8-11) that warrants review at this time. To begin with, no court of appeals has addressed the dichotomized approach to state sovereign immunity that the court of appeals adopted here, nor has any court of appeals addressed whether state or federal law controls definition of the elements of state sovereign immunity outside of the Eleventh Amendment context. There thus is no conflict with the court of appeals' substantive approach to the immunity question.

With respect to the question the Fifth Circuit did *not* conclusively resolve—whether petitioners may be sued for federal-law claims for which immunity has not been waived in state court—the Tenth Circuit has held, as petitioners explain (Pet. 10), that the rule of waiver recognized in *Lapides* applies to federal-law claims, even if sovereign immunity has not been waived in state court. See *Estes* v. *Wyoming Dep't of Transp.*, 302 F.3d 1200 (2002).

While the Ninth Circuit's decision in *Embury* v. *King*, 361 F.3d 562 (2004) (see Pet. 10), indicated that a waiver of immunity in state court was not a necessary predicate to application of *Lapides*' waiver rule, the court expressly reserved the question presented here: whether "a removing State defendant remains immunized from federal claims" for which there has been no valid abrogation of Eleventh Amendment immunity (as petitioners contend in this case). 361 F.3d at 566 n.20. In addition, that case involved such a significant delay by the State in asserting its immunity that the district court accused the State of "gamesmanship" for waiting

until the eve of an adverse ruling to invoke immunity. *Id.* at 563-564. The court thus held that, "in the circumstances of this case, allowing the reassertion of Eleventh Amendment immunity, after the State had litigated extensively in federal court but began to anticipate an unfavorable outcome, would waste the time and money of the litigants and the resources of the courts." *Id.* at 566. The court's discussion of *Lapides* thus was unnecessary to its decision.

Petitioners argue (Pet. 9-10) that the court of appeals' decision conflicts with rulings of the Seventh, District of Columbia, and Fourth Circuits. But the Seventh Circuit's decision in *Omosegbon* v. *Wells*, 335 F.3d 668 (2003), reflects a straightforward application of *Lapides*, because the case involved an assertion of immunity for a state-law claim for which the State had waived immunity in its own courts. *Id.* at 673. The Seventh Circuit thus had no occasion to address the question presented here, *i.e.*, whether the waiver rule of *Lapides* would apply to federal-law claims for which immunity had allegedly not been waived or abrogated.

Petitioners' reliance (Pet. 9-10) on a footnote in the D.C. Circuit's decision in *Watters* v. *Washington Metropolitan Area Transit Authority*, 295 F.3d 36 (2002), cert. denied, 538 U.S. 922 (2003), is also inapt. The court held in that case that the plaintiff had failed to assert its waiver argument in a timely manner, and further that, as an interstate compact, the Transit Authority's immunity does not arise solely from the Eleventh Amendment. *Id.* at 42 n.13. While the court noted the "narrow holding of *Lapides*," it declined "to consider, sua sponte, an issue upon which neither this circuit nor the Supreme Court has yet opined." *Ibid.*

Petitioner is correct (Pet. 9) that the Fourth Circuit held that removal does not waive a State's immunity for claims for which there has been no waiver of immunity in state court. See *Stewart* v. *North Carolina*, 393 F.3d 484, 488-489 (2005). That case, however, involved state-law rather than federal-law claims, *id.* at 487, and thus the ruling does not squarely conflict with *Estes, supra*, or the court of appeals' "narrow holding" here, which was pointedly limited to federal-law claims, Pet. App. 50. In any event, it remains to be seen on remand whether the court of appeals' decision here reflects a material difference in the law or simply a difference in approach in analyzing immunity claims.

4. There are substantial additional barriers to this Court's review of the question presented in this case. First, petitioners' sovereign immunity argument rests critically on the proposition that, in enacting Title II of the ADA, Congress lacked the constitutional authority under Section 5 of the Fourteenth Amendment to abrogate its immunity from suit. Indeed, petitioners' repeatedly couch their *Lapides* argument in terms of the federal court's jurisdiction over federal-law claims for which immunity has not been waived "or abrogated by Congress." Pet. i; see Pet. 6. The court of appeals, however, did not address whether Title II is a valid abrogation of state sovereign immunity in this context. If, as the United States argued below and in briefs to this Court in *Tennessee* v. *Lane*, 541 U.S. 509 (2004) (No. 02-1667), and *United States* v. *Georgia*, 126 S. Ct. 877 (2006) (No. 04-1203), the abrogation of immunity is valid, resolution of the constitutional question that petitioners

present would be unnecessary to the disposition of this case.[5]

Second, this Court has twice held that, before addressing a State's constitutional immunity to suit under the ADA, courts should first decide whether the plaintiffs have stated a valid claim under the statute. *Georgia*, 126 S. Ct. at 882; *Board of Trustees* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001). Indeed, just last Term, this Court unanimously held that courts confronted with a constitutional challenge to Congress's abrogation of immunity must

> determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Georgia, 126 S. Ct. at 882.

Resolution of the statutory question whether Meyers has stated a claim under Title II is thus a necessary prerequisite not only to deciding the constitutionality of Congress's abrogation, but also to the question that petitioners present here, which presupposes that the abro-

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[5] Petitioners argue (Pet. 6 n.3) that "there are no further proceedings to be had on the abrogation issue" because the district court already held that Title II is not a valid abrogation of immunity. But the district court's decision on that question five years ago, when *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), was the most analogous decision from this Court, has been overtaken by the intervening decisions of this Court in *Lane* and *Georgia*, which have upheld the constitutionality of Title II's abrogation in two contexts and have expressly prescribed a new model for analysis of the constitutional question.

gation is *not* valid and which is moot if the abrogation is valid.

As in *Georgia* and *Garrett*, resolution of that statutory question would allow the Court to avoid deciding important questions of constitutional law unnecessarily. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); see *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Adherence to established principles of constitutional avoidance is particularly appropriate here. For five years, the United States has taken the consistent position in cases presenting the identical Title II challenge to parking placard fees that the Justice Department interprets its regulation as *not* proscribing the fee charged by Texas here, and thus that Meyers has no valid claim under Title II. That is because parking placards generally are not "required," 28 C.F.R. 35.130(f), to provide nondiscriminatory access to buildings or facilities. Texas already provides such access for drivers with disabilities by offering special license plates at no additional charge, which allow drivers with disabilities, their family members, and non-profit groups that transport individuals with disabilities to utilize the parking spots reserved for persons with disabilities. See Pet. App. 3; Texas Transp. Code Ann. § 504.201 (West 2007). The placard fee here thus can be understood as a fee for

an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the Disabilities Act. 28 C.F.R. 35.130(f). The Justice Department's interpretation of its own regulation merits substantial deference, see *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), and casts such significant doubt on the viability of Meyers' claim on the merits as to eliminate any sound basis for prematurely resolving the important constitutional question presented.

Notably, this Court has repeatedly denied review in other cases where States have asserted an immunity defense to challenges to parking placard fees. See *Thompson* v. *Colorado*, 535 U.S. 1077 (2002); *Brown* v. *North Carolina Div. of Motor Vehicles*, 531 U.S. 1190 (2001); *California Dep't of Motor Vehicles* v. *Dare*, 531 U.S. 1190 (2001); cf. *Klinger* v. *Director, Mo. Dep't of Revenue*, 545 U.S. 1111 (2005) (vacating and remanding decision that addressed the constitutionality of Title II without resolving the statutory construction question).

Third, this case presents a potential statutory bar to federal jurisdiction. The Tax Injunction Act, 28 U.S.C. 1341, denies federal courts jurisdiction over actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Act is a "'jurisdictional rule' and a 'broad jurisdictional barrier'" to federal court review. *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 835 (1997) (quoting *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470 (1976)). The statute was designed "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

When petitioners first removed this case to federal court, the district court remanded the case to state court on the ground that the placard fee was a tax and that the Tax Injunction Act thus barred district court jurisdiction. Pet. App. 37. The Fifth Circuit subsequently held that Texas's parking placard fee was not a tax within the meaning of the Tax Injunction Act. See *Neinast* v. *Texas*, 217 F.3d 275, 277-279 (5th Cir. 2000), cert. denied, 531 U.S. 1190 (2001). In so holding, however, the court of appeals acknowledged that the criteria for identifying a tax under the Act pointed in opposite directions in this case. *Id.* at 278. The court nevertheless concluded that, on balance, the fee does not constitute a tax because it is a user fee designed to recoup the costs of the placard program. *Ibid.*

The courts of appeals have issued conflicting decisions on whether parking placard fees are taxes for purposes of the Tax Injunction Act. Compare *Neinast*, *supra*; *Marcus* v. *Kansas Dep't of Revenue*, 170 F.3d 1305, 1309-1312 (10th Cir. 1999), with *Hedgepeth* v. *Tennessee*, 215 F.3d 608, 611-616 (6th Cir. 2000) (Tax Injunction Act bars challenge to parking placard fee under the ADA); see *id.* at 616 (Moore, J., dissenting) (noting the different analytical approaches courts have taken, with some courts emphasizing where the funds go, while other emphasize "what the purpose or use of the assessment truly is") (quoting *Hexom* v. *Oregon Dep't of Transp.*, 177 F.3d 1134, 1138 (9th Cir. 1999)).

This Court has not yet addressed the definition of "tax" under the Tax Injunction Act, but the Court has held that its terms "should be interpreted to advance its purpose of confin[ing] federal-court intervention in state government." *Jefferson County* v. *Acker*, 527 U.S. 423, 433 (1999) (quoting *Farm Credit Servs.*, 520 U.S. at 826-

827). Furthermore, the Court has recognized that taxes can take the form of user fees imposed to recoup the costs of a governmental program. See *Massachusetts* v. *United States*, 435 U.S. 444, 446 (1978); *id.* at 460-463 (opinion of Brennan, J.). Thus, the question of whether the Tax Injunction Act bars this litigation is a substantial one.

The United States takes no position on that question here, other than to note that the Tax Injunction Act's potential statutory barrier to jurisdiction would have to be resolved before the Court could consider petitioners' constitutional challenge to jurisdiction. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 779-780 (2000) (statutory jurisdictional question must be resolved before Eleventh Amendment question); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 97 & n.2 (1998). The existence of that non-constitutional jurisdictional question provides an additional reason why this case is a poor vehicle to address the important constitutional question that petitioners ask the Court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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