NO.

In The Supreme Court of the United States

PATRICIA G. STROUD, PETITIONER

v.

THE ALABAMA BOARD OF PARDONS AND PAROLES AND PHILLIP MCINTOSH, RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, under the principles of *Lapides* v. *Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002), a State waives its sovereign immunity when it voluntarily invokes federal jurisdiction by removing a case to federal court, regardless of whether the State has relinquished that immunity in its own courts.

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Patricia G. Stroud respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 722 F.3d 1294. The opinion of the district court (App., *infra*, 18a-30a) is not reported but is available at 2011 WL 6838046.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2013. On October 9, 2013, Justice Thomas extended the time for filing a petition for a writ of

certiorari to and including November 20, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1441(a) of Title 28 of the United States Code provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

STATEMENT

This case presents the question whether, by removing a case and thereby voluntarily invoking the jurisdiction of the federal court, a State waives any claim it would have had in state court that it may not be held liable on sovereign immunity grounds. The federal courts of appeals have reached conflicting decisions on that question since shortly after this Court's decision in *Lapides* v. *Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002).

1. Petitioner, who is more than 60 years old, began working as a Personnel Assistant for respondent Alabama Board of Pardons and Paroles ("Board") in 2004 and was promoted in 2005. App., *infra*, 20a. Respondent Phillip McIntosh, the Personnel Director of the Board, encouraged petitioner to apply for a promotion to a higher position and promised to per-

sonally take her request for a promotion to the State's personnel officer. *Id.* at 21a; Amended Complaint ¶¶ 8-9. Despite these representations, McIntosh instead supported a younger, African American employee's application, falsely claiming that petitioner intended to retire. App., *infra*, 21a.

Petitioner filed a formal written complaint regarding McIntosh's conduct with the Director of the Board, leading to an internal investigation and a disciplinary hearing for McIntosh. Amended Complaint ¶ 12. Petitioner also filed a charge with the Equal Employment Opportunity Commission, alleging discrimination due to age and race. App., *infra*, 22a; Amended Complaint ¶ 13. The investigation and hearing were terminated by the Board, and McIntosh was permitted to transfer to a position at the Alabama Department of Transportation. App., *infra*, 21a. McIntosh's replacement has since altered petitioner's employment responsibilities, which has adversely affected her employment. *Id.*

2. Petitioner filed a complaint in state court. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and the Alabama Age Discrimination in Employment Act (Alabama ADEA), Ala. Code 25-1-20 to -29, against respondent Board. App., *infra*, 2a. The Alabama ADEA provides a state-law remedy in state court that is coextensive with the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*; the Alabama statute requires any Alabama ADEA claim in state court to be dismissed if a federal ADEA

claim is brought in federal court.[1] The complaint also alleged violations of the same statutes, as well as violation of 42 U.S.C. § 1983 and additional state-law claims, against respondent McIntosh. App., *infra*, 2a.

3. Respondents removed the case to federal court under 28 U.S.C. § 1441(a). App., *infra*, 2a; Amended Complaint ¶ 1. Now that the case was in federal court, petitioner amended her complaint to replace the Alabama ADEA claim with a federal ADEA claim. She also added a claim under 42 U.S.C. § 1983 against the Board. App., *infra*, 2a.

The Board filed a motion for judgment on the pleadings and McIntosh moved to dismiss the case. App., *infra*, 2a. The district court granted McIntosh's motion with respect to the Section 1983 claim

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[1] The relevant section of the Alabama ADEA provides:

> Any person aggrieved may elect to pursue their remedies under Title VII of the Civil Rights Act of 1964 as amended, and the Age Discrimination in Employment Act 29 U.S.C. Section 621 or in the alternative bring a civil action in the circuit court of the county in which the person was or is employed for such legal or equitable relief as will effectuate the purposes of this article. However, if an action is brought in the federal court, any action pending in the state court shall be simultaneously dismissed with prejudice. . . . Any employment practice authorized by the federal Age Discrimination in Employment Act shall also be authorized by this article and the remedies, defenses, and statutes of limitations, under this article shall be the same as those authorized by the federal Age Discrimination in Employment Act except that a plaintiff shall not be required to pursue any administrative action or remedy prior to filing suit under this article.

Ala. Code § 25-1-29 (1975).

against him. *Id.* at 28a-29a. The court also granted the Board's motion for judgment on the pleadings with respect to the Section 1983 and Title VII claims against it. *Id.* at 22a-23a, 25a-27a. The court remanded petitioner's state-law claims against McIntosh to state court. *Id.* at 29a-30a.

That left only the federal ADEA claim against the Board. This Court held in *Lapides* that a State's removal of a case to federal court waived its sovereign immunity. 535 U.S. at 616. Petitioner argued that the Board had similarly waived its sovereign immunity by removing this case to federal court. The district court rejected petitioner's argument, on the ground that the Board had not waived its immunity from suit in state court prior to the removal, whereas the State in *Lapides* had made such a waiver. App., *infra*, 24a. Based on that distinction, the court dismissed petitioner's ADEA claim. *Id.*[2]

4. The court of appeals affirmed. App., *infra*, 17a. It affirmed the district court's rulings on the Title VII and Section 1983 claims without discussion. *Id.* at 3a n.1. The court addressed only "questions of

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[2] In a footnote, the district court stated that the ADEA claim was "due to be dismissed on account of pleading defects." App., *infra*, 24a n.1. But the court declined to rely on that ground to resolve the case, because it "must address the antecedent issue of [the Board's] Eleventh Amendment immunity, which raises a question of the Court's subject matter jurisdiction." *Id.* at 24a-25a n1. Petitioner argued in the court of appeals that the district court had erred in finding "pleading defects," but the court of appeals did not reach the issue. Pet. C.A. Br. 18-20.

law" regarding the State's sovereign immunity claim, *id*. at 4a: whether the district court correctly ruled that "the Board was immune from liability under the ADEA and did not waive that immunity when it removed the case to federal court." *Id*. at 3a.

The court of appeals recognized that this Court held in *Lapides* 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 . . . in a federal forum." App., *infra*, 8a-9a (quoting *Lapides*, 535 U.S. at 624). The court also acknowledged that "[t]he facts in *Lapides* bear some similarity to the facts in this case." App., *infra*, 7a. The court noted that "[t]he contrast between *Lapides*'s narrow holding and its broad reasoning has sparked a debate in other circuits" over cases like this one, in which, unlike in *Lapides*, the suit involved a federal claim over which the State had *not* waived its sovereign immunity from suit in its own courts. *Id.* at 9a.

The court adopted the view of "[m]ost circuit courts" that "the *Lapides* Court's reasoning should apply in cases involving federal law claims as well as those involving state law claims." App., *infra*, 9a. The court also acknowledged that under *Lapides*, "a state consents to federal jurisdiction over a case by removing and . . . cannot then challenge that jurisdiction by asserting its immunity from a federal forum." *Id*. at 15a. But the court nonetheless held that "a state, if it chooses, can retain immunity from *liability* for a particular claim even if it waives its immunity from *suit* in federal courts." *Id.* at 13a (emphasis added). The court concluded that in this case

the State "did not waive its constitutional objection to ADEA liability on the basis of sovereign immunity." *Id.* at 16a. The court therefore affirmed the district court's judgment dismissing the ADEA claim on sovereign immunity grounds. *Id.* at 17a.

The court of appeals also held that the fact that petitioner "added the ADEA claim only after the case was removed does not change the result." App., *infra*, 15a n.3. As the court explained, "[o]nce [federal] jurisdiction is invoked by removal, the federal court has jurisdiction over the entire *case*—not simply those claims that the complaint alleged at the time of removal." *Id.* (citing *Embury* v. *King*, 361 F.3d 562, 565 (9th Cir. 2004) ("[T]he State removed the case, not the claims, and like all cases in federal court, it became subject to liberal amendment of the complaint.")); *see also Carlsbad Tech., Inc.* v. *HIF Bio, Inc.*, 556 U.S. 635, 636 (2009) (Section 1441 "allows removal of an 'entire case' when it includes at least one claim over which the federal district court has jurisdiction.").

REASONS FOR GRANTING THE PETITION

This case presents an important question that has divided the courts of appeals in the wake of *Lapides*: whether a State that voluntarily invokes the jurisdiction of a federal court through removal has thereby waived its claim to sovereign immunity, regardless of whether it would have retained immunity in its own courts if it had not removed the case. *Lapides* did not question the State's long-settled right to waive immunity in its own courts while retaining immunity in federal court. But the State's general right to do so was not controlling in

Lapides, because the State, by voluntarily invoking federal jurisdiction, had waived its ordinary right to claim immunity in a federal forum. The Court held that a State cannot voluntarily invoke federal jurisdiction by removing a case while simultaneously claiming that it has sovereign immunity from liability. That same rationale is directly applicable here, and it establishes that the court of appeals erred in holding that the State may both invoke a federal forum and insist that it is not subject to liability in that forum.

The question presented is the subject of a longstanding and deep conflict in the circuits that developed after this Court's decision in *Lapides*. Resolution of the conflict is critical both to plaintiffs and to States. States frequently seek to remove cases to obtain the perceived advantages of litigating in a federal forum. In circuits in which a State may remove while still asserting sovereign immunity, States may avail themselves of the perceived benefits of litigating in the federal forum without subjecting themselves to the possibility of liability; the consequences for plaintiffs, who may be left without any remedy at all for a serious injury, can be substantial. In circuits that have gone the other way, States must trade their immunity for the benefits of litigating in the federal forum. States in still other circuits that have not yet resolved the issue must hazard a guess about the effect of removal. The rights of plaintiffs and of States should not vary depending on the accident of geography, and this Court is the only forum that can resolve the conflict. Further review is warranted.

I. A STATE WAIVES SOVEREIGN IMMUNITY WHEN IT REMOVES A CASE TO FEDERAL COURT

In *Lapides*, 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 . . . in a federal forum." 535 U.S. 613, 624 (2002). The facts of *Lapides* differed from the facts here, because the State here retained its immunity before removal, while the State in *Lapides* had waived it in state court. But the rationale of *Lapides*—that voluntary invocation of federal jurisdiction waives sovereign immunity—is fully applicable in this situation.

The court of appeals held to the contrary only by adopting a novel form of immunity, under which a State *is* subject to the jurisdiction of the court but *is not* subject to liability. Permitting a State to waive and not waive sovereign immunity in the same case and with respect to the entire range of possible remedies finds no support in this Court's cases or in traditional views of sovereign immunity, and it should be rejected.

A. The Rationale Of *Lapides* Is Controlling Here

This Court's cases have made clear that sovereign immunity generally bars private citizens from suing a State or an arm of the State for damages. *See Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 751-52 (2002); *N. Ins. Co. of N.Y.* v. *Chatham Cnty., Ga.*, 547 U.S. 189, 193 (2006). The Court has also made clear, however, that States may forego their immunity by waiving it. *See Port Auth. Trans-*

Hudson Corp. v. *Feeney*, 495 U.S. 299, 304, 308–309 (1990); *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). The voluntary invocation of federal jurisdiction has long been held to be such a waiver, and that principle resolves this case.

1. In *Lapides*, this Court held that a State may waive its sovereign immunity not just by statute but also by litigation conduct. The Court explained:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.

535 U.S. at 619. The Court noted that a waiver of state sovereign immunity will be found only if there is "a 'clear' indication of the State's intent to waive its immunity." *Id.* at 620. In the context of waiver by litigation conduct, "[t]he relevant 'clarity' . . . must focus on the litigation act the State takes that creates the waiver." *Id.* Where the State "voluntarily invoke[s] the federal court's jurisdiction" by removing the case to federal court, "that act—removal—is clear." *Id.*; *see Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 397 (1998) (Kennedy, J., concurring). Indeed, the Court overruled its prior decision in *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945), "insofar as it would otherwise ap-

ply" to vitiate the State's waiver in this situation. *Lapides*, 535 U.S. at 623.[3]

The Court's reasoning in *Lapides* was based on precedents going back more than a century. In a variety of contexts, the Court had "in general made clear that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Lapides*, 535 U.S. at 619 (quoting *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906) (emphasis in *Lapides*)).

The Court had applied that principle in *Clark* v. *Barnard*, 108 U.S. 436 (1883), where it had held that a State's "'voluntary appearance'" in federal court as an intervenor "amounted to a waiver of its Eleventh Amendment immunity." *Lapides*, 535 U.S. at 619 (citing *Clark*, 108 U.S. at 447). It had applied the same principle in holding that a State that voluntarily files a claim in bankruptcy court thereby "'waives any immunity . . . respecting the adjudication of'" the claim. *Lapides*, 535 U.S. at 619 (quoting *Gardner* v. *New Jersey*, 329 U.S. 565, 574 (1947) (emphasis in *Lapides*)). *See also College Savings Bank*, 527 U.S. at 675-76 (1999) (citing *Clark and Gunter*). The Court

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[3] *Ford* cast doubt on whether a state attorney general may waive the State's immunity through litigation conduct absent a specific statutory authorization to do so. *See Lapides*, 535 U.S. at 622. The Court in *Lapides* held that *Ford* was "inconsistent with the basic rationale of th[e] line of cases" discussed in text on this page (*Clark*, *Gunter*, and *Gardner*), which "represent the sounder line of authority." *Id.* at 623.

in *Lapides* reasoned that removal, which is just another form of voluntary invocation of federal jurisdiction, is no different.

Although the State in *Lapides* asserted that it had legitimate motives for removing the case, the Court expressly rejected the proposition that the State's motivation in removing was relevant to the analysis. The State had argued that it had removed the case "not in order to obtain litigating advantages for itself, but to provide its codefendants, the officials sued in their personal capacities, with the generous interlocutory appeal provisions available in federal, but not in state, court." 535 U.S. at 621. The Court held, however, that "[a] benign motive . . . cannot make the critical difference for which [the State] hopes," because "[m]otives are difficult to evaluate" and "[t]o adopt the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages, if not in this case, then in others." *Id.* The Court concluded that "the rationale for applying the general 'voluntary invocation' principle is as strong . . ., in the context of removal, as elsewhere." *Id.*

Lapides and the cases it relied on are all instances of the generally applicable principle that when a State voluntarily invokes the jurisdiction of a federal court, it thereby waives sovereign immunity. The fact that the State originally found itself in *state* court involuntarily as a defendant was of no consequence in *Lapides* and should not be of any consequence here. "Since a State [defendant in] a state-court action is under no compulsion to appear in federal court and . . . has the unilateral right to block

removal . . . , any appearance the State makes in federal court may well be regarded as voluntary." *Schacht*, 524 U.S. at 395-96 (Kennedy, J., concurring).

2. It is true that *Lapides* itself involved a suit against a State on a cause of action for which the State had already waived immunity in its own courts. 535 U.S. at 617. This Court therefore noted that it "need [not] address 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." *Id.* at 617-618. Nonetheless, though the facts of *Lapides* did not present the question, the Court's reasoning makes clear that the act of voluntarily invoking the federal court's jurisdiction is sufficient to waive the State's sovereign immunity. Removing to a federal court and then asserting sovereign immunity "is the situation in which law usually says a party must accept the consequences of its own acts." *Schacht*, 524 U.S. at 393 (Kennedy, J., concurring). Like the State in *Lapides*, respondent here has voluntarily invoked the jurisdiction of the federal courts and is bound to accept the consequences of its choice.

B. The Court Of Appeals Erred In Concluding That Removal Waives Sovereign Immunity From Suit But Not Sovereign Immunity From Liability

While the court of appeals correctly held that "removal waived the agency's immunity from suit in a federal forum," the court nonetheless held that removal "did not waive the agency's immunity from liability on th[e] federal claim" in this case. App., *in-*

fra, 1a. In the court's view, while the State had consented to the jurisdiction of the federal court, the court nonetheless could not enter a judgment against it. That odd result is mistaken.

1. There is no basis for the court of appeals' conception of immunity—or of jurisdiction—in the federal system. A State, like any litigant subject to the jurisdiction of a federal court, may retain a variety of defenses on the merits to a claim against it, even if it has waived sovereign immunity. There is no basis, however, for the novel concept that a State that has waived sovereign immunity may still assert sovereign immunity to preclude a judgment against it.

The court of appeals based its reasoning on the theory that "sovereign immunity is a divisible concept," such that a State in a given case may waive immunity from the jurisdiction of a court without losing immunity from the substantive claims against it. App., *infra*, 11a. Most of the authorities on which the court relied for that proposition hold that a State generally may waive immunity in its own courts without waiving immunity in federal court. See App., *infra*, 12a (citing *College Savings Bank*, 527 U.S. at 676, and *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985), *superseded by statute on other grounds*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807)).

The fact that a State may consent to suit in one court but not another in no way suggests that it may voluntarily invoke the jurisdiction of a court while still retaining its immunity from liability in that same court. Indeed, the holding of *Lapides* was that, while a State may generally waive immunity in state

court while retaining it in federal court, its immunity in federal court does *not* survive its voluntary invocation of the federal forum. Nothing in the cited cases suggests that a State has the extraordinary privilege of asserting and denying the power of a court to adjudicate a case at the same time and in the same case.

The court of appeals also sought to rely on the settled principle that a State may waive sovereign immunity from equitable relief though not from monetary damages. App., *infra*, 12a; *see, e.g.*, *Sossamon* v. *Texas*, 131 S. Ct. 1651, 1658 (2011); *College Savings Bank*, 527 U.S. at 676; *Smith* v. *Reeves,* 178 U.S. 436, 441-45 (1900). In this case, however, the State has taken no action that affects only one or another form of relief, and the State accordingly has never argued for immunity from only one or another form of relief. The fact that a State can waive its immunity from one form of relief but not another in no way suggests the rule the court of appeals adopted here: that a State can take a step that *generally* waives its immunity while retaining immunity from *all* forms of relief. As this Court noted in *Lapides*, those two propositions—that the State invokes the jurisdiction of the federal court but at the same time retains its immunity from all forms of relief—are "anomalous or inconsistent." 535 U.S. at 619.

The court of appeals also misread *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002). *See* App., *infra*, 12a. The Court in that case held that state sovereign immunity required a federal court to dismiss a suit against a state agency. 535 U.S. at 769. In doing so,

the Court rejected the argument that the State might be immune from the issuance of a reparation order requiring it to pay money but that such immunity does not extend to other forms of equitable relief. The Court explained that "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability," but "[r]ather . . . provides an immunity *from suit*." *Id.* at 766 (emphasis added). The straightforward teaching of *Federal Maritime Commission* is that sovereign immunity is an immunity from suit. If it is waived with respect to a federal forum, the waiver permits suit against the sovereign and permits the sovereign to be held liable. Nothing in the Court's holding or reasoning in the case supports the proposition that sovereign immunity enables a State to consent to a novel concept of "jurisdiction," which waives sovereign immunity but does not permit the court to find that the consenting State is liable.

2. In an analogous context, the Court has made clear that sovereign immunity is an immunity from suit and that once a court has jurisdiction over the parties in a case (as the Eleventh Circuit held was true here), sovereign immunity provides no basis for immunity from liability on a particular claim. In *Workman* v. *New York City*, 179 U.S. 552, 566 (1900), the Court held that the City of New York could be held liable in federal court for a maritime tort, notwithstanding that the City was entitled to sovereign immunity under its own law. The Court first held that "there is no limitation taking [municipal] corporations out of the reach of the process of a court of admiralty," and therefore concluded that the City was subject to the process of the court. *Id.* at

565. The Court then rejected the argument that "nevertheless the admiralty court would afford no redress against the city for the tort complained of, because under the local law the corporation . . . should be treated by the maritime law as a sovereign." *Id.* at 566. The Court noted that "no example is found in [maritime] law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon." *Id.*[4] Once a court has obtained jurisdiction over a party, it may hold the party liable.

The sovereign immunity principles applicable in maritime law and under which *Workman* was decided are the same as those applicable in other areas of law. *See*, *e.g.*, *N. Ins. Co. of N.Y.*, 547 U.S. at 195-96; *Ex parte New York*, 256 U.S. 490, 497 (1921) (holding that "admiralty and maritime jurisdiction" are not "exempt from . . . the rule" that "a state may not be sued without its consent"); *see also Fed. Mar. Comm'n*, 535 U.S. at 754. Indeed, in *Ex parte New York*, the Court explained that *Workman* "was careful to distinguish between the immunity from jurisdiction attributable to a sovereign," which rested on the lack of "power to exercise jurisdiction over the person of defendant," and "immunity from liability in

[4] The Court noted that foreign sovereign immunity similarly "proceed[s] upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be asserted, . . . not upon the supposed want of power in the courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction." 179 U.S. at 566.

a particular case," which was found not to exist under "the substantive [federal] law of admiralty." 256 U.S. at 499. Where the court has obtained jurisdiction over the State, as the Eleventh Circuit held was the case here, and the governing substantive law applies equally to sovereign entities as to others, as is true of the ADEA, there is no basis for a State to claim an extra-statutory immunity from liability.

3. The court of appeals appeared to suggest that a State would suffer unfairness if it were "require[d] . . . to forfeit an affirmative [sovereign immunity] defense to liability simply because it changes forums." App., *infra*, 15a. Parties make litigation choices that have effects on their litigating position all the time, however, and they generally are held to the consequences of their choices. There is no reason to permit parties to invoke a particular forum and take advantage of the litigation advantages it offers while continuing to assert that the same forum may not hold them liable.

The claim of unfairness is particularly incongruous in this context, where holding the State to the consequences of its own choices would merely require the State, if it wanted to retain immunity, to litigate the issue *in its own courts*. Presumably, the State has structured its courts to provide a fair and just forum for resolving disputes. *Cf., e.g.*, *Burt* v. *Titlow*, No. 12-414, 2013 WL 5904117, at *4 (Nov. 5, 2013) ("State courts are adequate forums for the vindication of federal rights."); *Allen* v. *McCurry*, 449 U.S. 90, 105 (1980); *Amalgamated Clothing Workers of Am.* v. *Richman Bros.*, 348 U.S. 511, 518 (1955). If the State believes that its courts provide an inade-

quate forum for resolution of a particular sort of dispute, the State retains the ability, which no other litigant has, to alter the rules to remedy the deficiency. No unfairness results from requiring the State, if it wishes to retain sovereign immunity, to litigate cases in its own courts.

II. THERE IS A DEEP AND ENTRENCHED CONFLICT IN THE CIRCUITS

The court of appeals recognized that "the circuits divide" over the question whether "*Lapides* control[s] cases in which the state has not relinquished its sovereign immunity in its own courts against the claim in question." App., *infra*, 10a. Other courts have also noted the conflict.

Two circuits have held that that when a State removes a case to a federal forum, it thereby waives whatever sovereign immunity it would have had if the case had remained in the state forum. Two other circuits have not ruled on that precise question, but they have taken positions in cases involving other forms of voluntary invocation of federal jurisdiction that would lead to the same result here. Two circuits hold that a State's removal of a case to federal court does not deprive it of a sovereign immunity defense it would have had in state court. Two other circuits and the court below accept that under *Lapides* removal constitutes a waiver of sovereign immunity, but nonetheless hold that the State remains immune from liability in the removed case.

1. The Ninth and Tenth Circuits hold that a State's removal to federal court constitutes a full and complete waiver of its sovereign immunity defense. The Seventh and Federal Circuits have taken posi-

tions in voluntary invocation cases in other contexts that strongly suggest they would agree.

a. The Tenth Circuit has held that a State's voluntary invocation of the jurisdiction of the federal court by removal waives its claim to sovereign immunity in the federal court. In *Estes* v. *Wyoming Dept. of Transp.*, 302 F.3d 1200 (10th Cir. 2002), a state employee sued the State in state court, alleging a breach of contract under state law and violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*. The State removed the case to federal court. The Tenth Circuit held that under *Lapides* the removal waived sovereign immunity for the state-law cause of action. *Id*. at 1203-04. With respect to the federal ADA claim, the court held that the case was similarly resolved by the "unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts." *Id.* at 1206 (quoting *Coll. Sav. Bank*, 527 U.S. at 681 n. 3). As the court summarized, "[w]hen a State removes federal-law claims from state court to federal court[,] . . . it 'submits its rights for judicial determination'" in the federal court. *Id.* at 1206 (quoting *Gunter*, 200 U.S. at 284). *Accord Schrier* v. *Univ. of Colo.*, 427 F.3d 1253, 1268 (10th Cir. 2005).

b. The Ninth Circuit has reached the same conclusion. In *Embury* v. *King*, 361 F.3d 562 (9th Cir. 2004), a state university removed a case involving both state and federal claims, and then moved to dismiss on sovereign immunity grounds. *Id.* at 563. The court held that "removal itself affirmatively invoked federal judicial authority and therefore waives Eleventh Amendment immunity from subsequent

exercise of that judicial authority." *Id.* at 566. The court explained that a State should not be permitted to "waive immunity to remove a case to federal court, then 'unwaive' it to assert that the federal court could not act." *Id.* The court adopted "a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity." *Id.*

c. Two other circuits have reached the same conclusion in other contexts involving the voluntary invocation of federal jurisdiction. While those circuits have not directly addressed removal, their decisions strongly suggest their agreement with the Ninth and Tenth Circuits on the question presented.

(i) The Federal Circuit has held that a State that voluntarily invoked the jurisdiction of a federal court could not subsequently claim sovereign immunity from liability in the case. In *Vas-Cath* v. *Curators of Univ. of Missouri*, 473 F.3d 1376, 1385 (Fed. Cir. 2007), the court held that a State that initiates a patent interference proceeding in federal court cannot assert sovereign immunity to block a competing patent applicant from appealing the decision. In *Regents of the Univ. of New Mexico* v. *Knight*, 321 F.3d 1111, 1125-26 (Fed. Cir. 2003), the court held that a State that commences an action in federal court to enforce a patent claim thereby consents to all compulsory counterclaims arising from the same transaction. *See also In re Regents of Univ. of Calif.*, 964 F.2d 1128, 1135 (Fed. Cir. 1992) ("Having invoked the jurisdiction of the federal court, the State accepted the authority of the court" when a change of venue was subsequently ordered.)

In each of these cases, a State invoked the jurisdiction of the federal courts and then sought to claim an exemption from liability or other special privileges based on sovereign immunity. The governing principle in each case was precisely the same principle that controlled *Lapides*, *Gardner*, *Gunter*, and *Clark*: a State's voluntary invocation of federal jurisdiction waives its immunity. Removal is just one species of voluntary invocation. The Federal Circuit's decisions in these cases strongly suggest that it would agree with the Ninth and Tenth Circuits, and disagree with the court below, on the question presented in this case.

(ii) The Seventh Circuit recently noted that it had not decided the precise question whether removal waives state sovereign immunity. *Hester* v. *Indiana State Dep't of Health*, 726 F.3d 942, 950-51 (7th Cir. 2013). But another voluntary invocation case from the same circuit, *Bd. of Regents of the Univ. of Wis. Sys.* v. *Phoenix Int'l Software, Inc.*, 653 F.3d 448 (7th Cir. 2011), suggests that the Seventh Circuit would agree that removal waives sovereign immunity, regardless of whether the State would have retained immunity in its own courts.

In *Phoenix International Software*, an arm of the State of Wisconsin brought suit in federal district court, challenging an adverse decision of a federal agency that considered trademark claims. The Seventh Circuit concluded that *Lapides* did not "turn[] on the fact that the case reached the federal court through removal," rather than some other means. *Id.* at 461. The court read *Lapides* instead to state a "more general rule" regarding voluntary invocation

of federal jurisdiction, *id*., supported also by the other non-removal cases on which *Lapides* had relied. *Id*. at 463-64. On that basis, the court held that "[a] straightforward application of *Lapides* and the doctrine of waiver by litigation conduct require us to reinstate [the] counterclaim" that the district court had dismissed. *Id*. at 477. The Seventh Circuit thus agrees with the Ninth, Tenth, and Federal Circuits on the effect of voluntary invocation of a federal court's jurisdiction, and its holding likely will apply in the removal context as well.

2. Two circuits have held that a State retains its immunity in federal court, even after it invokes the jurisdiction of the federal courts by removing a case.

a. The Fourth Circuit has held that a State, "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." *Stewart* v. *North Carolina*, 393 F.3d 484, 490 (4th Cir. 2005). The court acknowledged the general principle that voluntary invocation of federal court jurisdiction waives sovereign immunity. *Id*. at 489 (citing *Lapides*, *Gardner*, *Gunter*, and *Clark*). But in the court's view, the voluntary invocation rule did not apply, because the State by removing the case "did not seek to *regain* immunity that it had previously abandoned," and instead "merely sought to have the sovereign immunity issue resolved by a federal court rather than a state court." *Id*. at 490.

b. The First Circuit has adopted the same rule. In *Bergemann* v. *Rhode Island Dept. of Environmental Management*, 665 F.3d 336 (1st Cir. 2011), a group of

Rhode Island environmental police officers sued their employer, a state agency, in state court on state breach of contract claims and federal claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201–219. The State removed the case to federal court. The First Circuit stated that "the challenge of interpreting *Lapides* has divided the courts of appeals." 665 F.3d at 342. But it feared that adopting a rule that removal waives sovereign immunity would leave the State with what the court viewed as two potentially undesirable options: either remove the claim to federal court where the State could not assert its immunity, or litigate the claim in state court. *Id*. The court believed that the State should not be put to that choice, and it therefore held that, "[b]ecause [the State] has consistently maintained its immunity to FLSA claims (wherever brought), the [S]tate did not waive its immunity by removing the instant action to federal court." *Id*. at 343.

3. The Eleventh Circuit in this case joins two other circuits that have adopted a rule that they view as an intermediate position. Under their rule, removal waives immunity from the jurisdiction of the federal court but does not waive immunity from liability in the case.

a. In *Meyers ex rel. Benzing* v. *Texas*, 410 F.3d 236 (5th Cir. 2005), *cert. denied*, 550 U.S. 917 (2007), the Fifth Circuit reached the same conclusion as the court of appeals in this case, albeit by slightly different reasoning. *Meyers* involved a suit against the Texas Department of Transportation, alleging violations of the ADA. The court of appeals stated 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." *Id.* at 242. The court thus expressly disagreed with the Fourth Circuit's holding in *Stewart* that removal waives a State's sovereign immunity only if the State has already waived it in state court. The Fifth Circuit concluded that *Stewart* "is not persuasive because its rationale misconstrues important principles animating *Lapides*." *Id.* at 249.

Nonetheless, the Fifth Circuit held that a State actually has "two kinds of immunity that it may choose to waive or retain separately—immunity from suit and immunity from liability." 410 F.3d at 252-53. In the court's view, the removal of the case by the State of Texas had waived only its "immunity from suit in federal court." *Id.* at 255. But the court found state, not federal, law dispositive on whether Texas could be held liable on the removed federal ADA claim. *See id.* (stating that Texas potentially "retained a separate immunity from liability" and describing the question as "an issue that must be decided according to that state's law"). Notwithstanding its holding that the State's removal of the case waived sovereign immunity, the court remanded to the district court, with instructions that the State not be "precluded from pursuing a claim that it is immune from liability under principles of Texas sovereign immunity law." *Id.* at 256. *Accord Carty* v. *State Office of Risk Mgmt.*, No. 12–40750, 2013 WL 4234029, at *3 (5th Cir. Aug. 15, 2013).

b. The Third Circuit in *Lombardo* v. *Penn. Dep't of Public Welfare*, 540 F.3d 190 (3d Cir. 2008),

adopted the same view as the court of appeals in this case. *Lombardo* involved a suit alleging employment discrimination in violation of state law and the ADEA, which the Commonwealth had removed from state to federal court. *Id.* at 193. The Third Circuit "discern[ed] two distinct types of state sovereign immunity: immunity from suit in federal court and immunity from liability." *Id.* at 194. The court held that "while voluntary removal waives a State's immunity from suit in a federal forum, the removing State retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability." *Id.* at 198. It therefore concluded that "the Commonwealth has immunity from liability regarding claims under the ADEA, and it has not waived such immunity in this case." *Id.* at 200.

3. The Second, Sixth, and Eighth Circuits have not yet taken a position on the question presented in this case. The court below and some other courts have suggested that the D.C. Circuit in *Watters* v. *Washington Metropolitan Area Transit Authority*, 295 F.3d 36 (D.C. Cir. 2002), held that removal does not waive sovereign immunity if the State has not already waived immunity in its own courts. *See* App., *infra*, 10a-11a; *Lombardo*, 540 F.3d at 198-99 n.8; *Bergemann*, 665 F.3d at 342. But as the Seventh and Fifth Circuits have correctly recognized, *Watters* did not reach a conclusion on that question. *See Phoenix Int'l Software*, 653 F.3d at 461; *Meyers*, 410 F.3d at 248 n.14.

Watters was argued just before *Lapides* was decided, and the D.C. Circuit issued its decision just

two months after *Lapides*. The D.C. Circuit did state that, because the States that were signatories to the interstate WMATA compact had "not waived immunity . . . in their own courts, the narrow holding of *Lapides* does not apply to this case." 295 F.3d at 42 n.13. But the court also noted that the *Watters* plaintiff "had never argued that WMATA waived its immunity (Eleventh Amendment or otherwise) by removing this case to federal court" from the local D.C. court system. *Id.* The court concluded that it "s[aw] no reason to consider, sua sponte, an issue upon which neither this circuit nor the Supreme Court has yet opined." *Id.* The D.C. Circuit has not addressed the issue in any subsequent case.

4. There is thus a deep conflict in the circuits on the question whether a State's voluntary invocation of federal jurisdiction by removing a case to federal court constitutes a waiver of the sovereign immunity it would have retained had it instead litigated the case in state court. The conflict has persisted since at least 2005. Nine circuits have weighed in on the question, seven of them in the specific context in which the State removes a suit from state to federal court. The court of appeals in this case, as well as the First, Fifth, and Seventh Circuits, have acknowledged the conflict. *See* Pet App. 10a-11a; *Hester*, 726 F.3d at 949 (question "has divided our sister circuits."); *Bergemann*, 665 F.3d at 343 (noting that "the challenge of interpreting *Lapides* has divided the courts of appeals"); *Meyers*, 410 F.3d at 249 (expressly disagreeing with *Stewart*). Only this Court can resolve the issue and bring uniformity to federal law in this area.

III. THE ISSUE IS IMPORTANT

The question whether a State waives its sovereign immunity by removing a case to federal court is of vital importance to both plaintiffs and the States. A valid assertion of immunity ends the litigation, regardless of the underlying merits of the case. That result is important to plaintiffs, who may find themselves with no remedy at all for serious wrongs. It is also important to States, which understandably would prefer to retain both their immunity and the litigation advantages the federal courts offer.

1. The question whether a state defendant has waived immunity by removal arises frequently. In just the years 2012 and 2013, federal courts have been presented with this issue in at least thirty cases in which judicial opinions addressing the issue are available. Those cases are listed in Appendix C.

The number of decisions listed in Appendix C and addressing immunity after removal undoubtedly understates the frequency with which the issue arises and its importance when it does. Not all cases in which the issue arises result in opinions that are available through standard research methods. Moreover, the resolution of the question presented has been clear, one way or the other, in many courts of appeals for some time, beginning at least with the Tenth Circuit's decision in *Estes* in 2002. Once a circuit has decided the issue, there is no longer a reason to litigate it in that circuit. Thus, in circuits that have held that immunity remains despite removal, there is little reason for plaintiffs to continue to raise the issue, even though its resolution governs their case. Likewise, in circuits that have held that the

voluntary invocation of federal jurisdiction by removal waives sovereign immunity, the States have no doubt removed far fewer cases, thus again limiting the number of decisions on the issue—notwithstanding that it may be affecting the decisions whether to remove in a large number of cases.

2. Plaintiffs' claims against States should not be permitted or barred based on the happenstance of where the claim arises and what the governing law of the particular circuit happens to be. States within the Ninth or Tenth Circuits cannot remove cases while retaining sovereign immunity, while States within five other circuits can do so freely. Meanwhile, the law in two other circuits is that voluntary invocation of federal jurisdiction is a waiver of immunity, and that holding likely applies in the removal context as well. The law in the remaining four circuits leaves both plaintiffs and the States uncertain. Further review by this Court to resolve this important question of federal law is warranted.

IV. THIS CASE SQUARELY PRESENTS THE QUESTION

This case presents a clean vehicle for resolving the question presented. The court of appeals decided only "whether a state waives its sovereign immunity from suit and whether it waives its immunity from liability when it removes." App., *infra*, 4a. The court's resolution of those "questions of law," *id.*, did not turn on any factual dispute or any other case-specific factor. The rule that the court adopted finally disposed of this case, and it clearly settled the question presented in the Eleventh Circuit. The issue is ripe for resolution by this Court in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 12-10436

PATRICIA G. STROUD, *Plaintiff-Appellant*

v.

PHILLIP MCINTOSH, THE ALABAMA BOARD OF PARDONS AND PAROLES, *Defendants–Appellees*.

Decided: July 23, 2013

Before WILSON AND COX, Circuit Judges, and VOORHEES, District Judge

COX, Circuit Judge:

The principal issues we address in this appeal are (1) whether removal of this case to a federal court waived the state agency's sovereign immunity from *suit* in a federal court, and (2) whether removal of the case waived the agency's sovereign immunity from *liability* on a claim under the federal Age Discrimination in Employment Act. We conclude that removal waived the agency's immunity from suit in a federal forum but did not waive the agency's immunity from liability on this federal claim. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case began in a circuit court in Montgomery County, Alabama, in December 2010, when Patricia Stroud sued her employer, the Alabama Board of Pardons and Paroles, and Phillip McIntosh, the Board's personnel director during the relevant time. Against the Board, Stroud's original complaint alleged claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e–2, and the Alabama Age Discrimination in Employment Act (AADEA), Ala.Code §§ 25–1–20 to –29. The Complaint alleged the same claims against McIntosh, as well as a claim under 42 U.S.C. § 1983 and state law claims for wanton conduct and intentional infliction of emotional distress.

The Board and McIntosh removed the case to federal court, invoking the court's subject-matter jurisdiction under 28 U.S.C. § 1331. Five months after removal, Stroud amended her complaint. The Amended Complaint alleged claims under § 1983 and Title VII against both defendants, repeated the state law claims against McIntosh, and added a claim for damages under the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634, against the Board.

In its Answer, the Board asserted as an affirmative defense (among many others) that the Eleventh Amendment and the doctrine of sovereign immunity barred all of Stroud's claims against it. (Dkt. 26 at 17–18.) The Board then moved for judgment on the pleadings, and McIntosh moved to dismiss the case.

The district court dismissed all of Stroud's federal claims other than the ADEA claim for failure to state

a claim. (Immunity was not a basis for dismissal of these claims.) Importantly for this appeal, the district court held that the Board was immune from liability under the ADEA and did not waive that immunity when it removed the case to federal court. The court entered judgment in favor of the Board on the ADEA claim and remanded the remaining state law claims against McIntosh to state court.

Stroud appeals.

II. ISSUES ON APPEAL AND CONTENTIONS OF THE PARTIES

Stroud raises a number of issues on appeal. We address only her contentions that the Board waives its immunity from suit and its immunity from liability under the ADEA when it removed the case.[1]

For these contentions, Stroud relies on the Supreme Court's reasoning in *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613 (2002). She argues that the rationale behind *Lapides*'s holding suggests that a state waives its sovereign immunity—to both a federal forum and liability for a particular claim—when it removes a case. The Board contends in response that *Lapides* is distinguishable on its facts and that *Lapides*'s reasoning does not inform our result in this case; accordingly, the Board argues, it did not waive its im-

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[1] Stroud challenges other rulings of the district court, none of which were resolved on the basis of sovereign immunity. Specifically, she contends that the district court improperly dismissed her Title VII claims against both defendants and erred by dismissing her § 1983 claims against McIntosh. We conclude that there is no error in these challenged rulings.

munity from suit or from liability by removing.

III. DISCUSSION

The questions we address—whether a state waives its sovereign immunity from suit and whether it waives its immunity from liability when it removes—are questions of law that we review de novo. *See Barnes v. Zaccari,* 669 F.3d 1295, 1302 (11th Cir. 2012).

A. Sovereign Immunity And The Eleventh Amendment

Put in its broadest form, the concept of sovereign immunity bars private citizens from suing states for damages. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.,* 535 U.S. 743, 751–52 (2002). This immunity also shields "arms of the State" from suit. *N. Ins. Co. of N.Y. v. Chatham Cnty., Ga.,* 547 U.S. 189, 193 (2006). There is no dispute that the Board is an arm of the state for the purposes of asserting sovereign immunity.

States enjoyed this immunity as a perquisite of their sovereignty before entering the United States. *See Hans v. Louisiana,* 134 U.S. 1, 16 (1890). But soon after the Constitution was adopted, the Supreme Court took the position that Article III's extension of federal jurisdiction to controversies "between a State and Citizens of another State," U.S. Const. art. III, § 2, allowed states to be sued by citizens of other states in federal court. *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 466 (1793) (opinion of Wilson, J.), *superseded by constitutional amendment,* U.S. Const. amend. XI. The reaction to this "unexpected blow to state sovereignty" was overwhelming-

ly negative. *Alden v. Maine,* 527 U.S. 706, 720 (1999) (quoting David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 196 (1997)). This negative response to *Chisholm* crystallized two years later with the ratification of the Eleventh Amendment.

By its terms, the Eleventh Amendment prohibits the "Judicial power of the United States" from reaching "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. But the language is deceiving; the Supreme Court interprets the Eleventh Amendment to mean far more than what it says. *See Blatchford v. Native Vill. of Noatak,* 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition ... which it confirms ...."). Though the Amendment's text appears to only withdraw federal jurisdiction from any private suit against a state by a noncitizen, the Supreme Court reads the Amendment to remove any doubt that the Constitution preserves states' sovereign immunity in the federal courts. *Va. Office for Prot. & Advocacy v. Stewart,* 131 S. Ct. 1632, 1637 (2011) ("[W]e have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant."); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) ("[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984) (recognizing that the Eleventh

Amendment's "significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution).

Importantly, the Eleventh Amendment is neither a source of nor a limitation on states' sovereign immunity from suit. *Alden,* 527 U.S. at 713. Rather, it is a recognition of states' sovereign immunity in federal court. *See* Erwin Chemerinsky, Federal Jurisdiction 422 (6th ed. 2012) ("The Court has thus ruled that there is a broad principle of sovereign immunity that applies in both federal and state courts; the Eleventh Amendment is a reflection and embodiment of part of that principle.").

Like most general rules, sovereign immunity has exceptions. The Supreme Court has recognized two ways that a private person can sue a state for damages: either (1) Congress can abrogate sovereign immunity by enacting legislation to enforce the substantive provisions of the Fourteenth Amendment, or (2) a state can waive its sovereign immunity. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1999).

B. Stroud's Contention

The ADEA, as enacted, authorized suits against states. But the Supreme Court held that Congress was without authority to abrogate states' sovereign immunity against ADEA claims. *See Kimel,* 528 U.S. at 91–92. The Court held that the ADEA was "not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment" because of "the indiscriminate scope of the Act's substantive requirements[ ]

and the lack of evidence of widespread and unconstitutional age discrimination by the States." *Id.* at 91.

Stroud recognizes *Kimel*'s holding. But she argues that the Board waived this immunity when it removed the case to federal court.[2] And she rests this argument on the Supreme Court's opinion in *Lapides,* 535 U.S. 613.

C. *Lapides* And Its Scope

The facts in *Lapides* bear some similarity to the facts in this case. A university professor sued the Board of Regents of the University System of Georgia (an arm of the state) in state court, alleging a violation of Georgia law. Notably, Georgia had expressly consented to suit in its own courts for the al-

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[2] Stroud also argues that Alabama consented to suit for federal ADEA claims when it enacted the AADEA, because the AADEA "specifically adopted all of the rights and remedies of the federal [ADEA]". (Appellant's Br. at 12.)

This argument is meritless. First, the argument assumes that a state consents to suit simply by passing a law creating liability for employers generally. Alabama has not expressly waived its immunity from AADEA claims. *Cf. Larkins v. Dep't of Mental Health & Mental Retardation,* 806 So.2d 358, 363 (Ala. 2001) ("[The state's] immunity cannot be waived by the Legislature or by any other State authority."). Second, even if Alabama had waived its immunity from AADEA claims, that fact would not affect whether Alabama waived its immunity from claims under the federal ADEA. A state does not waive immunity against a federal law by waiving immunity against a similar state law. *See Kimel,* 528 U.S. at 91–92 (recognizing that states' express consent to claims under state age-discrimination laws does not affect states' immunity from federal ADEA claims).

leged violation. The plaintiff also named certain university officials as defendants and alleged claims under § 1983 against them. The defendants in *Lapides* removed the case to federal court. The district court then dismissed the § 1983 claims on the basis of qualified immunity, leaving only the state law claim against the Board of Regents. The Board of Regents asserted immunity under the Eleventh Amendment from the state law claim in federal court, but the district court held that the Board of Regents had waived its immunity when it removed the case.

The Supreme Court agreed with the district court. Using the phrase "Eleventh Amendment immunity" to refer to a state's immunity from suit in a federal forum, the Court began by reciting the principle that a state waives its Eleventh Amendment immunity by voluntarily invoking the jurisdiction of the federal courts. *Lapides,* 535 U.S. at 619. That principle, the Court decided, applies where the state removes a case to federal court because removal constitutes a voluntary invocation of federal jurisdiction. *Id.* at 620. The Court reasoned that the principle has as its main concern the potential for "inconsistency, anomaly, and unfairness" if a state were allowed to (a) submit its case for resolution in the federal courts and (b) if advantageous, deny the federal courts' jurisdiction to resolve the case. *Id.* at 619–23. Even though the Board of Regents argued that it sought no unfair advantage by removing, the Court refused to consider its motive because "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 621. Ultimately, the Court said, "the rule is a clear one"—"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 ... in a federal forum." *Id.* at 623–24.

The Court placed two restrictions on its holding. Because (1) the only remaining claim in the case was a state law claim and (2) Georgia had waived its immunity-based objection to suit in its own courts, the Court limited its holding to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.* at 617. The Court noted that the plaintiff's claim was a state law claim, not "a valid federal claim against the State." *Id.* Moreover, the opinion declined to "address 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." *Id.* at 617–18.

The contrast between *Lapides*'s narrow holding and its broad reasoning has sparked a debate in other circuits. These courts have addressed the weight of *Lapides*'s reasoning in the situations *Lapides*'s holding expressly does not control—where the state removes a case involving a valid federal law claim or where the state has not relinquished its immunity from suit in its own courts. We find a brief review of these cases helpful to give context to this case.

Most circuit courts seem to agree that the *Lapides* Court's reasoning should apply in cases involving federal law claims as well as those involving state law claims. That is, the source of a plaintiff's claim against a state (state law or federal law) is irrelevant to whether a state waives its immunity

against that claim by removing to federal court. *See Lombardo v. Penn., Dep't of Pub. Welfare,* 540 F.3d 190, 197 (3d Cir. 2008) (applying *Lapides*'s reasoning to a state's removal of a federal claim); *Embury v. King,* 361 F.3d 562, 564 (9th Cir. 2004) ("Nothing in the reasoning of *Lapides* supports limiting the waiver ... to state law claims only."); *Estes v. Wyo. Dep't of Transp.,* 302 F.3d 1200, 1204 (10th Cir .2002) (applying *Lapides*'s reasoning to hold that the state waived immunity by removing a federal claim); *see also Bergemann v. R.I. Dep't of Envtl. Mgmt.,* 665 F.3d 336, 340–42 (1st Cir. 2011) (distinguishing *Lapides* in the context of a removed federal law claim without reference to *Lapides*'s application only to removed state law claims); *Stewart v. North Carolina,* 393 F.3d 484, 490 (4th Cir. 2005) (same).

But the circuits divide over the meaning of *Lapides*'s second limitation—that it does not control cases in which the state has not relinquished its sovereign immunity in its own courts against the claim in question. On one hand, three circuits (the First and Fourth Circuits and the D.C. Circuit) distinguish *Lapides* on that basis, holding that a state did not waive sovereign immunity by removing a case because, unlike Georgia in *Lapides,* the state had not waived its immunity in its own courts. *See Bergemann,* 665 F.3d at 341; *Stewart,* 393 F.3d at 488–89; *Watters v. Washington Metro. Area Transit Auth.,* 295 F.3d 36, 42 n. 13 (D.C.Cir. 2002), *cert. denied,* 538 U.S. 922 (2003). On the other hand, three circuits (the Seventh, Ninth, and Tenth) read *Lapides*'s broad reasoning to establish the general rule that a state's removal to federal court constitutes a waiver of immunity, regardless of what a state waived in its

own courts. *See Bd. of Regents of the Univ. of Wis. Sys. v. Phoenix Int'l Software, Inc.,* 653 F.3d 448, 461 (7th Cir. 2011); *Embury,* 361 F.3d at 564–65; *Estes,* 302 F.3d at 1204–06.

Two circuits (the Third and Fifth) occupy something of a middle ground. *See Lombardo,* 540 F.3d 190; *Meyers ex rel. Benzing v. Texas,* 410 F.3d 236 (5th Cir. 2005), *cert. denied sub nom. Texas v. Meyers,* 550 U.S. 917 (2007). These courts conclude that *Lapides*'s reasoning informs the answer to the question of whether a state has waived its immunity-based objection to suit in a federal forum—and *only* that question. But sovereign immunity, they say, encompasses more than this narrow immunity from federal jurisdiction; specifically, a state that waives its forum-based immunity may still have immunity from liability for particular claims. *See Lombardo,* 540 F.3d at 198–200; *Meyers,* 410 F.3d at 252–55. That underlying immunity from liability is unaffected by the state's voluntary invocation of the federal forum. *See Lombardo,* 540 F.3d at 200; *Meyers,* 410 F.3d at 255.

D. Our Holding

We agree with the conclusions of the Third and Fifth Circuits. We hold that although the Board's removal to federal court waived its immunity-based objection to a federal forum, the Board retained its immunity from liability for a violation of the ADEA.

1.

As a preliminary matter, we agree that sovereign immunity is a divisible concept. *See Lombardo,* 540 F.3d at 198–200; *Meyers,* 410 F.3d at 252–55. The

Supreme Court has repeatedly recognized that sovereign immunity is a flexible defense with multiple aspects that states can independently relinquish without affecting others. *See, e.g., Sossamon v. Texas,* 131 S. Ct. 1651 (2011) (noting that a state's waiver of sovereign immunity "in its own courts is not a waiver of its immunity from suit in federal court" and that a state can retain its "immunity to damages" even if it waives sovereign immunity against "other types of relief"); *Fed. Mar. Comm'n,* 535 U.S. at 766 (suggesting that sovereign immunity is an immunity "from suit" and encompasses a narrower "defense to monetary liability"); *Coll. Sav. Bank,* 527 U.S. at 676 (noting that a state can retain its immunity from suit in federal court even when it waives immunity in its own courts (citing *Smith v. Reeves,* 178 U.S. 436, 441–45 (1900))); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 241 (1985) (same), *superseded by statute on other grounds,* Rehabilitation Act Amendments of 1986, Pub.L. No. 99–506, 100 Stat. 1807. And courts (including ours) have acknowledged that sovereign immunity can include immunity from suit as well as immunity from liability, depending on a state's choices in fashioning the scope of its immunity. *See, e.g., New Hampshire v. Ramsey,* 366 F.3d 1, 15 (1st Cir. 2004) ("Certainly, a state may waive its immunity from substantive liability without waiving its immunity from suit in a federal forum."); *CSX Transp., Inc. v. Kissimmee Util. Auth.,* 153 F.3d 1283, 1286 (11th Cir. 1998) (examining Florida law and determining that Florida fashions its sovereign immunity as an immunity from liability but not from suit); *cf. Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 58 (1996) (explaining

that the sovereign immunity embodied by the Eleventh Amendment exists both to "preven[t] federal-court judgments that must be paid out of a State's treasury," implying an immunity from liability, and to "avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," implying an immunity from suit (alteration in original) (internal quotation marks omitted)).

The point that arises from these cases: a state, if it chooses, can retain immunity from liability for a particular claim even if it waives its immunity from suit in federal courts.

2.

The Board contends that *Lapides* does not apply to this case because, unlike in *Lapides,* Alabama has not waived its immunity before its own courts for ADEA claims. We agree with the Board's position that *Lapides* is distinguishable and does not *control* our result. But the first question we address is whether to accept *Lapides*'s reasoning as support for a holding that removal in this case waived the Board's immunity from a federal forum. We conclude that *Lapides*'s reasoning supports that holding.

A close reading of the opinion shows that the *Lapides* Court sought to avoid the unfairness, anomaly, and inconsistency of a state's invocation of federal jurisdiction by removal, on one hand, and on the other, its denial of federal jurisdiction by asserting immunity from federal court proceedings. The Court first mentions this potential anomaly at the beginning of its analysis:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.

Lapides, 535 U.S. at 619. This paradox, the Court says, "could generate seriously unfair results." *Id.* The Court notes that the voluntary-invocation principle seeks to avoid "selective use of 'immunity' to achieve litigation advantages." *Id.* at 620. In other words, it would be unfair to allow a state to remove to a federal forum and then assert a jurisdictional immunity from that federal forum—this tactic would allow a state to essentially use removal as a jurisdictional trump card in any case initiated in a state forum that could fall under the original jurisdiction of the federal courts.

So, under *Lapides*'s reasoning, a state waives its immunity from a federal forum when it removes a case, which voluntarily invokes the jurisdiction of that federal forum. But nothing in *Lapides* suggests that a state waives any defense it would have enjoyed in state court—including immunity from liability for particular claims. *Lapides* specifies that it is addressing only immunity to a federal forum. *Id.* at 618 (narrowing the discussion to whether Georgia waived its "Eleventh Amendment immunity from suit in a federal court"); *id.* at 624 ("[R]emoval 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 ... in a federal*

forum." (emphasis added)). In fact, the opinion distinguishes this immunity against federal court proceedings from a state's "underlying sovereign immunity," *id.* at 617–18—implying that its discussion of immunity from federal court does not address other aspects of sovereign immunity, including a state's immunity from liability. Finally, the Court's reasoning, including its concern for the potential unfairness of a state gaining a new litigation advantage by removing, does not involve a state's immunity from liability that the state would have enjoyed had it remained in its own courts. We do not understand *Lapides* to require the state to forfeit an affirmative defense to liability simply because it changes forums. But the *Lapides* Court's reasoning supports the propositions that a state consents to federal jurisdiction over a case by removing and that it cannot then challenge that jurisdiction by asserting its immunity from a federal forum. We therefore hold that the Board waived its immunity from suit in federal court when it removed the case.[3]

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[3] That Stroud added the ADEA claim only after the case was removed does not change the result. Forum immunity is a jurisdictional immunity that shields a state from suit in federal court. U.S. Const. amend. XI ("The *Judicial power* of the United States shall not be construed to extend to *any suit* ...." (emphasis added)). Once that jurisdiction is invoked by removal, the federal court has jurisdiction over the entire *case*—not simply those claims that the complaint alleged at the time of removal. *See* 28 U.S.C. § 1441(a) ("[A]ny *civil action* brought in a State court of which the district courts of the United States have original jurisdiction [ ] may be removed by the defendant ...."); Fed.R.Civ.P. 81(c)(1) (applying the Federal Rules of Civil Procedure to removed cases); *id.* R. 15(a)(2) (allowing parties in civil cases to amend pleadings "with the opposing party's writ-

3.

That brings us to our final point. The defense of immunity from a federal forum was not the only immunity-based defense the Board had in its arsenal and asserted in the Answer. As we have established, a state can waive its forum immunity but retain other aspects of sovereign immunity, including immunity from liability for certain claims. *See Lombardo,* 540 F.3d at 198–200; *Meyers,* 410 F.3d at 252–55. Here, an arm of the state remains immune from liability for claims under the ADEA, notwithstanding its removal of the case.

The Supreme Court has made it clear that the ADEA is unconstitutional as applied to the states because Congress did not enact the law under section 5 of the Fourteenth Amendment, the only recognized constitutional basis for abrogating states' sovereign immunity. *Kimel,* 528 U.S. at 91–92. The Board's removal of the case did not waive its constitutional objection to ADEA liability on the basis of sovereign immunity. *See Meyers,* 410 F.3d at 255 n. 27 (recognizing that, even after waiver by removal, a state may raise an objection to liability on the basis that Congress did not abrogate its sovereign immunity).

Nor has Alabama waived its immunity from ADEA claims through other means. Alabama retains

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ten consent or the court's leave"); *Embury,* 361 F.3d at 565 ("[T]he State removed the case, not the claims, and like all cases in federal court, it became subject to liberal amendment of the complaint.").

a "nearly impregnable" immunity from suit, *Patterson v. Gladwin Corp.,* 835 So.2d 137, 142 (Ala. 2002), and neither the state legislature nor any other state authority can waive it, *Larkins v. Dep't of Mental Health & Mental Retardation,* 806 So.2d 358, 363 (Ala. 2001). Alabama may assert the defense of immunity from ADEA liability in state court. *Cf. Ala. State Docks Terminal Ry. v. Lyles,* 797 So.2d 432, 438 (Ala. 2001) (holding that an arm of the state was immune in the state trial court from a claim brought under the Federal Employers' Liability Act). Its removal to federal court did not affect the availability of that defense. *Cf. Lombardo,* 540 F.3d at 198 ("[W]hile voluntary removal waives a State's immunity from suit in a federal forum, the removing State retains all defenses it would have enjoyed had the matter been litigated in state court, including immunity from liability."); *Meyers,* 410 F.3d at 255 ("[T]he Constitution permits and protects a state's right to relinquish its immunity from suit while retaining its immunity from liability, or vice versa ...."). The Board's affirmative defense of sovereign immunity was therefore valid, and the district court correctly held that the Board did not waive that defense by removing.

IV. CONCLUSION

We conclude that the Board waived its defense of immunity from litigation in federal court when it removed to federal court, but the Board did not waive its immunity from ADEA liability. The judgment of the district court is therefore

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

No. 2:11–cv–006–MEF [WO]
December 29, 2011

PATRICIA G. STROUD, *Plaintiff-Appellant*

v.

PHILLIP MCINTOSH, THE ALABAMA BOARD OF PARDONS AND PAROLES, *Defendants–Appellees*.

MEMORANDUM OPINION

MARK E. FULLER, DISTRICT JUDGE:

After this case was removed (Doc. # 2) by Defendants Phillip McIntosh ("McIntosh") and the Alabama Board of Pardons and Paroles ("ABPP") from the Circuit Court of Montgomery County, Alabama, Plaintiff filed an Amended Complaint (Doc. # 25), bringing claims under 42 U.S.C. § 1983; Title VII, 42 U.S.C. § 2000e *et seq*. ("Title VII"); the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. ("ADEA"); and several state law causes of action against Defendant McIntosh. The case is before the Court on Defendant ABPP's Motion for Judgment on the Pleadings (Doc. # 27) and Defendant McIntosh's Motion to Dismiss (Doc. # 29). Both motions have

been fully briefed and are ripe for review. After careful consideration of the arguments of counsel and the relevant law, the Court finds that Defendants' motions are due to be **GRANTED.**

I. JURISDICTION AND VENUE

Subject matter jurisdiction is exercised pursuant to 28 U.S.C. §§ 1331, 1343, and 1367(a). Personal jurisdiction and venue are not contested, and there are adequate allegations in support of both.

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). A judgment on the pleadings is limited to consideration of "the substance of the pleadings and any judicially noticed facts." *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n,* 137 F.3d 1293, 1295 (11th Cir. 1998). In considering a motion for judgment on the pleadings, the court must accept all facts in the complaint as true. *Moore v. Liberty Nat'l Life Ins. Co.,* 267 F.3d 1209, 1213 (11th Cir. 2001); *Ortega v. Christian,* 85 F.3d 1521, 1524 (11th Cir. 1996). A judgment on the pleadings pursuant to Rule 12(c) is appropriate when "no issues of material fact exist, and the movant is entitled to judgment as a matter of law[,]" *Ortega,* 85 F.3d at 1524, or when "the complaint lacks sufficient factual matter to state a facially plausible claim for relief that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct." *Jiles v. United Parcel Serv., Inc.,* 413 F. App'x 173, 174 (11th

Cir. 2011) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 570 (2007)).

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint; thus, in assessing the merits of a Rule 12(b)(6) motion, the court must assume that all the factual allegations set forth in the complaint are true. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007))). To state a claim that survives a Rule 12(b)(6) challenge, a complaint need not contain "detailed factual allegations," but must include enough facts "to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Twombly,* 550 U.S. at 545.

III. BACKGROUND

Accepting as true the factual allegations in the Amended Complaint, the Court finds the following facts:

Plaintiff, who is more than sixty years of age, began working for the State of Alabama in 1975. (Am.Compl.¶¶ 4, 7.) She became employed by ABPP in 2004, assuming the position of Personnel Assistant II ("PA II"). (Am.Compl.¶ 7.) Due to her increased responsibilities, ABPP promoted Plaintiff to Personnel Assistant III ("PA III") in October of 2005. (Am.Compl.¶ 7.) By June of 2009, Plaintiff was approaching the maximum pay level for her PA III position, and discussed with Defendant McIntosh the

position of Administrative Services Officer I ("ASO I"). (Am.Compl.¶ 8.) McIntosh had previously encouraged Plaintiff to apply for the ASO I position, and "promised [Plaintiff] that he would personally take the request for reallocation to the [S]tate's personnel office for approval if [Plaintiff] qualified for the position." (Am.Compl.¶¶ 8, 9.)

However, instead of supporting Plaintiff's ASO I application, McIntosh allegedly prioritized securing a promotion for "a black employee from [PA II] to ... [PA III]...." (Am.Compl. ¶ 9.) He justified this action to the decisionmaker by falsely stating that Plaintiff intended to retire and that her PA III position soon would become vacant. (Am.Compl.¶ 9.) McIntosh allegedly told other state employees that he wished that Plaintiff "would hurry up and retire." (Am.Compl.¶ 9.) Plaintiff alleges that she was "adversely affected by McIntosh's utilization of her age as a factor in effecting these personnel actions." (Am.Compl.¶ 9.)

Plaintiff initiated an internal complaint, later followed by an EEOC charge of discrimination, regarding Defendant McIntosh's allegedly discriminatory conduct, which allegedly resulted in him receiving a lateral transfer to the Alabama Department of Transportation. (Am.Compl.¶¶ 12, 13.) Plaintiff's internal complaint was then terminated by ABPP after Defendant McIntosh's transfer. Plaintiff alleges that Defendant McIntosh's replacement at ABPP "has caused alterations to the professional responsibilities of [Plaintiff] which adversely affect her future employment with the State of Alabama." (Am.Compl.¶ 13.) Plaintiff alleges that Defendant

McIntosh's transfer and the subsequent alterations to her employment responsibilities were retaliatory in response to her complaints of age and race discrimination.

IV. DISCUSSION

A. *Plaintiff's Federal Claims*

1. Defendant ABPP

a. *ABPP is Not a "Person" for Purposes of the § 1983 Claim and is Entitled to Eleventh Amendment Sovereign Immunity*

Plaintiff's Amended Complaint is unclear as to whether both McIntosh and ABPP are named as defendants in the § 1983 count, or just Defendant McIntosh. The § 1983 claim makes allegations regarding Defendant McIntosh's conduct, but nowhere mentions Defendant ABPP. Furthermore, the allegations in the § 1983 claim refer to "Defendant" in the singular, while other counts refer to "Defendants" plurally. Plaintiff nevertheless argues in her Brief in Opposition that the "Amended Complaint plainly states [a claim under § 1983 for] prospective injunctive relief ... against [D]efendant [ABPP]...." (Doc. # 36, at 6.) Even assuming Plaintiff has pleaded such a claim against ABPP, ABPP is entitled to judgment on the pleadings.

ABPP, as an arm of the State, is not a "person" for purposes of § 1983 relief. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58 (1989); *see also McGinley v. Fla. Dep't of Highway Safety and Motor Vehicles,* No. 10–15240, 2011 WL 3428128, at *1 (11th Cir. Aug. 8, 2011). ABPP also is entitled to Eleventh Amendment sovereign immunity on Plaintiff's

§ 1983 claim. *See Quern v. Jordan,* 440 U.S. 332, 342 (1979). Plaintiff's attempt to avoid *Will* and *Quern* by seeking only prospective injunctive relief against ABPP is futile as well. Prospective injunctive relief is available against state officials in their official capacity, but not against the State itself. *See Will,* 491 U.S. at 71 n. 10 (citing *Ex parte Young,* 209 U.S. 123, 159–160 (1908)); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993) ("The doctrine of *Ex parte Young* ... has no application in suits against the States and their agencies, which are barred regardless of the relief sought[.]"). Accordingly, to the extent that ABPP is named as a defendant to Plaintiff's § 1983 claim, ABPP is entitled to judgment on the pleadings.

b. *ABPP's Sovereign Immunity on the ADEA Claim*

Plaintiff argues that ABPP, by removing this case to federal court, has waived its Eleventh Amendment immunity under *Lapides v. Board of Regents of the University System of Georgia,* 122 S.Ct. 1640, 1646 (2002). As observed by this Court, "[s]ome language in *Lapides* suggests a broad holding—that any time a [S]tate removes a case to federal court, the [S]tate has waived its immunity." *Stallworth v. Ala. Dep't of Mental Health & Mental Retardation,* No. 2:10cv918, 2011 WL 3503177, at *2–3 (M.D.Ala. Aug. 10, 2011) (published) (Fuller, J.); *see also Lapides,* 122 S.Ct. at 1646 ("We conclude that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity...."). Despite the broad language, the *Lapides* holding was narrow. The scope of the holding was

delimited at the outset of the *Lapides* opinion: "It has become clear that 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." *Lapides,* 122 S. Ct. at 1643.

As this Court found in *Stallworth,* "[t]he narrow holding of *Lapides* does not apply to this case." 2011 WL 3503177, at *3. Unlike *Lapides,* Plaintiff's ADEA claim against Defendant ABPP is based in federal law, and there is no allegation that Alabama has waived its immunity in state court for ADEA claims. *Stallworth,* 2011 WL 3503177, at *3 ("Unless waived by other law, Alabama retains sate sovereign immunity from suits brought in its own courts ." (citing Ala. Const. art. I § 14 (1901))); *see also Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 82–83, 92 (2000) (holding that "the ADEA does not validly abrogate the States' sovereign immunity"); *see also Hillemann v. Univ. of Cent. Fla.,* 167 F. App'x 747, 748 (11th Cir. 2006). And, as this Court noted in *Stallworth,* "[t]he Eleventh Circuit has yet to speak on the subject [of the scope of *Lapides*], and accordingly there is no case law binding on this Court ... In the absence of such case law, this Court declines to find that a state always waives its sovereign immunity upon removing a case to federal court." *Id.* at *3. The Court sees no reason to withdraw from this position, and ABPP is entitled to Eleventh Amendment sovereign immunity on Plaintiff's ADEA claim.[1] [2]

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[1] Plaintiff's ADEA claim is also due to be dismissed on account of pleading defects. Nevertheless, the Court must address the antecedent issue of ABPP's Eleventh Amendment immunity, which raises a question of the Court's subject matter juris-

c. *Plaintiff's Title VII Claim*

Unlike the ADEA claim, there is no Eleventh Amendment sovereign immunity for Defendant ABPP on Plaintiff's Title VII claim. In 1972, Congress amended Title VII to expand its reach to state and local governments by including within the definition of "person" the words "governments, governmental agencies, [and] political subdivisions." 1 Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 12:16 (quoting 42 U.S.C. § 2000e-

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diction. *See Thomas v. U.S. Postal Serv.,* 364 F. App'x 600, 601 n. 3 (11th Cir. 2010) (noting that "a dismissal on sovereign immunity grounds should be pursuant to Rule 12(b)(1) because no subject-matter jurisdiction exists" (citing *Bennett v. United States,* 102 F.3d 486, 488 n. 1 (11th Cir. 1996))). Put briefly, Plaintiff necessarily alleges failure to promote claims since she "continues to serve" as PA III. (Am.Compl.¶ 7.) However, Plaintiff's factual allegations only obliquely hint at a cognizable age discrimination claim. Any direct evidence claim based upon Defendant McIntosh's statements is futile because Defendant McIntosh was not the decisionmaker with respect to Plaintiff's promotion. *Standard v. A.B.E.L. Servs., Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998) ("Remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination."). Plaintiff's allegations regarding a circumstantial evidence claim are woefully inadequate. Plaintiff does not allege that she applied for or was qualified for the ASO I position. Plaintiff identifies no comparator outside the protected class who was promoted to the ASO I position. Plaintiff does not allege that the decisionmaker—the personnel office—failed to promote Plaintiff because of her age. In fact, no allegations linking the personnel office to Plaintiff's ADEA claim appear anywhere in the Amended Complaint.

[2] To the extent that Plaintiff's retaliation claim is rooted in the ADEA, Defendant ABPP is entitled to sovereign immunity on that claim as well.

(a)). In so amending, Congress validly exercised its power under § 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity for Title VII claims. *In re Emp't Discrimination Litig. Against State of Ala.,* 198 F.3d 1305, 1317 (11th Cir. 1999) (citing and quoting *Fitzpatrick v. Bitzer,* 427 U.S. 445, 447–48 (1976)). Because its Eleventh Amendment immunity has been abrogated, ABPP is a proper Title VII defendant.

Nevertheless, Plaintiff's Title VII discrimination and retaliation claims against ABPP are due to be dismissed for substantially the same reasons that Plaintiff's ADEA claim also would have failed, *supra* at note 1. To the extent that Plaintiff brings a direct evidence claim based on Defendant McIntosh's conduct, that claim fails for multiple reasons. First, " 'only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race]' will constitute direct evidence of discrimination." *Dixon v. The Hallmark Cos., Inc.,* 627 F.3d 849, 854 (11th Cir. 2010) (quoting *Wilson v. B/E Aerospace, Inc.,* 376 F.3d 1079, 1086 (11th Cir. 2004)). Second, "[r]emarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination." *Standard v. A.B.E.L. Servs., Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998). To the extent that Plaintiff brings a circumstantial evidence claim, Plaintiff makes little progress alleging the elements of a *prima facie* case. *See Maniccia v. Brown,* 171 F.3d 1364, 1368 (11th Cir. 1999). Plaintiff does not explicitly allege that she was qualified for the ASO I position. Plaintiff does not explicitly allege that she applied for the ASO I position and was rejected. Plaintiff

does not allege that a person outside her protected class was promoted to the ASO I position, or that anyone was promoted to the ASO I position. Plaintiff identifies no proper comparators. *See Wilson,* 376 F.3d at 1091 (explaining that the "comparator must be similarly situated in all relevant respects" and "nearly identical to the plaintiff"). Plaintiff does not allege that the decisionmaker—the personnel office—used race as a substantial or motivating factor in failing to promote Plaintiff to the ASO I position. In fact, no allegations linking the personnel office to Plaintiff's Title VII claim appear anywhere in the Amended Complaint.

Plaintiff's Title VII retaliation claim is doomed as well. Plaintiff alleges that after she engaged in statutorily protected activity by filing an internal complaint against Defendant McIntosh and an EEOC complaint, Defendant McIntosh was laterally transferred. His replacement then "caused alterations to the professional responsibilities of [Plaintiff] which adversely affect her future employment with the state of Alabama." (Am.Compl.¶ 13.) These vague allegations do not meet Rule 8(a)'s pleading standard and are not sufficient to survive a motion to dismiss. *Twombly,* 550 U.S. at 545 (To state a claim that survives a Rule 12(b)(6) challenge, a complaint need not contain "detailed factual allegations," but must include enough facts "to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true (even if doubtful in fact)"). Defendant ABPP is entitled to judgment on the pleadings on Plaintiff's Title VII claim.

2. Defendant McIntosh

The only potentially viable federal claim against Defendant McIntosh is the § 1983 claim. *See Busby v. City of Orlando,* 931 F.2d 764, 772 (11th Cir.1991) ("The relief granted under Title VII is against the *employer,* not individual employees whose actions would constitute a violation of the Act."); *see also Smith v. Lomax,* 45 F.3d 402, 403 n. 4 (11th Cir. 1995) (Individuals "cannot be liable under the ADEA or Title VII").

Section 1983 "creates no substantive rights, but merely provides a remedy for deprivations of federal rights created elsewhere." *Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985). To establish a claim under § 1983 against Defendant McIntosh in his individual capacity, Plaintiff must show: (1) a deprivation of a federal statutory or federal constitutional right and (2) that the deprivation was committed by a person acting under color of state law. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49–50 (1999); *see also Maine v. Thiboutot,* 448 U.S. 1 (1980) (holding that § 1983 creates a cause of action against state officials for violations of federal statutes).

Plaintiff alleges that Defendant McIntosh, acting under color of state law, discriminated against Plaintiff "on the basis of age and/or race" in violation of the ADEA; the Alabama Age Discrimination Act; Title VII; the Alabama Administrative Code; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff's § 1983 theories based on alleged deprivations of state law are due to be dismissed. *See Par-*

ratt v. Taylor, 451 U .S. 527, 536 (1981) (§ 1983 plaintiff must allege deprivation of federal, not state, right). Plaintiff's § 1983 discrimination theories based on the ADEA, Title VII, and the Equal Protection Clause are likewise due to be dismissed for the reasons stated above in footnote 1 (ADEA) and Part IV.A.1.c. (Title VII) of this opinion. *Cross v. Alabama,* 49 F.3d 1490, 1507–08 (11th Cir. 1995) ("When [§] 1983 is used as a parallel remedy for violation of [Title VII], the elements of the two causes of action are the same."); *Bryant v. Jones,* 575 F.3d at 1281, 1296 n. 20 (11th Cir. 2009) (noting that "discrimination claims ... brought under the Equal Protection Clause ... or [Title VII] are subject to the same standards of proof and employ the same analytical framework"); *see also Burns v. Gadsden State Cmty. Coll.,* 908 F.2d 1512, 1518 n. 8 (11th Cir. 1990) (same for ADEA). Because Plaintiff's § 1983 claim against Defendant McIntosh is due to be dismissed, the Court need not address Defendant McIntosh's qualified immunity defense.

B. *Plaintiff's State Law Claims*

28 U.S.C. § 1367(c) states that "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... the district court has dismissed all claims over which it has original jurisdiction ...." § 1367(c)(3). Having dismissed Plaintiff's federal claims, the court exercises its discretion to decline supplemental jurisdiction over Plaintiff's state law claims against Defendant McIntosh. *See Shotz v. City of Plantation, Fla.,* 344 F.3d 1161, 1185 (11th Cir. 2003) (a district court's decision to decline supplemental jurisdiction is reviewed

for abuse of discretion); *see also Crosby v. Paulk,* 187 F.3d 1339, 1352 (11th Cir. 1999) (instructing district courts to "take into account concerns of comity, judicial economy, convenience, fairness, and the like"). Weighing these considerations, the Court concludes that remanding Plaintiff's state-law claims is the appropriate action. *See Lewis v. City of St. Petersburg,* 260 F.3d 1260, 1267 (11th Cir. 2001) (stating that "[supplemental state-law] claims shall be remanded to state court, rather than dismissed, because this case was originally filed in state court and removed to federal court" (citing *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 351 (1988))).

V. CONCLUSION

Based on the foregoing, it is ORDERED that Defendant ABPP's Motion for Judgment on the Pleadings (Doc. # 27) is GRANTED and Defendant McIntosh's Motion to Dismiss (Doc. # 29) is GRANTED. It is further ORDERED that Plaintiff's state-law claims are REMANDED to the Circuit Court of Montgomery County, Alabama.

An appropriate judgment will be entered.

APPENDIX C

Cases Since January 1, 2012, In Which A State Claimed Sovereign Immunity After Removal

1. *Canales v. Gatnuzis*, No. CIV.A. 13-11766-JLT, 2013 WL 5781285 (D. Mass. Oct. 28, 2013)
2. *Zavareh v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:12-CV-02033-APG, 2013 WL 5781729 (D. Nev. Oct. 17, 2013)
3. *Coniff v. Vermont*, No. 2:10-CV-32, 2013 WL 5429428 (D. Vt. Sept. 30, 2013)
4. *Gorney v. Arizona Bd. of Regents*, No. CV-13-00023-TUC-CKJ, 2013 WL 5348304 (D. Ariz. Sept. 24, 2013), appeal dismissed (Oct. 22, 2013)
5. *Davis v. Abercrombie*, No. CIV. 11-00144 LEK, 2013 WL 5204982 (D. Haw. Sept. 13, 2013)
6. *Hester v. Indiana State Dep't of Health*, No. 12-3207, 2013 WL 4034397 (7th Cir. Aug. 9, 2013)
7. *Barrett v. Mississippi Dep't of Pub. Safety*, No. 3:11CV185TSL-JMR, 2013 WL 4015094 (S.D. Miss. Aug. 6, 2013)
8. *Lacy v. Gray*, No. 4:13CV370 RWS, 2013 WL 3766567 (E.D. Mo. July 16, 2013)
9. *Long* v. *HCA Health Servs., Inc.*, No. CIV-12-0957-HE, 2013 WL 3055357 (W.D. Okla. June 17, 2013)
10. *Byrge v. Virginia State Univ. Bd. of Visitors*, No. 3:13CV031-HEH, 2013 WL 2490183 (E.D. Va. June 10, 2013).
11. *Gawlik v. Arizona*, No. CV 12-1946-PHX-RCB, 2013 WL 2422701 (D. Ariz. June 3, 2013)

12. *Garcia v. Univ. of Texas Sw. Med. Ctr. at Dalla*s, No. 3:11-CV-3282-B, 2013 WL 1759421 (N.D. Tex. Apr. 24, 2013)

13. *Martin v. Indiana*, No. 1:12 CV 69 JM, 2013 WL 1332165 (N.D. Ind. Mar. 29, 2013)

14. *Taraska v. Ludwig*, No. CV-12-2544-PHX-DGC, 2013 WL 655124 (D. Ariz. Feb. 21, 2013)

15. *Brodkorb v. Minnesota*, No. CIV. 12-1958 SRN/AJB, 2013 WL 588231 (D. Minn. Feb. 13, 2013)

16. *Hammett* v. *S. Carolina Dep't of Health & Envtl. Control*, No. CA 3:10-932-MBS-SVH, 2013 WL 1316440 (D.S.C. Jan. 25, 2013) *report and recommendation adopted*, No. CA 3:10-0932-MBS, 2013 WL 1316434 (D.S.C. Mar. 28, 2013)

17. *Delaney v. Mississippi Dep't of Pub. Safety*, No. 3:12CV229TSL-MTP, 2013 WL 286365 (S.D. Miss. Jan. 24, 2013)

18. *Pathria v. Univ. of Texas Health Sci. Ctr. at San Antonio*, No. SA-12-CV-338, 2013 WL 265241 (W.D. Tex. Jan. 23, 2013) *aff'd,* No. 13-50068, 2013 WL 3090280 (5th Cir. June 20, 2013)

19. *Ah Sing v. Hawaii Dep't of Pub. Safety*, No. CV 12-2553-PHX-GMS, 2013 WL 179482 (D. Ariz. Jan. 17, 2013)

20. *Carter v. Maryland*, No. CIV. JKB-12-1789, 2012 WL 6021370 (D. Md. Dec. 3, 2012)

21. *Meyer v. City of Russell, Kansas Police Dep't*, No. 12-1178-SAC, 2012 WL 4867379 n.12 (D. Kan. Oct. 15, 2012)

22. *Reinhold v. Cnty. of York, Pa.,* No. 1:11-CV-605, 2012 WL 4104793 (M.D. Pa. Aug. 31, 2012), *report and recommendation adopted sub nom. Reinhold v. Cnty. of York*, No. 11-CV-605, 2012 WL 4106748 (M.D. Pa. Sept. 18, 2012)

23. *Ramos v. Berkeley Cnty.*, No. CA 2:11-3379-SB-BM, 2012 WL 5292899 (D.S.C. Aug. 7, 2012) *report and recommendation adopted*, No. CIV.A. 2:11-3379-SB, 2012 WL 5292895 (D.S.C. Oct. 25, 2012)

24. *Eller v. Kaufman,* No. 2:11CV31, 2012 WL 3018295 (W.D.N.C. July 24, 2012)

25. *McRae v. Knapp*, No. CIV. 11-00361-CG-N, 2012 WL 2681832 (S.D. Ala. July 6, 2012), appeal dismissed (Oct. 17, 2012)

26. *Vaughn v. Georgia*, No. 1:11-CV-4026-RWS, 2012 WL 2458538 (N.D. Ga. June 27, 2012)

27. *Hargett ex rel. Humphries v. Corr. Med. Servs., Inc.*, No. 1:11-1316-JMS-DKL, 2012 WL 1390189 (S.D. Ind. Apr. 20, 2012)

28. *Kelley v. Papanos*, No. CIV.A. H-11-0626, 2012 WL 208446 (S.D. Tex. Jan. 24, 2012)

29. *Santiago v. Keyes*, 839 F. Supp. 2d 421 (D. Mass. 2012)

30. *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1204 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013)