No. _____

In The

Supreme Court of the United States

CITY OF AUSTIN, TEXAS,

Petitioner,

v.

KEN PAXTON, Attorney General of the State of Texas,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Texas Legislature enacted a self-enforcing preemption statute that voided an Austin ordinance prohibiting landlords from refusing to rent to tenants on the ground that federal Section 8 housing vouchers would be used to pay some of their rent. Relying on *Ex parte Young*, 209 U.S. 123 (1908), Austin filed an official-capacity suit in federal court against the Attorney General—who conceded his authority to enforce the statute against the city—for a declaratory judgment that federal law preempts the state statute.

The Fifth Circuit held the suit barred by the Eleventh Amendment after finding that the Attorney General's power to enforce the statute is not enough of an enforcement "connection" to meet *Ex parte Young*'s test. The question presented is:

> Under *Ex parte Young*, is a state official a proper defendant in a federal declaratory judgment challenge under the Supremacy Clause to the validity of a self-enforcing state statute, if the official with authority to enforce the statute has not yet overtly threatened enforcement?

PARTIES TO THE PROCEEDING

Petitioner is the City of Austin, Texas.

Respondent is Ken Paxton, in his official capacity as Attorney General of the State of Texas.

The Texas Workforce Commission, a state agency, was a defendant-appellee below, but is not a respondent here.

DIRECTLY RELATED PROCEEDINGS

There are none other than in the proceedings below. They are:

United States District Court for the Western District of Texas, No. 1:17cv00843-SS, *City of Austin v. Paxton*. Order entered July 12, 2018; Judgment of Dismissal Without Prejudice entered on remand February 26, 2020.

United States Court of Appeals for the Fifth Circuit, No. 18-50646, *City of Austin v. Paxton*. Judgment entered December 4, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, REGULATIONS, AND ORDINANCES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

The City of Austin, Texas, petitioner herein, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 943 F.3d 993 (5th Cir. 2019). The opinion of the district court (App. 21a-40a) is reported at 325 F.Supp.3d 749 (W.D. Tex. 2018). The court of appeals order denying petitioner's motion for rehearing is at App. 41a.

JURISDICTION

The court of appeals issued its opinion and judgment together on December 4, 2019, App. 1a, and denied petitioner's timely motion for rehearing on February 3, 2020, App. 41a. The first paragraph of this Court's Order of March 19, 2020, granted a 150-day extension, counting from denial of a timely motion for rehearing, for filing a petition which, like this one, was due after March 19. This petition is due by July 3, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATE STATUTORY PROVISIONS AND CITY ORDINANCE INVOLVED

The Eleventh Amendment, U.S. Const. Amend. XI, states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Tex. Loc. Gov't Code § 250.007 states:

> (a) Except as provided by this section, a municipality or county may not adopt or enforce an ordinance or regulation that prohibits an owner, lessee, sublessee, assignee, managing agent, or other person having the right to lease, sublease, or rent a housing accommodation from refusing to lease or rent the housing accommodation to a person because the person's lawful source of income to pay rent includes funding from a federal housing assistance program.
>
> (b) This section does not affect an ordinance or regulation that prohibits the refusal to lease or rent a housing accommodation to a military veteran because of the veteran's lawful source of income to pay rent.
>
> (c) This section does not affect any authority of a municipality or county or decree to create

> or implement an incentive, contract commitment, density bonus, or other voluntary program designed to encourage the acceptance of a housing voucher directly or indirectly funded by the federal government, including a federal housing choice voucher.

City of Austin Ordinance No. 20141211-050 ("Source of Income Ordinance") is reproduced at App. 42a-48a.

STATEMENT OF THE CASE

Adoption of Austin's Source of Income Ordinance

1. Austin is a Texas home rule city with nearly a million residents.[1] About half of them rent their housing. African-American and Latino residents rent in even higher proportions, 70% for African-Americans and 60% for Latinos.

2. In order to "promot[e] economically mixed housing" and help low-income renters obtain a "decent place to live," 42 U.S.C. § 1437f(a), Congress created a voucher program called the Housing Choice Voucher

[1] https://www.census.gov/quickfacts/fact/table/austincitytexas/PST045219. This case comes to the Court on a motion to dismiss under Fed. R. Civ. Proc. 12(b)(1), so plausibly pled factual allegations are taken as true. *See*, *e.g.*, *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921, 1927 (2019). Unless otherwise indicated, the facts are from the city's first amended complaint.

Program. *See id.* § 1437f(o).[2] This program allows low-income renters to obtain federal housing vouchers, often called "Section 8 vouchers," which they can use to pay rent. The Housing Authority of the City of Austin administers the Section 8 voucher program locally.[3] As of 2014, 58% of the program's participants were African-American, 27% Latino, and 14% Anglo.

3. In 2011, the Austin city council set out to develop strategies to increase affordable housing in the city. Two years later, the housing authority reported to the council that it was administering nearly 6,000 federal housing vouchers serving over 15,000 Austinites with average annual incomes of only $14,000.[4] The program's wait-list was expected to soon grow to 20,000 applicants. An estimated 91% of landlord rental properties would not accept housing vouchers for rent, and those that did accept them were in only a few parts of the city. In combination with already high city-wide occupancy rates, low-income renters using Section 8 vouchers—disproportionately African-American and Latino—were being forced into lower opportunity neighborhoods in narrower segments of the city.[5] But

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[2] "Voucher" is a synonym for subsection (o)'s "tenant-based assistance." *See* 24 C.F.R. § 982.1(b).

[3] City council resolutions may allow establishment of separate municipal housing authorities covering territory coextensive with municipal boundaries. Tex. Loc. Gov't Code §§ 392.011, 392.014.

[4] This paragraph's facts are from Council Resolution No. 20140417-048, cross-referenced in the first amended complaint.

[5] The University of Toronto's Martin Prosperity Institute reported in 2015 that the Austin metropolitan area was one of the

according to a United States Department of Housing and Urban Development report, "source of income" laws offered hope for significantly improving housing opportunities for voucher holders.

4. The Austin city council responded to this problem in late 2014 with Ordinance No. 20141211-050, amending the city's housing discrimination code to prohibit discrimination on the basis of "source of income." *See* App. 42a-48a (codified in Austin City Code ch. 5-1).[6] Under the ordinance—the only one in Texas covering federal vouchers—landlords were prohibited from refusing to rent to otherwise qualified individuals solely because of the source of income they would use to pay rent.

5. A local apartment association tried but failed to quickly derail the new ordinance in early 2015. A federal district court denied preliminary relief, finding that housing voucher participants "suffer serious discrimination in the Austin private housing market." *Austin Apartment Ass'n v. City of Austin*, 89 F.Supp.3d 886, 899 (W.D. Tex. 2015).

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most economically segregated areas in the country. Florida & Mellander, *SEGREGATED CITY–The Geography of Economic Segregation in America's Metros* (Feb. 23, 2015) at 9, available at http://martinprosperity.org/content/segregated-city/.

[6] "Source of Income" is specifically defined. App. 44a. It covers not only housing vouchers but "other subsidies" such as child support and spousal maintenance. The Texas Legislature targeted only the federal housing voucher part of the ordinance.

Texas Legislature's Preemption of Austin's Ordinance

6. Opponents of the ordinance received a better reception in the Texas Legislature, which moved promptly to counter Austin's source of income ordinance. Only a week after Austin adopted the ordinance, a bill had been filed to override it. By September 1, 2015, legislation codified as Section 250.007 of the Texas Local Government Code had been enacted, signed into law, and taken effect.

7. The key provision is subsection (a) of § 250.007. It prohibits Texas cities and counties from adopting or enforcing ordinances or regulations that prohibit a landlord from refusing to rent to a prospective tenant if any part of the rent payment "includes funding from a federal housing assistance program."[7] The only such federal housing assistance program involving the use of vouchers by non-veterans is the Section 8 voucher program.

8. Section 250.007 itself does not assign monitoring or enforcement duties concerning the law's subsection (a) prohibition to any state agency or official. Instead, it is self-enforcing, automatically preempting local ordinances in conflict with § 257.007(a). Although

[7] Subsection (b) excepts from subsection (a)'s preemptive reach ordinances or regulations protecting military veterans from landlord refusals based on the source of *their* income for paying rent. A federal housing voucher program created specifically for low-income veterans, 42 U.S.C. § 1437f(o)(19), thus was unaffected by subsection (a)'s prohibition.

Texas home-rule cities such as Austin generally have the "full power of local self-government" under Article XI, § 5(a), of the Texas Constitution, their powers may be preempted by state statutes if the intent to do so is unmistakably clear. *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592-93 (Tex. 2018). A local ordinance preempted by a state statute is void and unenforceable. *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (preempted home-rule ordinance "unenforceable" to the extent of conflict); *see also* Tex. Att'y Gen. Op. KP-0296 (2020) at 3 (preempted ordinance "void").

8. It is undisputed by Austin that § 250.007(a) preempts its source of income ordinance (other than for veterans). Through this state legislation, the city ordinance's protection of low-income renters who plan to pay some of their rent with Section 8 vouchers from landlord discrimination has been void and unenforceable since September 2015.

District Court

9. Austin challenged § 257.007(a) in a suit under 28 U.S.C. § 1331, asserting that the statute is invalid because federal law preempts it under the Supremacy Clause. In its live pleading—the first amended complaint—the city claimed that § 250.007(a) is preempted because it conflicts with certain federal statutes and regulations governing fair housing and because it violates two specific Fair Housing Act provisions, 42 U.S.C. §§ 3615 and 3617. Austin opted to seek only the

"less intrusive" remedy, *Steffel v. Thompson*, 415 U.S. 452, 469 (1974), of a declaratory judgment under 28 U.S.C. § 2201(a) that § 250.007(a) is unconstitutional because it is federally preempted.[8] Austin sued the Texas Attorney General in his official capacity and the Texas Workforce Commission, a state agency.[9] Austin specifically alleged that "it is likely the Attorney General will take action to enforce" § 250.007(a) against the city were it to even investigate a claim of discrimination under the source of income ordinance.

10. The defendants moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted the Rule 12(b)(6) motion in part and denied it in part. The court dismissed Austin's conflict preemption claim, App. 34a-37a, and its express preemption claim under § 3617, App. 39a. But relying on *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507 (2015), the court held that the city had stated a viable

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[8] The amended complaint dropped the original complaint's request for injunctive relief. Both the district court and the appeals court mistakenly recite that the city was seeking injunctive relief. *See* App. 2a (appeals court stating city "seeking to enjoin" statute); App. 24a (same by district court).

[9] The city agrees that this state agency is not a proper defendant. Its Eleventh Amendment immunity is clear. *See*, *e.g.*, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (*per curiam*). Thus, the Texas Workforce Commission is not named a respondent in this petition.

disparate impact claim of express preemption under § 3615. App. 37a-39a.[10]

11. Addressing the defendants' Rule 12(b)(1) jurisdictional issues, the court found that the city had standing, App. 25a-27a. It also found that the city's claim against the Attorney General came within the *Ex parte Young* doctrine and, hence, that the Eleventh Amendment did not deprive it of jurisdiction, App. 27a-30a. The court found that the Attorney General is the state's chief law enforcement officer and that he had "repeatedly brought suit to enforce the supremacy of state law over superseded municipal ordinances." App. 28a. It rejected the argument that the city could not avail itself of the *Ex parte Young* doctrine until the Attorney General "threaten[ed] or commence[d]" enforcement proceedings against it. App. 29a. Because an ongoing violation of federal law was alleged and because the Attorney General had some connection to enforcement of the statute said to violate federal law, the Eleventh Amendment did not bar the city's suit. App. 30a.

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[10] This Fair Housing Act provision invalidates "any law of a State . . . that purports to require or permit any action that would be a discriminatory housing practice under this subchapter." The subchapter makes it a discriminatory housing practice to refuse to rent because of race or national origin or to discriminate on such basis in renting. 42 U.S.C. § 3604.

Fifth Circuit

12. The defendants took an interlocutory appeal from the court's Eleventh Amendment immunity ruling. App. 2a (appeal as to "sovereign-immunity holding only"). The appeals court declined to reach the issue of standing. App. 16a-17a & n.3. Instead, it reached only the Eleventh Amendment issue, held the *Ex parte Young* doctrine inapplicable to the Attorney General, reversed the district court, and remanded for dismissal for lack of jurisdiction. App. 20a.

13. The appeals court first determined that the district court was correct in holding that the city's amended complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," App. 8a (quoting *Verizon Md., Inc. v. Pub. Svc. Comm'n*, 535 U.S. 635, 645 (2002)), thus satisfying the first part of the *Ex parte Young* test. Then the court turned to the part of the *Young* test that asks whether the Attorney General has "some connection with the enforcement" of § 250.007(a). *See Ex parte Young*, 209 U.S. at 157.

14. As a self-enforcing statute, § 250.007(a) automatically rendered Austin's source of income ordinance void and unenforceable. There was thus no need for it to include a provision assigning enforcement duties to any state official, including the Attorney General.

15. The appeals court agreed that this textual lacuna alone does not foreclose availability of the *Ex parte Young* doctrine. App. 6a (statute's "text need not

actually state" official's duty to enforce). In such a situation, said the court, the next step is to consider whether the sued state official—the Attorney General here—"actually has the authority to enforce" the statute. App. 7a. The Attorney General conceded he had such authority, and the court found such authority exists. *Id*. & App. 12a n.1.[11] In the court's analysis, the question then became whether this authority constituted a sufficient "connection to enforcement" under *Young*.

Before articulating its own test, the court searched extant Fifth Circuit authority for guidance about what level of acknowledged enforcement authority suffices to bring the Attorney General within *Young*'s "connection" requirement. Finding the answer "not clear from our jurisprudence," App. 9a, the court surveyed the inconclusive guidance on *Young* in an *en banc* plurality opinion, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), and three subsequent panel opinions that run the gamut from declining to use the *Okpalobi* plurality test, to avoiding a decision on whether to use it, to using it.[12] App. 9a-11a.

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[11] The Attorney General's opening Fifth Circuit brief tiptoed through the concession of his enforcement authority: "[T]he Attorney General does have the power to enforce this provision (though not the *expressed* willingness to do so, or any other sufficient connection to the provision[.])" Br. for Appellants at 25 (emphasis added). The Attorney General has never *disclaimed* an intent to enforce the statute against the city.

[12] *K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2010), *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div'n of Workers' Comp.*, 851

The court concluded by saying nothing more specific than that, whatever the proper test may turn out to be, *Young* requires at least a "higher showing" than proffered by Austin. App. 11a. The district court had found that recent Attorney General suits against Austin to enforce preemptive state statutes signaled a willingness to do so again. App. 28a-29a. And the city specifically alleged that an Attorney General § 250.007(a) enforcement action was likely. But despite this allegation—in an appeal on the pleadings—the appeals court concluded that the city had provided "no evidence" that the Attorney General was "likely" to try to enforce § 250.007(a) against Austin. App. 15a.[13] It said that the circuit's case law requires "some scintilla" of § 250.007(a)'s enforcement by the Attorney General. App. 16a. Finding that this enforcement threshold had not been reached, the court held the *Ex parte Young* doctrine inapplicable and immunized the Attorney General from suit under the Eleventh Amendment.

REASONS FOR GRANTING THE WRIT

Ex parte Young is a pillar of federal constitutional jurisprudence, a "landmark" decision. *Green v. Mansour*, 474 U.S. 64, 68 (1985). Its doctrine "gives life to the

F.3d 507 (5th Cir. 2017), and *Morris v. Livingston*, 739 F.3d 740 (5th Cir.), *cert. denied*, 573 U.S. 909 (2014), respectively.

[13] This reverses the normal burden, which rests with the party trying to avail itself of Eleventh Amendment immunity. *See*, *e.g.*, *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir.), *cert. denied*, 513 U.S. 932 (1995).

Supremacy Clause," *id.*, and is "necessary" to permit federal courts to vindicate constitutional rights. *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011).

The decision below and the unevenly applied, murky doctrine it and some other circuits have embraced, are sapping the life *Young* has long given to federal law's supremacy. *Young* held that a federal challenge to the validity of a state statute, seeking prospective relief, could be made against a state official with "some connection" to the statute's enforcement without running afoul of the Eleventh Amendment. 209 U.S. at 157. But using the test adopted below, a self-enforcing state statute that unconstitutionally voids enforcement of local law is shielded from a challenge seeking prospective relief as long as state officials, such as the Attorney General here, remain strategically mum about whether they will ever act to enforce the state law should an effort be made to enforce the local law in open disregard of the state law. Thus, under the rationale below, a state legislature is allowed to adopt legislation that violates federal law but still remain immune and federally unaccountable as long as its officials are clever enough to keep quiet. This is the opposite of *Young*'s purpose.

The Court should grant review, address the connection-to-enforcement requirement, and restore coherence to this part of the principle of state accountability under the Supremacy Clause that underpins *Young*. First, *Ex parte Young* itself refutes the Fifth Circuit's curtailment of its reach. Second, in

contrast to the Fifth Circuit, other circuits use a standard consistent with *Young*'s purpose by applying its "connection" requirement to allow such challenges to proceed without proof of an overt threat. Third, in clarifying *Young*'s application, the Court should craft a rule that applies *Young*'s "connection" requirement specifically to the circumstance of self-enforcing state statutes that allegedly violate federal law but have full force and effect without the need of any threat of enforcement by a state official.

I. Giving A State Official Eleventh Amendment Immunity From A Federal Challenge To A Self-Enforcing Statute Unless Evidence Shows An Actual Threat Of Enforcement Conflicts With *Ex parte Young* Itself.

The Fifth Circuit ruling conflicts with *Ex parte Young*. *Young*'s discussion of the "connection" requirement starts with the principle that, to be a proper defendant in a federal action to enforce federal law as against a state law, a state official "must have some connection with the enforcement of the [state] act[.]" 209 U.S. at 157. But *Young*'s discussion of "connection" does not end there. The opinion then proceeds step-by-step to refute the test used by the Fifth Circuit to determine what kind of enforcement connection is necessary to satisfy the *Young* doctrine.

First, the Court explains that the connection to enforcement does not have to be "specially created." *Id*.

Enforcement authority under "general law" suffices to establish the requisite connection. *Id*.

Continuing from there, the Court rejects the proposition that the state official—and it was a state attorney general in *Young*—had to have a duty to *act* to enforce in order for the requisite connection to exist. Having the "discretion" to enforce suffices. A federal court order that the state official "is simply prohibited from doing an act which he had no legal right to do" is acceptable because such an order is "not an interference with the discretion" of the officer. *Id*. at 159-60.

Next, and crucially for the question presented here, the Court concludes that the existence of "the [Attorney General's] right and the power to enforce the statutes of the state," held "by virtue of his office," was a sufficient connection with enforcement "to make him a proper party" to the federal suit. *Id*. at 161. Nothing is said to suggest the necessary presence of an accompanying *threat* to enforce, or actual conduct enforcing, the statute. *Young* establishes that the power to enforce the state law is "connection" enough to make the state official a proper defendant.

Under these guiding principles—not mere distillations from the *Young* opinion but part of the opinion itself—the Texas Attorney General was properly named a defendant in Austin's suit, and the appeals court ruling to the contrary is in direct conflict with *Young*. The Texas Attorney General is Texas's "chief law enforcement officer." *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943); *see also Perry*

v. Del Rio, 67 S.W.3d 85, 92 (Tex. 2001) (Attorney General is "State's chief legal officer" with "broad discretionary power in carrying out his responsibility to represent the State"). It is the Attorney General's duty, in the exercise of discretion, to sue "to *enforce* or protect" any public right that is being violated. *Agey*, 172 S.W.2d at 92 (emphasis added.)

The appeals court knew this. The Attorney General informed the court in briefing that he has, as he phrased it, "generalized enforcement authority," which includes "the authority to bring suit to enforce state law." Br. for Appellants at 14, 23. Specifically as to § 250.007(a), the Attorney General claimed "generalized enforcement authority." Reply Br. for Appellants at 15. His only argument was that this authority is not enough—even though *Young* plainly says it is.

Young's foundational importance to federal law's supremacy is too critical to allow the diminishment of *Young* that occurred below to stand unreviewed and uncorrected. The Court has jealously guarded the doctrine over the years, showing care to insulate its protection from potential spillover issues about the merits of the underlying claim, *Verizon*, *supra*, 535 U.S. at 646, or the identity of the plaintiff, *Virginia Office for Protection and Advocacy*, *supra*, 563 U.S. at 256. The Court should continue its protection of the doctrine by hearing this case and requiring lower courts to follow what *Young* says.

II. This Court Should Take This Case To Re-Establish A Clear Standard For *Young*'s "Connection" Test And Resolve The Conflicting And Muddled Tests Currently Used By The Circuits.

Fully reinstating *Young* and articulating a clear standard for what counts as a sufficient connection to enforcement of a self-enforcing state statute is urgently needed. The circuits are in conflict and have been unable to provide a consistent, coherent rule for applying *Young*'s "connection to enforcement" test. The issue has arisen most frequently in the context of enforceable statutes that are not self-enforcing, but the circuits' analysis has generally not distinguished between the two types of statutes. *But see Shell Oil Co. v. Noel*, 608 F.2d 208, 211-13 (1st Cir. 1979) (distinguishing statute declaring conduct "unlawful" from other types of statutes). *Noel* and the important distinction it draws are discussed in Part III, *infra* at 24-25.

A. Fifth Circuit Authority Is Hopelessly Muddled On The "Connection" Required To Meet The *Young* Test.

A clear articulation of the applicable standard would be doing the Fifth Circuit in particular a favor. As the opinion below recounts, the circuit has floundered for at least two decades in trying to find a coherent standard for *Young*'s "connection to enforcement" test. It has failed and is no closer to a solution today than when it started.

In *Okpalobi* in 2001, the *en banc* Fifth Circuit split 7-7 on how to apply *Young*'s "connection" test to a self-executing statute establishing a private liability regime related to the provision of abortion services. The 14-page analysis by a court plurality concluded that *Young* requires a "special charge" of enforcement if Eleventh Amendment immunity is to be avoided. *Okpalobi*, *supra*, 244 F.3d at 410-24. The other seven members of the court, in three different opinions, rejected the plurality's test. Judge Higginbotham, joined by Judge King, concurred, *id*. at 429-32, but rejected the plurality's application of *Young* on the ground that it undermined the "vital role" played by *Young* and improperly injected an "amorphous, case-by-base inquiry" of precisely the sort seven members of this Court had "affirmatively rejected." *Id*. at 432.[14] Judge Benavides partially dissented on *Young* grounds. *Id*. at 432-41. *Young*, he concluded, specifically allows a challenge to "the *existence* of a state's *self-executing*, private liability scheme," further criticizing the plurality opinion for failing to cite a "single modern Supreme Court case that relies on [*Young*'s] connection requirement" to dismiss under the Eleventh Amendment. *Id*. at 437, 439 (emphases added). Judge Parker, joined by four other judges, dissented, finding *Young* applicable. *Id*. at 441-53. In opposition to the plurality's "connection" analysis, his dissent specifically cited the already-cited

[14] Judge Higginbotham's concurrence here cites concurring opinions by Justices O'Connor and Souter in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

language from *Young*, *supra* at 15, that applies in particular to self-enforcing statutes. *Id*. at 448.

Three subsequent panel opinions surveyed by the court below either expressly declined to use the *Okpalobi* plurality test, or avoided it entirely, or used it. The court in this case continued the trend of failure, declining to embrace the *Okpalobi* plurality test and settling instead on an equally uncertain and imprecise new formulation, requiring a plaintiff to prove a "scintilla" of enforcement.

Things have not gotten any better in the intervening half year. In its most recent visit to the issue, two members of a Fifth Circuit motions panel, acknowledging that jurisprudence on the issue was "not a model of clarity," held that, for *Young* to apply, the sued official must have taken "some step" toward enforcement but that the issue of how big a step is "unsettled" and the "line evades precision." *Texas Democratic Party v. Abbott*, 2020 WL 2982937 (5th Cir. June 4, 2020) at *7 & n.21, *cert. pending sub nom. Garcia v. Abbott*, No. 19-1389.[15]

B. Seven Circuits Apply *Young* "Connection" Tests That Conflict With The Fifth Circuit's Test.

Across the spectrum of circuits, the tests are nearly as confusing and baffling in actual application

[15] The question presented in this case does not involve the Eleventh Amendment or *Ex parte Young*.

as the Fifth Circuit's. Taken as a whole, they have effectively set the bedrock case of *Young* adrift on the very "amorphous, case-by-case inquiry" Judge Higginbotham warned against in his *Okpalobi* concurrence.

1. The Tests Of The Seventh, Eighth, Tenth, And Eleventh Circuits Conflict With The Fifth Circuit's.

Unlike the Fifth Circuit, the Seventh, Eighth, Tenth, and Eleventh Circuits do not require any actual step toward enforcement before finding that the state attorney general is a proper defendant in a constitutional challenge to a state statute.[16]

The Seventh Circuit has not imposed a "threat" requirement in order for a state attorney general with authority to enforce a statute to be amenable to suit under *Young*. *See Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006) (adding that attorney general could be sued even though he

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[16] Besides the Fifth Circuit, three other circuits—the Second, Fourth, and Federal—appear to require some threat of enforcement. *HealthNow New York Inc. v. New York*, 448 Fed.Appx. 79, 80 (2d Cir. 2011) (attorney general had not threatened action against plaintiffs); *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010) (same, but adding that no agency advice had been given either), *aff'd on other grounds sub nom. McBurney v. Young*, 569 U.S. 221 (2013). The Federal Circuit uses a similar test. *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342-43 (Fed. Cir. 2006) (holding that "simply a broad general obligation to prevent" violation of a statute is insufficient under *Young* to subject state official to suit).

had "no authority to prosecute the plaintiff under the statute").[17]

In the Eighth Circuit, even absent a threat to enforce a challenged statute, a state attorney general may be sued under *Young* if authority resides in the office to take enforcement action, regardless of whether "primary authority" resides there. *281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011), *cert. denied*, 567 U.S. 951 (2012).

The Tenth Circuit found Utah's Attorney General amenable under *Young* to a suit challenging a state statute because, without mention of a specific threat to enforce, the Attorney General nonetheless had *authority* to administer state laws and advise a state agency, as well as issue authoritative opinions to agencies. *Kitchen v. Herbert*, 755 F.3d 1193, 1203 (10th Cir.), *cert. denied*, 574 U.S. 874 (2014).

The Eleventh Circuit has held that a state's chief election official is subject to suit under the *Young* doctrine as long as the official's office is "imbue[d]" with enforcement responsibilities under the challenged statute. *Grizzle v. Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2011). The court did not add the requirement that

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[17] But what it means to have authority to enforce has recently divided the circuit. In a 2-1 vote, a court panel held that the state attorney general was not a proper defendant under *Young* because the official's duty was to defend, not enforce, the challenged statute. *Doe v. Holcomb*, 883 F.3d 971 (7th Cir.), *cert. denied*, 139 S.Ct. 126 (2018). Judge Wood dissented on the ground that the attorney general did have a sufficient connection to enforcement. *Id*. at 980.

there must be a threat to exercise those responsibilities.

2. The Third, Sixth, And Ninth Circuit Tests Are Muddled, But Recent Iterations Conflict With The Fifth Circuit's.

In some recent decisions, the Third, Sixth, and Ninth Circuits appear to have retreated, at least implicitly, from previous decisions and held that *Young* does not require an actual step toward enforcement before a state official can be a proper defendant in a federal challenge to a state statute.

The Third Circuit had required that, to be subject to suit under *Young*, a state official with authority to enforce the challenged statute could be sued "only if the official has either enforced, or threatened to enforce, the statute *against the plaintiffs*." *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993) (emphasis added). But more recently, it determined that a state official with only "a minor administrative role" in a challenged statutory scheme was sufficiently connected to be sued under *Young*. *Constitution Party of Pa. v. Cortes*, 824 F.3d 386, 398 (3d Cir. 2016).

The Sixth Circuit had held that the connection requirement means that the sued state official must "threaten and be about to commence" enforcement proceedings. *Children's Health Care Is A Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996). But more recently, the court held the *Young* connection test met

even though there was no threat directed at the plaintiff, but only a "realistic possibility" of enforcement because the authority to enforce existed and steps toward enforcement had been taken in other situations. *Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015).

The Ninth Circuit had required that there be a "real likelihood" of enforcement against "plaintiffs' interests." *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (*per curiam*). But more recently, it determined that mere "exposure to the risk of prosecution" sufficed for a plaintiff to sue a state attorney general in a challenge to a state statute's constitutionality. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005).

III. *Young*'s Connection Test Needs To Be Refreshed, Not Revisited, And This Case Is The Proper Vehicle For Doing So.

Since around 2000, the meaning of *Young*'s connection requirement has received increasing attention, with mixed results, from the lower courts, and its application is being used more and more frequently to shield state officials and state legislation from federal court scrutiny.[18] But this Court does not appear to have

[18] This increased attention is attributable in part to the fact that *Young*'s Eleventh Amendment "connection" analysis has spilled over into Article III standing issues of traceability and redressability. The Eleventh Circuit *en banc* has only recently split 7-5 over plaintiffs' standing to challenge an Alabama preemption

provided further guidance on *Young*'s connection in the more than a century since the doctrine's inception. *See* Lovins, A Constitutional Door Ajar: Applying the *Ex Parte Young* Doctrine To Declaratory Judgment Actions Seeking State Patent Invalidity, 2010 UNIV. OF ILL. L. REV. 265, 297 (2010) ("Over 100 years later, the Supreme Court has yet to articulate the kind of connection needed for the *Ex parte Young* doctrine.").

There was only one issue before the Fifth Circuit on interlocutory appeal: whether *Young* requires recognition of the Texas Attorney General as a proper defendant in Austin's lawsuit to reinstate its ordinance and begin enforcing it. And that is the only issue raised in this petition. The test as stated in *Young* itself, as well as in at least four and perhaps as many as seven circuits, would have required that Austin be allowed to proceed with its federal declaratory judgment suit against the Attorney General. So this case cleanly presents the issue and the opportunity to resolve the conflict.

The case is especially significant because the meaning of the "connection" requirement in *Young* arises in the context of a self-enforcing statute. The First Circuit saw the significance of the confluence of these two circumstances—a self-enforcing statute and *Young*'s connection requirement—forty years ago in a case in which it ended up not having to reach the issue. In *Shell Oil Co. v. Noel*, *supra*, the court noted that

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statute affecting municipal minimum wage rules. *Lewis v. Governor of Alabama*, 944 F.3d 1287 (11th Cir. 2019) (*en banc*). The appeals court below mused about but did not reach this aspect of standing. App. 16a-17a & n.3.

the nature of the statute at issue is "[o]f critical importance" in *Ex parte Young* analysis and differentiated self-enforcing statutes from other types:

> *A statute declaring conduct "unlawful" is of a different order of magnitude* with respect to public policy than a statute which determines the right of one person to recover from another, or sets the jurisdictional requirements for divorce, or governs the custody of a child, or enables a local authority to grant a license.

608 F.2d at 212 (emphasis added). And the court also foresaw the answer to such a circumstance, observing that for such a statute—that is, the one before it then and the one before this Court now—"it seems to us that at least the Attorney General . . . would be a proper party defendant." *Id*.[19]

More recent scholarship focusing on the same question has reached the same conclusion. One in particular hones in on the very issue presented here. "A state that enacts a self-executing scheme effectively enforces it simultaneously." Borgmann, Legislative Arrogance and Constitutional Accountability, 79 SO. CAL. L. REV. 753, 791 (2006). This "causal nexus," argues the author, "suffices" to connect the state to the statute, and the *Ex parte Young* doctrine is thus satisfied. *Id*.

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[19] The opinion's author was a legendary federal trial judge. *See generally* Levi, In Memoriam: Charles E. Wyzanski, Jr., 100 HARV. L. REV. 716 (1987).

The Fifth Circuit departed from *Young* by imposing a "connection" requirement that is untethered to *Young*, conflicts with at least four other circuits, and is inconsistent with the basic principle underpinning *Young*: that the supremacy of federal law can only be given meaning when states and their officials can be held accountable for federal law violations in federal courts. The escape hatch created by the Fifth Circuit needs to be closed, and this case gives the Court the obvious opportunity to do that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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