No. 19-1441

In the Supreme Court of the United States

CITY OF AUSTIN, TEXAS, PETITIONER

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The City of Austin wishes to enforce a local ordinance that requires private landlords to participate in the otherwise voluntarily federal housing voucher program. The Texas Legislature has passed a statute specifically preempting that ordinance. The City of Austin seeks a declaration that the state law is, in turn, preempted by federal law. Rather than bringing a suit to enforce its ordinance against a private landlord and raising federal preemption in the course of such a suit, the City has sued Texas's Attorney General. It is undisputed that Attorney General Paxton has never sought to enforce this provision against the City or anyone else. The question presented is:

Whether *Ex parte Young*, 209 U.S. 123 (1908), permits a suit to invalidate a state law to proceed against a state officer based solely on his general duty to uphold state law.

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STATEMENT

I. Statutory and Regulatory Background

This case involves efforts at the federal, state, and local levels to balance the need to provide affordable housing to low-income individuals and the right of private landowners to use their property as they see fit. The federal Housing Choice Voucher Program, otherwise known as "Section 8," provides financial assistance to low-income individuals so that they may lease housing from private landlords. *See* 24 C.F.R. § 982.1, *et seq.* The Program is funded by the United States Department of Housing and Urban Development but administered by state and local public-housing authorities. *Id.* § 982.1(a)(1). Tenant participants in the Voucher Program "may search for a unit," *id.* § 982.302(a), and if they "find[] a unit, and the owner is willing to lease the unit under the program," the participants may request that the local public-housing authority approve the tenancy. *Id.* § 982.302(b).

Landlord participation in the federal Voucher Program carries with it significant administrative and regulatory burdens, including inspection, reporting, and approval requirements.[1] Therefore, federal law makes participation voluntary. 24 C.F.R. § 982.302(b). "[T]he voluntariness provision of Section 8 reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be

[1] *See, e.g.*, Office of Policy Development & Research, *Landlords: Critical Participants in the Housing Choice Voucher Program* (Winter 2019), https://www.huduser.gov/portal/periodicals/em/winter19/highlight1.html (describing incentives local programs might use to encourage participation).

forced on landlords." *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300 (2d Cir. 1998).

As in many communities, the City of Austin found greater demand for subsidized housing than private landlords who were willing to undertake the burdens associated with the Program. *See supra* n.1. In 2014, the City responded by passing an ordinance that prohibits landlords from refusing tenants based on their "source of income"—defined to include "housing vouchers" and other government subsidies. *See* Pet. App. 42a-48a (codified in Austin City Code, ch. 5-1) (emphases omitted). This Ordinance elevates "source of income" to a status equivalent to "race, color, religion, sex, familial status, or national origin" or "handicap," which are protected classes under both state and federal housing law. 42 U.S.C. § 3604(a), (f); Tex. Prop. Code §§ 301.021(a), .025(a). The Ordinance has the effect of requiring landlords to participate in the otherwise voluntary Program.

In 2015, to protect the rights of landlords, the Texas Legislature passed section 250.007 of the Local Government Code. Section 250.007 preempts any "ordinance or regulation that prohibits" a landlord "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." Tex. Loc. Gov't Code § 250.007(a). The preemptive intent of this law is clear: It was introduced in the Texas Legislature one week after the City passed the Ordinance. Tex. S.B. 267, 84th Leg., R.S. (2015). While the state law prevents localities from treating "source of income" as a protected status akin to those listed in the Federal Housing Act, it does permit localities to create incentive programs that encourage landlords to

participate voluntarily in the Voucher Program, Tex. Loc. Gov't Code § 250.007(c).

II. Petitioners' Lawsuit

The City immediately filed suit for declaratory and injunctive relief in the Western District of Texas, asserting that Texas's effort to preempt the Ordinance was itself preempted by federal law. The City originally sued the State of Texas and its Governor. ROA.7-13.[2] In response to the defendants' motion to dismiss on the grounds of sovereign immunity, the City amended its complaint to name Attorney General Paxton, in his official capacity, and to remove the claim for injunctive relief. ROA.94-103.[3] The Attorney General then filed his own motion to dismiss on standing and sovereign immunity grounds, as well as for failure to state a claim. ROA.114-34.

The district court denied the Attorney General's Rule 12(b)(1) motion to dismiss as to sovereign immunity and standing. With respect to the sovereign immunity issue presented in this petition, the district court held that the City could bring a claim under *Ex parte Young* because Attorney General Paxton "is not bereft of authority to enforce § 250.007," and because he had brought suit in other contexts to enforce the supremacy of other state laws. Pet. App. 28a-29a.

Turning to the Rule 12(b)(6) motion, the district court concluded that the City had plausibly alleged that section

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[2] "ROA" refers to the Fifth Circuit's electronic record on appeal for *City of Austin v. Paxton*, No. 18-50646 (5th Cir.).

[3] The City also named the Texas Workforce Commission as a defendant, but it waived any claim against the Commission on appeal. Pet. App. 18a n.4. As the petition does not seek to revive that claim, Pet. ii, 8 n.9, this response will address it no further.

250.007 disparately impacts racial minorities and thus may be in conflict with the federal Fair Housing Act. *Id.* at 37a-38a (dismissing separate field-preemption theory). That ruling was not subject to immediate appeal and is not at issue in this petition.

On interlocutory appeal, the Fifth Circuit reversed the district court's sovereign immunity ruling. *Id.* at 1a-20a. The court of appeals held that the suit was barred by sovereign immunity because Attorney General Paxton did not possess the requisite "connection to the enforcement" of the challenged statute to satisfy *Ex parte Young*. *Id.* at 2a. The Fifth Circuit acknowledged that "[w]hat constitutes a sufficient 'connection to [] enforcement' is not clear." *Id.* at 9a. But it held that it "need not define the outer bounds of this circuit's *Ex parte Young* analysis today," *id.* at 11a, because the City had not demonstrated a "scintilla" of enforcement on the part of the Attorney General, *id.* at 16a.

This petition followed.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly concluded that sovereign immunity bars the City's lawsuit against the Attorney General. *Ex parte Young* sought to harmonize the supremacy of rights guaranteed by the federal Constitution with the States' inherent sovereign immunity, as confirmed by the Eleventh Amendment. 209 U.S. at 149. The balance it struck was to permit suit against state officials who are both "clothed with some duty in regard to the enforcement of the laws of the state, *and* [] threaten and are about to commence proceedings" to enforce an unconstitutional law. *Id.* at 155-56. Those elements are necessary to establish that the state official sued is committing an ongoing violation of federal law—and thus should not be considered to be acting on behalf of the

sovereign State. Because section 250.007 does not specially task the Attorney General with its enforcement, and because the Attorney General has not expressed any intent to enforce section 250.007, *Ex parte Young*'s limited exception to sovereign immunity does not apply.

Attorney General Paxton agrees that in an appropriate case, the Court should address the considerable confusion that exists in the lower courts regarding the scope of the *Ex parte Young* exception to sovereign immunity. This confusion has led to hundreds—if not thousands—of lawsuits against state officials who are not alleged to have taken action or threatened to take action under the challenged law. Under *Ex parte Young*, such a suit is properly viewed as a suit against the State and barred by sovereign immunity.

This case is not an appropriate vehicle to resolve that confusion, however, because it provides little opportunity for the Court to examine the limits of *Ex parte Young*'s exception to sovereign immunity. Here, Attorney General Paxton has done nothing other than *be* the attorney general. The circuit courts need guidance from this Court about *how much* more is needed to satisfy *Ex parte Young*, but there is no question that *Ex parte Young* requires far more than the City has alleged here. The decision below follows from a straightforward application of *Ex parte Young* itself. As the Fifth Circuit put it, this case does not require the Court to "define the outer bounds of [the] *Ex parte Young* analysis." Pet. App. 11a. Accordingly, the Court should deny the petition.

ARGUMENT

I. The Fifth Circuit Correctly Applied *Ex parte Young* and Dismissed Plaintiffs' Claims Based on Sovereign Immunity.

The Fifth Circuit properly concluded that the City's complaint does not fall within *Ex parte Young*'s limited exception to the rule that sovereign immunity precludes suits against state officials in their official capacities. 209 U.S. at 167; *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-102 (1984); *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974). This exception protects the supremacy of federal law by allowing suit "against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). To fit within its narrow confines, however, a complaint must plausibly allege an "ongoing violation of federal law" and "relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part).

To invoke this exception, the named official must "have some connection with the enforcement of the [challenged law]." *Ex parte Young*, 209 U.S. at 157. The "connection" requirement is consistent with the premise of the "fiction" of *Ex parte Young*—the state official must be engaged in an ongoing violation of federal law in order that there be something to enjoin or declare unlawful. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Absent such a connection, the *Ex parte Young* exception would swallow the doctrine of sovereign

immunity by simply providing an avenue for plaintiffs to sue the State. 209 U.S. at 157; *see also Va. Office for Prot. & Advocacy*, 563 U.S. at 253; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Edelman*, 415 U.S. at 663–69.

Such connection is absent here: It is undisputed that Attorney General Paxton has never sought to enforce section 250.007 against anyone, let alone the City of Austin.

In *Ex parte Young*, the Court examined a suit to enjoin a state attorney general from enforcing an allegedly unconstitutional state law. 209 U.S. at 129-30. The Court announced the following test:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

Id. at 155-56.

The Court held that the attorney general was a proper defendant in the suit because (1) his office's general duties provided the ability to enforce the laws of the State and he had demonstrated "[b]y his official conduct" that "he regarded it as a duty connected with his office to compel the company to obey" the particular statute; and (2) he had actually "commenced proceedings to enforce such obedience" notwithstanding a "risk of being found guilty of contempt by so doing." *Id.* at 160. Because the attorney general had already commenced enforcement proceedings, the Court found both elements of its

test satisfied and did not explain the outer limits of the "connection" requirement.

In this case, the City cannot establish either element. As to the first element, the City can point *only* to Attorney General Paxton's generalized duty to uphold State law. Pet. 14-15. Section 250.007 does not specifically task the Attorney General with its enforcement, Tex. Loc. Gov't Code § 250.007, and he has taken no action that would suggest he views his office as having a particularized duty to enforce *this* challenged statute. As to the second element, the Fifth Circuit correctly concluded that the City has not alleged even a "scintilla" of enforcement, and accordingly failed to overcome the State's sovereign immunity. *Compare* Pet. App. 16a, *with Ex parte Young*, 209 U.S. at 156.

In arguing that the Fifth Circuit misapplied *Ex parte Young*, the City effectively asks this Court to jettison two of that case's central holdings. *First*, the City states that "[n]othing is said" in *Ex parte Young* "to suggest the necessary presence of an accompanying *threat* to enforce, or actual conduct enforcing, the statute." Pet. 15. That flies in the face of *Ex parte Young*'s express language, which permitted suit against officers who have a duty to enforce the challenged statute and "who threaten or are about to commence proceedings" to enforce that statute. 209 U.S. at 156.

Second, the City asserts that because section 250.007 is "self-enforcing," it should not have to demonstrate that any particular defendant is likely to enforce the statute. Pet. 14. Section 250.007 is not "self-enforcing," however; *courts* enforce preemption rules, typically as an affirmative defense to enforcement of some other action. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015). The way to test the validity of section

250.007 is for the City to enforce its ordinance against a landlord. The landlord may choose to raise state preemption as a defense to enforcement, and the City may argue that section 250.007 is itself preempted by federal law.

The City may find a direct suit against the State to be a more "convenient way for obtaining a speedy judicial determination" of constitutional law. *Ex parte Young*, 209 U.S. at 157. But this Court recognized in *Ex parte Young* that such a shortcut "cannot be applied to the states . . . consistently with the fundamental principle they cannot, without their assent, be brought into any court at the suit of private persons." *Id.*; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992). That is precisely what the City has attempted to do here.

The City complains that applying this rule will mean that the state legislature will be "federally unaccountable" so long as state officials "remain strategically mum." Pet. 13. But as just described, the City does not lack an avenue to test the validity of section 250.007, and it faces no "drastic" penalty if it chooses to proceed with that course. *Ex parte Young*, 209 U.S. at 131. And more fundamentally, *Ex parte Young* is not about holding state legislatures accountable for the laws they pass—its limited exception to sovereign immunity operates only to stop a state officer from *enforcing* an unconstitutional law. Because Attorney General Paxton lacks any connection to an actual or threatened enforcement of the challenged statute, the Fifth Circuit correctly held that the plaintiffs' claims do not fall within the *Ex parte Young* exception to sovereign immunity.

II. This Case Is Not an Appropriate Vehicle to Provide Additional Guidance Regarding the Application of *Ex parte Young*.

Attorney General Paxton recognizes that this Court's case law has left unanswered questions regarding the scope of *Ex parte Young*. In particular, the issue of *how much* of an additional connection is needed to bring a claim against a state officer with generalized enforcement authority under *Ex parte Young* has perplexed the lower courts. In the century since *Ex parte Young* was decided, there has been a great proliferation of formulations of the "connection" test. Some of that is attributable to differences in the factual configurations of each case—for instance the type of defendant, statute, or official action. Yet no clear framework has emerged. This Court's guidance is needed to define the connection to enforcement necessary to invoke *Ex parte Young*, but the Court should wait for an appropriate case.

A. This Court's precedents have left unanswered questions regarding how to apply *Ex parte Young*'s "connection" test.

For at least twenty years, this Court has recognized that *Ex parte Young* is an "important part of [its] jurisprudence," but one that is subject to numerous "criticisms" in both its theoretical underpinnings and its applications. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). The test in *Ex parte Young* has proved hard to apply, and years of built-up precedent have led to a number of anomalous rulings, including one in which the Court held that "a state agency may sue officials acting on behalf of the State in federal court." *Va. Office for Prot. & Advocacy*, 563 U.S. at 266 (Roberts, C.J., dissenting). Much of this confusion arose because

Ex parte Young provided little guidance about how certain aspects of its reasoning worked with each other.

As to the first element of its now-canonical two-part test, *Ex parte Young* explained that the lack of a particular duty arising from statute is not fatal. 209 U.S. at 157. Nevertheless, the existence of a particularized duty to enforce the statute is an "important and material fact." *Id.* That is, this Court stated that whether that duty "arises out of the general law, or is specially created by the act itself, is not material *so long as it exists*." *Id.* (emphasis added). A statewide officer can demonstrate by his "official conduct" that he considers himself to have the particular duty to enforce the challenged law against the plaintiff. *Id.* at 160. But the mere existence of generalized power held by the state attorney general is insufficient.

This factor has proved difficult to apply because statutes frequently do not specify who must enforce them. Even where they do specify certain duties, the courts must decide whether those duties involve anything that could be characterized as enforcement, as the concept is understood under *Ex parte Young*. *See Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986).

Moreover, where the particularized nature of the duty is supplied by the official's own actions, there is considerable analytical overlap with the second prong of the test. As this Court has repeatedly recognized, executive-branch officials have discretion in how to deploy scarce enforcement resources. *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 834 (1985). The existence of an unconstitutional state law does not create a violation of federal law that may be enjoined absent *some* method by which that law is being put into force. Without that plus factor, there is no basis to conclude that the named defendant is

disregarding his obligation as a public servant to obey the Constitution. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011). When such enforcement takes the form of a civil suit or criminal prosecution, the potential federal violation is clear. The Court's guidance is needed to delineate what other forms of enforcement—if any—satisfy *Ex parte Young*.

It is unclear how other factors considered in *Ex parte Young* and its progeny fit into the general two-part test. In particular, what significance should be afforded to the availability of other reasonable avenues to challenge the law? *Coeur d'Alene Tribe*, 521 U.S. at 273. This Court has suggested that "States have real and vital interests in preferring their own forums in suits brought against them, interests that ought not to be disregarded based upon a waiver presumed in law and contrary to fact." *Id.* at 274. But it has never squarely held that the availability of such an alternative means to challenge the law will defeat a pre-enforcement challenge like this one.

Similarly, in *Ex parte Young*, the Court expressed concern that even if an alternative forum exists, the penalties prescribed for a one-time violation of the state law could be "so drastic that no owner or operator of a railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms in jails and penitentiaries of its officers, agents, and employees." 209 U.S. at 131. But it did not elaborate whether that factor was necessary to its finding an exception to sovereign immunity. That is highly significant in case like this one because the City and its officials face no jail time or heavy penalties for violating section 250.007. And the validity of that provision can be tested in a state court.

B. This case does not implicate the difficult questions that have led to inconsistent applications of *Ex parte Young*'s "connection" requirement.

Attorney General Paxton agrees that "this case cleanly presents" a particular issue, Pet. 24, but because that issue is narrow and well-settled, the case does not provide an opportunity for this Court to resolve more difficult questions about *Ex parte Young*'s application. This case is therefore not a suitable vehicle for the Court to further consider *Ex parte Young*'s "connection" test.

The circumstance presented here—asserted federal preemption of a state law in the housing context, with one named defendant—calls for a straightforward application of *Ex parte Young*. The Fifth Circuit therefore saw no need to "define the outer bounds" of *Ex parte Young*'s "connection" test to determine that sovereign immunity barred the City's claims against the Attorney General. Pet. App. 11a. That judgment was correct in both respects. As a result, this case does not present an opportunity to address more difficult questions about *Ex parte Young*'s application in other circumstances.

While the requisite connection to enforcement is plainly absent in this case, uncertainty about what "connection" to enforcement is sufficient in other circumstances has led to uneven results within circuits as well as across them. The City's neat placement of the circuits into three categories—those that require a threat of enforcement, those that do not, and those that previously required a threat of enforcement but have moved away from that requirement—if anything oversimplifies the state of the law.

1. The Fifth Circuit has struggled to define *Ex parte Young*'s "connection" test, but this case fails any potential test.

The Fifth Circuit's case law illustrates the difficulty lower courts have encountered in defining *Ex parte Young*'s "connection" requirement. *See id.* at 9a (noting absence of clear "connection" standard). Since this case was decided nearly a year ago, another merits panel reiterated that "[t]his circuit has not spoken with conviction about all relevant details of the 'connection' requirement." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020). And several motions panels have encountered the same difficulty in recent election cases. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400-01 & n.21 (5th Cir. 2020) (stating that "[o]ur decisions are not a model of clarity on what 'constitutes a sufficient connection to enforcement'" because the "precise scope of the 'some connection' requirement is still unsettled" and, moreover, the "line" delineating "how big a step" to "enforce" a law is needed "evades precision") (quoting Pet. App. 9a); *Tex. Democratic Party v. Hughs*, 974 F.3d 570, 571 (5th Cir. 2020) (per curiam) (noting that "some connection" requirement is unsettled); *Lewis v. Hughs*, No. 20-50654, 2020 WL 5511881, at *1 (5th Cir. Sept. 4, 2020) (per curiam), *withdrawn*, No. 20-50654, 2020 WL 6066178 (5th Cir. Oct. 2, 2020) (motions panel first stating that it was "convinced that no substantial question exists" concerning the sufficiency of the state officials' connection to enforcement, but then withdrawing that decision on further consideration).

a. The Fifth Circuit's precedent has reflected confusion about the "connection" test since at least *Okpalobi v. Foster*, where a fractured en banc opinion produced four different conceptions of the formulation and role of

Ex parte Young's connection test in the context of a medical malpractice regime. 244 F.3d 405 (5th Cir. 2001) (en banc).

The lead opinion garnered only a plurality of the court as to sovereign immunity, though it did reach a majority to dismiss the case due to plaintiffs' lack of Article III standing. *Id.* at 409. The plurality, evaluating a suit brought against the Texas Governor and Attorney General under *Ex parte Young*, wrote:

> [T]he *Young* principle teaches that it is not merely the general duty to see that the laws of the state are implemented that substantiates the required "connection," but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty. . . . [A]ny probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute.

Id. at 416-17 (footnote omitted). The plurality also stated the two-part test differently when it explained that *Ex parte Young* required "*both* a close connection between the official and the act *and* the threatening or commencement of enforcement proceedings by the official." *Id.* at 415 (emphases added, footnote omitted).

With respect to the first prong, the plurality variously described the showing needed as the "ability of the official to enforce," a "'close' connection," and a "special charge." *Id.* at 416-19. The "special charge" requirement was drawn from *Fitts v. McGhee*, 172 U.S. 516, 529 (1899), and "is an essential part of *Young*'s holding" that "*Young* merely allows . . . to be drawn implicitly from the laws of the state, rather than requiring that it be stated

explicitly in the challenged statute," *Okpalobi*, 244 F.3d at 418-19 (plurality op.) (citing *Ex parte Young*, 209 U.S. at 158).

Following a thorough canvassing of other circuits' authority with respect to the second prong, the plurality concluded that to overcome immunity, a plaintiff must show either "actual or threatened enforcement" or a "demonstrated willingness" to enforce the statute. *Id.* at 415-16.

But the case also generated three other opinions that contradicted various points of the majority's sovereign-immunity analysis. A concurring opinion concluded that the court should have evaluated only Article III standing and criticized the plurality's sovereign immunity analysis as creating an "amorphous, case-by-case inquiry." *Id.* at 429-32 (Higginbotham, J.). A partially concurring and partially dissenting opinion would have found *Ex parte Young* satisfied as to the declaratory claim because "the existence of a state's self-executing, private liability scheme" allows jurisdiction. *Id.* at 432-41 (Benavides, J.). It noted the absence of modern precedent from this Court dismissing a case on sovereign-immunity grounds based on the connection requirement and theorized that this "Court's modern standing doctrine has subsumed the connection inquiry." *Id.* at 439 (Benavides, J., concurring in part and dissenting in part). Finally, a dissenting opinion concluded that threatened enforcement is *not* uniformly required by federal courts applying *Ex parte Young*. *Id.* at 447 (Parker, J.). In any event, the dissenting opinion concluded, sufficient connection to enforcement existed "by virtue of the Governor's and Attorney General's participation in the State's extensive medical malpractice regime." *Id.* at 450 (Parker, J.).

Subsequent panels in the Fifth Circuit have taken different approaches to *Okpalobi*'s plurality opinion. Noting that it was not binding precedent, the panel in *K.P. v. LeBlanc* declined to apply the *Okpalobi* plurality's requirement of a "special" relationship under the first prong of the "connection" test. 627 F.3d 115, 124 (5th Cir. 2010). Nevertheless, it concluded that either a "some connection" or a "special" relationship test would be satisfied. *Id.* In the process, the panel in *K.P.* announced a new test for defining "enforcement," broadly including any regulatory activity that involves "compulsion or constraint," of the plaintiff, even if it does not constitute a classic enforcement action for civil or criminal penalties. *Id.* at 124-25; *see also Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 518 (5th Cir. 2017).

In contrast, the panel in *Morris v. Livingston* repeated the *Okpalobi* plurality's test—this time as binding precedent in the circuit. 739 F.3d 740, 746 (5th Cir. 2014). The court in *Morris*, as in *Okpalobi*, stated that *Ex parte Young* requires both a special charge and a threat of enforcement. *Id.* Concluding that suit was barred against the Governor, *Morris* held that an official with general enforcement powers must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty" in order to satisfy *Ex parte Young*. *Id.* The *Okpalobi/Morris* standard has been applied in a number of subsequent decisions, including *In re Abbott*, which found no threatened enforcement even where the Attorney General had, in a public statement, "threatened that [the statute] would be enforced" but had not threatened that "he would enforce it." 956 F.3d 696, 709 (5th Cir. 2020).

b. The different approaches just described cannot entirely be explained by the nature of the defendant in each case. It is clear that the Fifth Circuit, like the other circuits discussed below, is applying somewhat different standards depending on whether the officer sued has general authority (like a governor or attorney general) or is a more specialized official tasked by the statute with a particular role in its administration. But these standards are not consistently applied—likely because they are not expressly delineated in this Court's jurisprudence.

Some level of distinction may be appropriate. Often, in the case of the more specialized officials, there is already some ongoing action taking place, and the main issue for a court to decide is whether the administrative role constitutes "enforcement" at all. *See, e.g., Air Evac*, 851 F.3d at 515; *K.P.*, 627 F.3d at 124. By contrast, for cases involving attorneys general, the *capacity* to bring a traditional enforcement action is typically present, so the more relevant question is whether the plaintiff has shown that general capacity will be brought to bear against them for *this* statute. *See, e.g.*, Pet. App. 15a-16a; *Okpalobi*, 244 F.3d at 418-19 (plurality op.).

But because this Court has never fully delineated how the different pieces of *Ex parte Young* fit together, lower courts struggle to apply a consistent rule. For example, in cases involving statewide officers with broad power, it is unclear whether indicia that an actor is likely to enforce a law should be considered in the first element of the test (as amounting to a special charge or particularized duty), in the second element of the test (as a threatened enforcement or willingness to enforce), or both. *See Okpalobi*, 244 F.3d at 418-19 (plurality op.).

Cases that involve multiple defendants are illustrative. For instance, *Texas Democratic Party*, the defendants were Texas's Governor, Attorney General, and Secretary of State. 978 F.3d at 179-81. The court quickly disposed of claims against the Governor based on lack of enforcement *ability*: Texas law gives the Governor the authority to issue an executive order, not the power to enforce it. *Id.* at 180 (citing *In re Abbott*, 956 F.3d at 708–09); *see also Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020). The court held that a "closer question" existed as to the Attorney General because he has certain power to enforce the Election Code, but plaintiffs were not relying on those powers. *Tex. Democratic Party*, 978 F.3d at 181. This required the court to turn to *Okpalobi/Morris*, which required more than a "general duty to see that the laws of the state are implemented," namely the "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Id.* (quoting *Morris*, 739 F.3d at 746). The court concluded that plaintiffs had not overcome the Attorney General's immunity because the only alleged indicia of impending enforcement was a letter sent to election officials, which did not "intimat[e] that formal enforcement was on the horizon," particularly as to the named plaintiffs. *Id.* Nevertheless, the Court concluded that the plaintiffs *did* overcome the Secretary of State's immunity. *Id.* at 180. It concluded that the Secretary of State should be considered a relatively specialized office in an election case and applied *K.P.* to hold that she has the duty to enforce the challenged provision. *Id.* at 179-80.[4]

[4] For the reasons explained in the Brief in Opposition, *Texas Democratic Party v. Abbott*, No. 19-1389 (U.S. Nov. 23, 2020), this was improper. Texas's Secretary of State does *not* have the power

Nevertheless, the court also applied to the Secretary the "scintilla of enforcement" authority language that the court applied in *this* case for the Attorney General. 978 F.3d at 179 (quoting Pet. App. 16a).

In this case, the panel correctly determined that "in the same vein as panels before us, we find that we need not define the outer bounds of this circuit's *Ex parte Young* analysis today." Pet. App. 11a. It considered the *Okpalobi/Morris* and *K.P./Air Evac* lines of inquiry—finding as to the former that there was no "scintilla" of enforcement and then as to the latter that the Attorney General does not enforce any larger regulatory apparatus that acts to compel or constrain the City. *Id.* at 16a; *see also Air Evac*, 851 F.3d at 519; *K.P.*, 627 F.3d at 124. Thus, the difficulty in articulating a universal theory of "connection" under *Ex parte Young* did not prevent the court below from reaching the correct result in this case.

2. Despite uncertainty about the outer bounds of the "connection" requirement, other courts consistently require more than general enforcement authority.

There is language in nearly every circuit supporting that at least some "plus" factor beyond a generalized enforcement duty (such as the Attorney General's here) is needed to establish a "connection" to enforcement under *Ex parte Young*. What that plus factor is, though, is inconsistent both within and across courts.

Most look for a threat of enforcement, as did the Fifth Circuit here. *See, e.g.*, *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010) ("[E]ven were we to find a special relation, we cannot apply *Ex parte Young* because the

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or duty to enforce the Election Code generally or the section at issue in that case specifically.

Attorney General has not acted or threatened to act."); *Sherman v. Cmty. Consol. Sch. Dist.*, 980 F.2d 437, 440-41 (7th Cir. 2002) ("Plaintiffs have not articulated any theory under which *Ex parte Young* supports a suit against the Attorney General, who has never threatened the [plaintiffs] with prosecution and as far as we can tell has no authority to do so."); *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) ("*Young* does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute."); *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993) ("A plaintiff challenging the validity of a state statute may bring suit against the official who is charged with the statute's enforcement only if the official has either enforced, or threatened to enforce, the statute against the plaintiffs."); *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam) (holding that there "must be a threat of enforcement"—*i.e.*, "a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests"); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (holding that the "mere fact that an attorney general has a duty to prosecute all actions in which the state is interested enough" does not "make him a proper defendant in every such action"). The Tenth Circuit has looked for a "demonstrated willingness" to enforce. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007).

Other courts have appeared to focus more on the "special relation" aspect of the *Ex parte Young* test. The Fourth Circuit has allowed suit where the officer has a "proximity to and responsibility for the challenged state action"—a focus that appears to be on the "special relation" element. *S.C. Wildlife Fed'n v. Limehouse*, 549

F.3d 324, 333 (4th Cir. 2008); *see also McBurney*, 616 F.3d at 399 (stating that "we must find a 'special relation' between the officer being sued and the challenged statute," and that even if a special relation were found, a threat of enforcement is still needed). The Eighth Circuit found that an attorney general was not a proper party because he did not have a special relation to the tolling provision that was challenged. *Smith v. Beebe*, 123 F. App'x 261 (8th Cir. 2005) (per curiam). Other courts have described this as whether an officer has a sufficient "nexus" with the challenged law, beyond some general enforcement duty. *In re Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 373 (2d Cir. 2005) (finding sufficient nexus because state officers oversaw fund and distribution of claims); *see also Pennington Seed, Inc. v. Produce Exch. 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 not sufficient connection). And some courts have required that the official's duty with respect to the challenged law be one of *affirmative* enforcement rather than a simple duty to support or defend challenged state statutes. *Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976); *see Doe v. Holcomb*, 883 F.3d 971 (7th Cir. 2018).

Some decisions suggest that, under certain circumstances, a special relationship and/or threat of enforcement may not be necessary. But there still is typically some examination of whether there is a *risk* of enforcement. *See Russell v. Lundegran-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015) (identifying a "realistic possibility" of enforcement); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006) (noting that probability of Attorney General involvement distinguished another case). For instance, the Sixth Circuit found *Ex parte*

Young satisfied in a criminal case where "prosecutors *could* charge plaintiff" with a crime. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 210 (6th Cir. 1997). Moreover, based on context as well as the authorities these cases rely upon, it is not clear that these courts *intended* to diverge from cases that require a threat of enforcement. *See Blagojevich*, 469 F.3d at 645 (appearing to equate attorney general's "power" to enforce the challenged law with the "connection" required to satisfy *Ex parte Young*, but citing cases from Second, Eighth, and Ninth Circuits); *Russell*, 784 F.3d at 1047 (citing language from *Deters*, 92 F.3d at 1415, clearly requiring threatened enforcement, and moreover making finding that "[t]he record indicates that [the Attorney General's] office repeatedly fielded and investigated complaints of impermissible electioneering, and promised the public that it would pursue criminal sanctions").

In some instances, courts have seemed to apply something closer to a sliding scale approach—allowing a lesser showing under one prong of *Ex parte Young* where there is a clear showing on the other. For instance, in *Los Angeles County Bar Association v. Eu*, the Ninth Circuit held that "the lack of any enforcement proceeding by [defendants] against the [plaintiff] under the challenged statute does not preclude this suit" because the statute "is simply not the type of statute that gives rise to enforcement proceedings." 979 F.2d 697, 704 (9th Cir. 1992). But the court noted that defendants *did* have "a specific connection to the challenged statute" and that the suit was "not based on any asserted general duty to enforce state law." *Id.* Similarly, in *Kitchen v. Herbert*, the Tenth Circuit disclaimed that an officer needed a "special connection" to the statute but did require a "particular duty to enforce the statute in question and a

demonstrated willingness to exercise that duty." 755 F.3d 1193, 1201 (10th Cir. 2014).

The Eleventh Circuit is the only circuit that can fairly be characterized allowing suit to proceed against officials based on the inherent responsibilities of their offices—*i.e.*, without the various "plus" factors that the other circuits have looked for. In *Luckey v. Harris*, the court stated that "[p]ersonal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity" and "[a]ll that is required is that the official be responsible for the challenged action." 860 F.2d 1012, 1015 (11th Cir. 1988). And in *Grizzle v. Kemp*, considering a suit against the Georgia Secretary of State, the court held *Ex parte Young* was satisfied because "his office imbues him with the responsibility to enforce the law or laws at issue in the suit." 634 F.3d 1314, 1319 (11th Cir. 2011).

If there is a single thread unifying these cases (apart from possibly the Eleventh Circuit), it is that they generally recognize the basic proposition that some "plus" factor beyond general enforcement authority is required to satisfy *Ex parte Young*—even as they struggle to define what "plus" factors suffice. That settled proposition resolves this case. Accordingly, this case is not a suitable vehicle for the Court to clarify *Ex parte Young*'s "connection" test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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