No. 19-1441

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF AUSTIN, TEXAS,

Petitioner,

vs.

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

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I.

The Parties Agree That The Court Needs To Provide Guidance On Application Of The *Young* Doctrine And That A Circuit Conflict Is Presented.

Ex parte Young goes hand-in-hand with the Court's longstanding atextual interpretation of the Eleventh Amendment.[1] The *Ex parte Young* doctrine is a necessary adjunct to the Court's Eleventh Amendment jurisprudence, providing a way to ensure that federal courts remain available forums for vindication of federal constitutional rights in the face of state infringements. The lower courts are in disarray about how to reconcile these two important components of the federal court system. The parties do not agree on much in this dispute but they are in agreement on this point: the lower courts need the Court's guidance on the *Young* doctrine's application.[2]

The Texas Attorney General also concedes, albeit in a single paragraph buried at the end of his response, that there is a direct conflict in the circuits about how the *Young* doctrine applies in the precise situation of this case. Resp. 24. In contrast to the Fifth Circuit, the Eleventh Circuit allows suits to proceed in federal courts against state officials based on those officials' *authority* to act in defense of, or to enforce, a state statute, even if the official

[1] "The text of the Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State." *Allen v. Cooper*, 140 S.Ct. 994, 1000 (2020).

[2] *See*, *e.g.*, Pet. 17 (no "consistent, coherent rule"); Pet. Supp. 3 n.1 (case example of problems caused by doctrine's "confused state"); Resp. 5 ("considerable confusion"), 10 ("no clear framework"). Beyond this point, the views of the City of Austin and the Texas Attorney General diverge significantly on how the doctrine should be tailored. But that is an issue for the merits if certiorari is granted and is not further addressed in this reply.

ha not taken steps to exercise that authority in the situation giving rise to the lawsuit. Austin's petition made the same point, adding three other circuits to the list of those in conflict with the Fifth Circuit's gloss on *Young*. *See* Pet. 20-22.

Thus, guidance is needed on an issue of fundamental importance to the federal courts, and the circuits are adrift—and split—on the issue. Further, Attorney General Paxton concedes that consideration of the question presented is not blocked by any procedural impediments. *Id.* 13. Granting the petition, then, seems well-warranted.

II.

This Case Is An Ideal Opportunity For The Court To Clarify The *Young* Doctrine On A Thus Far Unaddressed Point.

Nonetheless, Attorney General Paxton urges the Court not to provide the needed direction in this particular case, arguing that it presents "little opportunity" to clarify operation of the *Young* doctrine and could leave "more difficult questions" unresolved. *Id.* 5, 13. This argument is mistaken. To the suggestion that this is the wrong case because it cannot lead to a delineation of *Young*'s "outer bounds," Resp. 5, the obvious response is that no case can resolve *every* doctrinal question that may ever arise. But this one provides an ideal platform for the Court to clarify a major component of the *Young* doctrine, one that has gone unaddressed since the doctrine's inception: what connection with enforcement of a state statute suffices to take a state official outside the protection of Eleventh Amendment immunity?

At bottom, Attorney General Paxton's "right issue, wrong case" argument rests on a flawed understanding—or insufficient articulation—of two key aspects of this case: (a) the operative effect under Texas law on a local municipal ordinance of a preemptive state statute; and (b) the fact that the City is seeking declaratory, not injunctive, relief. Correcting for these mistakes, it becomes clear that this case presents the very issue lying at the heart of the present confusion about the *Young* doctrine in the lower courts.

A. Because Enactment Itself Voided Austin's Ordinance, Section 250.007(a) Does Not Require Any Separate Enforcement Action By A State Official.

The statute here is indisputably operative and has been since it took effect in 2015. It voids Austin's source-of-income ordinance. The statute is self-enforcing and, since it became law, has never needed action by any state official to make it operative or effective. The Texas Attorney General's characterization of Austin's declaratory judgment action to invalidate the statute as a "pre-enforcement challenge," Resp. 12, is wrong. It was a suit seeking relief from the statute's ongoing, self-operative enforcement.

Attorney General Paxton acknowledges his authority to act to ensure the challenged statute's continued viability. He is, in fact, the *only* state official in the executive branch with any authority concerning the statute. Such action by the Attorney General could take any one of several forms: suing Austin if the city chooses to act in blatant disregard of the statute by enforcing its ordinance; defending the statute's validity if it is judicially

challenged; or issuing a formal Attorney General opinion about the statute's operation. But the statute and its invalidation of Austin's local ordinance has a life of its own, independent of any formal actions such as these. And under the Texas Attorney General's theory of *Ex parte Young*'s connection requirement, as long as he silently watches the statute have its clearly and fully intended effect of voiding Austin's ordinance, Austin would be unable to seek federal court redress for the Supremacy Clause violation it discerns in the state statute. The question this raises is whether a strategically silent state official leaves Austin utterly stymied from seeking a federal judicial declaration about the statute's validity under federal law?[3]

The effect of Section 250.007(a)'s preemption of Austin's ordinance is to repeal the ordinance. Since enactment of Section 250.007(a), the city's ordinance has been void and unenforceable. *See* Pet. 7 (citing, *inter alia*, *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489 (Tex. 1993)). As long as Section 250.007(a) remains on the books, any effort by Austin to enforce its ordinance would be as a governmental scofflaw, deliberately violating state law. Attorney General Paxton nonetheless invites the city—if it perceives a viable basis and need for challenging Section

[3] This formulation conforms to the question presented by the city. *See* Pet. i. But the Texas Attorney General's *re*formulation, Resp. (I), does not. It omits an essential component of the question this case presents: the ongoing enforcement of the statute as against Austin. Implicit in the reformulation is that the challenged statute is inert, not really effective until the Attorney General takes some affirmative step towards its enforcement. But in Texas law, preemptive statutes such as Tex. Loc. Gov't Code § 205.007(a) are self-enforcing (or self-executing). Their impact is immediate and actual, unaffected by the Attorney General's inaction or silence. Section 250.007(a) is not, as the Attorney General paints it, a mere "effort" to preempt Austin's ordinance. Resp. 3. It actually does preempt it.

250.007(a)'s validity—to take that course, to deliberately violate clear state law, sue a local landlord for violating its preempted ordinance, and then argue federal preemption as a defense to the landlord's state preemption claim. Resp. 8-9.[4]

Even were this course of action—a local government suing to enforce a concededly invalidated local ordinance—otherwise appropriate, it would provide no solution to the *Ex parte Young* problem created by the Texas Attorney General's argument that he retains Eleventh Amendment immunity so long as he holds his tongue. The "test case" alternative dangled by the Attorney General would shunt Austin into the Texas court system, not federal court. *Ex parte Young*, though, protects access to *federal* courts. 17A Wright & Miller, FED. PRAC. & PROC. § 4231 (3d ed.) (*Young* "established the power of the federal courts to enforce the Constitution against state legislative and executive action").

Intended to debunk the city's point that the ruling below insulates the statute from federal court challenge as long as the state official is savvy enough to maintain silence, Attorney General Paxton's argument actually showcases the *Young* problem created by the ruling of the court below. It

[4] Besides putting the city in the position of deliberately flouting clear state law, such an effort also would expose it to paying the landlord's attorney fees. In *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586 (Tex. 2018), involving a much less clear-cut preemption question, the Supreme Court of Texas invalidated a local ordinance because a state statute preempted it. The decision affirmed the lower court's remand of a fee claim against the city to the district court. *Id*. at 598. This potentially large liability for the other side's fees refutes the Attorney General's argument—which it terms "highly significant"—that the city and its officials would not be confronted with "heavy penalties" if they chose to flaunt Section 250.007(a). Resp. 12.

would leave Austin and others faced with similar situations no federal court option.

A state statute is fully effective, doing the work it was designed to do by freezing enforcement of a local ordinance, but the adversely affected party is barred from taking a federal challenge into federal court because the only state official with any authority to ensure the statute's continued operation has taken no action. The consequence of the Fifth Circuit's adoption of this principle is that the federal courts are sealed off from a federal challenge by a party against whom the state statute is fully effective without any state official having to do anything at all.

This situation lies at the heart of the confused status of *Ex parte Young* in the lower courts. A state statute is being enforced against a party claiming it violates federal law. Is a state official's authority with respect to protecting the statute's viability, and hence its continued enforcement, a sufficient connection to the statute to trigger *Young*'s exception to Eleventh Amendment immunity? Answering the question in this case, and clarifying the *Young* doctrine, will assist the lower courts in virtually every conceivable iteration of federal suits raising federal claims against state officials.

B. The "Active Threat" Requirement Is Inapplicable To A Declaratory Judgment Action Challenging A Self-Enforcing Preemption Statute.

1. *Young*'s Connection Requirement For Declaratory Judgment Actions Differs From The Requirement For Actions Seeking Injunctive Relief.

The analysis of what constitutes a sufficient "connection" to enforcement that was used by the lower court and is proffered by the Texas Attorney General overlooks the importance of the type of relief the City seeks.[5] It sought declaratory, not injunctive, relief. The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, did not become law until 1934, a quarter of a century after the decision in *Ex parte Young*. The form of relief it made available was designed to relieve an adversely affected party from having to openly flout a statute considered to be constitutionally invalid. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also id.* at 480 (J. Rehnquist concurring) (declaratory judgment process is "alternative to pursuit of the arguably illegal activity").

An official's "connection" to a statute's enforcement is not the same in a declaratory judgment context as it is in the injunctive relief context. If injunctive relief is sought, then it matters not only that the statute is operating on the challenger but also *who* if anyone is affirmatively furthering such operation. If an injunction is warranted at all, it would need to run against the entity or official taking the affirmative steps to apply the statute to the challenger. If no such affirmative steps are being taken, then there is

[5] The lower court's mistaken analysis may have derived to some degree from its mistaken understanding that the city was seeking injunctive relief. *See* Pet. 8 n.8 (explaining mistake about relief being sought).

no one to enjoin—other than the state itself, which the Eleventh Amendment forbids.

But the declaratory judgment context is different, particularly in the face of the preemptive force of a statute such as Section 250.007(a). Even in the absence of active enforcement steps by a state official, enforcement is still happening—on the reasonable assumption that a local government will not simply disregard clear state law.

An injunction is neither needed nor sought by the city. Instead, coupling the Declaratory Judgment Act with *Young*, an adversely affected challenger of the statute may sue whichever state official has a connection with the statute's enforcement. Requiring an active threat from that official in order to avoid Eleventh Amendment immunity problems makes no sense if all that is sought is a declaration. In any commonsense understanding of the term "connection," the only state official with authority concerning the statute—here, the Texas Attorney General—has a connection to it. He can enforce and defend it as necessary. This is why the *Young* doctrine, viewed through the prism of the Declaratory Judgment Act, readily supports finding a connection to enforcement sufficient to avoid Eleventh Amendment immunity when a state official on stand-by alert to defend a self-enforcing statute is sued for a declaration of the statute's invalidity.

2. The "Active Threat" Component Of *Young*'s Connection Requirement Has Been Displaced By The Requirement That There Be An "Ongoing Violation."

Strands of the Court's *Ex parte Young* jurisprudence of recent years suggest a solution to the "connection" issue that simplifies the analysis for lower courts when the relief being sought is declaratory. In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Court explained that "[a]n allegation of *an ongoing violation of federal law* where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Id.* at 281 (emphasis added).[6] The Court repeated this formulation of the *Young* doctrine in a later opinion addressing whether the doctrine's application avoided an Eleventh Amendment bar. *See Verizon Md. Inc. v. Public Svc. Comm'n of Md.*, 535 U.S. 635, 645 (2002). To resolve the issue, the Court said, it needs to "only conduct" a simple two-part inquiry: (a) whether the lawsuit alleges an "ongoing violation of federal law;" and (b) whether it seeks prospective relief. *Id.*; *see also Va. Office of Protection and Advocacy v. Stewart*, 563 U.S. 247, 256 (2011) (same). None of these opinions discusses, or even mentions, the element of enforcement "connection."

What this authority suggests is that the "connection" element of *Young* has largely been subsumed into the "ongoing violation" factor, at least in the declaratory judgment context. If there is an ongoing violation—and here, the lower court properly found there was, App. 8a—then the pertinent question would be whether the sued state official has any authority with respect to the

[6] This part of the opinion authored by Justice Kennedy was for the Court.

violation, regardless of whether the authority has somehow been activated. The official's passivity, of the sort found dispositive by the court below, is displaced as a relevant consideration. The issue becomes whether the official has some authority, even if it is to some degree general, linked to the ongoing violation.

At a minimum, this case affords the Court the opportunity to explain whether the connection test has been displaced or modified by the two-part *Verizon* test or whether the connection test is an entirely separate inquiry—and if so, whether the type of relief being sought affects the analysis. The circumstances of this case give the Court full range to address this aspect of the *Ex parte Young* doctrine and, in doing so, resolve not only the issue presented in this case but also lift much of the uncertainty currently clouding the lower courts' application of the *Young* doctrine.

III.

Ex Parte Young Itself Supports Exercise Of Jurisdiction Over The City's Declaratory Judgment Action Against The Texas Attorney General.

Attorney General Paxton fails to grapple directly with the fact that the opinion in *Ex parte Young* itself rejects the pinched reading of the "connection" test by the court below. Instead, he just repeats the refrain that the opinion below was simply a "straightforward application" of that seminal decision. Resp. 5, 13. Even as a pre-Declaratory Judgment Act opinion, *Young* spoke directly to the circumstances in this case and explained that the

doctrine it established meant that, by the simple "virtue of [the] office," a state attorney general with "the right and power to enforce the statutes of the state" has a sufficient connection to enforcement "to make him a proper party" to a federal suit. *See* Pet. 15 (citing and quoting *Young* at 161).

This is a more "straightforward" reading of the opinion, reinforced by one of the principal authorities on which *Young* relied, *Reagan v. Farmers' Loan & T. Co.*, 154 U.S. 362 (1894). *See* 209 U.S. at 153. There, challengers to a state rate-setting statute sued, among others, a state attorney general. As far as the opinion reveals, the attorney general had not taken any affirmative action to enforce or threaten enforcement of the challenged statute, despite being charged with the duty to sue on behalf of the state to recover penalties under the law. *Reagan* held that the attorney general was a proper defendant unimpeded by the Eleventh Amendment.

The Texas Attorney General uses his overly-narrow reading of *Young* to support an argument that, however much the doctrine needs attention from the Court, this case is not the right one for the job. He says that, however difficult arriving at a "universal theory" of the connection test may prove to be, the lower court nonetheless reached the "correct result" in this case. Resp. 20. But it did not. The lower court's ruling clashes with *Young* itself, making it all the more important that the Court take this case and clear up the lower courts' misapprehensions about the way to reconcile access to federal courts for federal claims and the Eleventh Amendment.

Conclusion

This case is well-suited for a merits decision on the question presented in the petition for a writ of certiorari.

Respectfully submitted,

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