

No. _____

In The
Supreme Court of the United States

PHILIP C. JAMES, JOHN BALLANTYNE,
WILLIAM NOE,

Petitioners,

v.

GLENN ALLEN HEGAR, JR., in his individual and official capacities as Texas Comptroller of Public Accounts, and his official and custodial capacities as Chairman of the Texas Treasury Safekeeping Trust Company and administrator of Texas Unclaimed Property Funds; JOANI BISHOP, in her individual and official capacities as Director of Unclaimed Property Reporting and Compliance, Texas Comptroller of Public Accounts,

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

JONATHAN GREINER CHRISTOPHER ROSS GREINER & ASSOCIATES, PLLC 401 Austin Highway, Suite 110 San Antonio, Texas 78209 Telephone: (210) 824-5528 service@greinerattorneys.com	RICHARD M. PAUL III <i>Counsel of Record</i> LAURA C. FELLOWS DAVID W. BODENHEIMER PAUL LLP 601 Walnut Street, Suite 300 Kansas City, Missouri 64106 Telephone: (816) 984-8100 Rick@PaulLLP.com Laura@PaulLLP.com David@PaulLLP.com <i>Counsel for Petitioners</i>
---	---

QUESTIONS PRESENTED

1. Petitioners' assets were escheated to the State under the Texas Unclaimed Property Act and the State currently has physical possession of their property. Have Petitioners suffered an injury to confer standing to challenge Respondents' ongoing administration of Texas' Unclaimed Property Act?
2. Petitioners challenged the constitutionality of Texas' Unclaimed Property Act and Respondents' enforcement thereof. As property owners and Texas citizens whose private property is currently in Texas' bank account, have Petitioners alleged an ongoing violation of federal law for purposes of *Ex parte Young* or must Petitioners also demonstrate additional takings of their property are imminent or certainly impending?

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs-Appellees below) are Philip C. James, John Ballantyne, and William Noe.

Respondents (Defendants-Appellants below) are Glenn Allen Hegar Jr., individually and in his official capacities as Chairman of the Texas Treasury Safe-keeping Trust Company and administrator of Texas Unclaimed Property Funds, and Joani Bishop, individually and in her official capacities as Director of Unclaimed Property Reporting and Compliance, Texas Comptroller of Public Accounts.

RELATED CASES

James v. Hegar, No. 22-cv-00051, U.S. District Court for the Western District of Texas. Interlocutory appeal taken from Order entered September 6, 2022.

James v. Hegar, No. 22-50828, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 20, 2023.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
RELATED CASES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW.....	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED....	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	3
SUMMARY OF THE ARGUMENT	7
REASONS FOR GRANTING THE PETITION....	9
I. The Fifth Circuit's Ruling Improperly Allows Unclaimed Property Laws to Evade Constitutional Scrutiny by Holding Property Owners Lack Standing to Challenge the Ongoing Administration of the UPA Despite the State Still Holding Their Property	9
II. To Ensure a Federal Forum is Available to Challenge States' Administration of Unconstitutional Statutes, the Court Should Clarify the Relationship Between Standing and <i>Ex parte Young</i> 's Ongoing Violation Pleading Requirements in the Context of a Takings Without Due Process	14
CONCLUSION.....	17

TABLE OF CONTENTS—Continued

	Page
APPENDIX	
Opinion of the United States Court of Appeals for the Fifth Circuit, filed November 16, 2023.....	App. 1
Order of the United States District Court, Western District of Texas, filed September 6, 2022	App. 18
Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Re- hearing En Banc, filed December 12, 2023	App. 50
Relevant provisions of the Texas Unclaimed Property Act and the Texas Local Government Code	App. 53

TABLE OF AUTHORITIES

	Page
CASES	
<i>Albert v. Franchot</i> , No. 1:22-CV-01558 (D. Md.).....	5
<i>Armstrong v. Davis</i> , 275 F.3d 849 (9th Cir. 2001)	11
<i>Arnett v. Strayhorn</i> , 515 F. Supp. 2d 690 (W.D. Tex. 2006), <i>aff'd sub nom. Arnett v. Combs</i> , 508 F.3d 1134 (5th Cir. 2007).....	12, 13
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983) ...	9, 10, 11
<i>Clapper v. Amnesty Intern. USA</i> , 568 U.S. 398 (2013).....	12
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	7
<i>Garza v. Woods</i> , No. CV-22-01310 (D. Ariz.).....	4
<i>Green v. Mansour</i> , 474 U.S. 64 (1985)	14
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S. 261 (1997).....	15
<i>James v. Hegar</i> , 2022 WL 21756145 (W.D. Tex. Sept. 22, 2022).....	1
<i>James v. Hegar</i> , No. 22-50828, slip op. (5th Cir. Dec. 12, 2023)	1
<i>Jones v. Flowers</i> , 547 U.S. 220 (2006).....	7
<i>Knellinger v. Young</i> , No. 1:22-CV-01379-CNS-MDB (D. Colo.)	4
<i>Knellinger v. Young</i> , 2023 WL 120976 (D. Colo. Jan. 6, 2023)	12, 13
<i>Kolton v. Frerichs</i> , No. 1:16-CV-03792 (N.D. Ill.)	4
<i>Light v. Davis</i> , No. 22-611-CJB (D. Del.).....	4

TABLE OF AUTHORITIES—Continued

	Page
<i>Mousseau v. Crum</i> , No. 3:23-CV-00075 (D. Ala.).....	5
<i>Pennhurst St. Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984)	15
<i>Raymond v. Conine</i> , No. 2:23-CV-01195 (D. Nev.)	5
<i>Salvato v. Harris</i> , No. 21-12706 (D.N.J.)	4
<i>Suever v. Connell</i> , 439 F.3d 1142 (9th Cir. 2006)...	8, 15, 16
<i>Taylor v. Westly</i> , 402 F.3d 924 (9th Cir. 2005)	4
<i>Taylor v. Westly</i> , 488 F.3d 1197 (9th Cir. 2007) ..	4, 8, 11, 12
<i>Taylor v. Westly</i> , 525 F.3d 1288 (9th Cir. 2008)	4
<i>Taylor v. Yee</i> , 577 U.S. 1178 (2016)	4, 5, 7
<i>Taylor v. Yee</i> , 780 F.3d 928 (9th Cir. 2015)	4
<i>Verizon Maryland, Inc. v. Pub. Serv. Com'n of Maryland</i> , 535 U.S. 635 (2002)	14, 15
CONSTITUTIONAL PROVISIONS	
U.S. Const. Amend. V	2
U.S. Const. Amend. XIV	2
STATUTES AND RULES	
28 U.S.C. § 1254(1).....	1
Fed. R. Civ. P. 12(b)(1).....	1
Tex. Loc. Gov't Code § 381.004	3
Tex. Prop. Code § 72.101.....	5
Tex. Prop. Code § 74.201.....	4, 5

TABLE OF AUTHORITIES—Continued

	Page
Tex. Prop. Code § 74.301.....	5
Tex. Prop. Code § 74.304.....	5
Tex. Prop. Code § 74.602.....	4
Tex. Prop. Code § 74.603.....	4
Tex. Prop. Code § 74.702.....	4, 5

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is published at 86 F.4th 1076 (5th Cir. 2023) and reprinted in the Appendix, App. 1-17. The Order of the United States District Court for the Western District of Texas granting in part and denying in part Respondents' motion to dismiss, *James v. Hegar*, 2022 WL 21756145 (W.D. Tex. Sept. 22, 2022), is reprinted in the Appendix, App. 18-49. The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing *en banc*, *James v. Hegar*, No. 22-50828, slip op. (5th Cir. Dec. 12, 2023), is reprinted in the Appendix, App. 50-52.

JURISDICTIONAL STATEMENT

On November 16, 2023, a panel of the United States Court of Appeals for the Fifth Circuit issued its decision reversing an order of the United States District Court for the Western District of Texas that denied, in part, Respondents' motion to dismiss under Fed. R. Civ. P. 12(b)(1) asserting sovereign immunity. Respondents filed an interlocutory appeal on September 14, 2022, and on December 12, 2023, the United States Court of Appeals for the Fifth Circuit denied Petitioners' timely petition for rehearing *en banc*.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Relevant portions of Texas' Unclaimed Property Act, Tex. Prop. Code §§ 71.001, *et seq.*, as well as the relevant provision from Texas' Local Government Code, Tex. Loc. Gov't Code § 381.004, are reprinted in the Appendix. App. 53-64.

STATEMENT OF THE CASE

The Texas Unclaimed Property Act (“UPA”) ostensibly exists to hold private property for safekeeping with the goal of reuniting citizens, whose whereabouts are unknown, with their lost and forgotten property. Pet. Resp. to Motion to Dismiss at 5.¹ Texas, like almost every other state in this country, is using its unclaimed property statute to take billions of dollars of citizens’ private property without prior notice—even when the State knows precisely where to find the owner of that property. Pet. Compl. at 7. As just one example, the State of Texas still holds a \$2,525 check payable to “Attorney General of Texas Greg Abbott.” Pet. Resp. to Motion to Dismiss at 5.

At the time Petitioners filed their complaint in 2022, Texas had amassed over \$6 billion in unclaimed property. Pet. Compl. at 7. Now, instead of serving a public good by seeking to reunite citizens with their property, the State uses the UPA as a substitute

¹ Pin citations to documents from the record below refer to the pagination applied by the Court, not the pagination applied by the filer’s word processing software.

revenue source that is subject to appropriation by the legislature. Pet. Compl. at 8-11; Tex. Prop. Code §§ 74.602, 74.603.

The State's pervasive use of the UPA as a revenue source has been accentuated by continuously shortening the requisite presumptive abandonment periods, hiring third-party auditors to identify additional "unclaimed" property, and reliance on archaic publication notice. Pet. Compl. at 11-13, 15; Tex. Prop. Code §§ 74.201, 74.702. By making it easier to escheat property and by providing less and less due process, Texas has stockpiled billions of dollars of citizens' private property. *See* Pet. Compl. at 7-11. The massive influx and retention of private property empirically demonstrates Texas' lack of desire to fulfill the UPA's original goal: reunite citizens with their property. *See id.*

The current state of unclaimed property statutes in this country implicates important constitutional issues, *Taylor v. Yee*, 577 U.S. 1178, 1178 (2016) (Alito, J., concurring in denial of certiorari), and in the wake of the *Taylor v. Yee* progeny,² there have been numerous challenges to the constitutionality of state unclaimed property laws across the country, including this one.³

² *See Taylor v. Yee*, 780 F.3d 928 (9th Cir. 2015); *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005); *Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007); *Taylor v. Westly*, 525 F.3d 1288 (9th Cir. 2008).

³ *See, e.g., Salvato v. Harris*, No. 21-12706 (D.N.J.); *Knellinger v. Young*, No. 1:22-CV-01379-CNS-MDB (D. Colo.); *Light v. Davis*, No. 22-611-CJB (D. Del.); *Kolton v. Frerichs*, No. 1:16-CV-03792 (N.D. Ill.); *Garza v. Woods*, No. CV-22-01310 (D. Ariz.);

The UPA’s current iteration is a simple and effective revenue source for Texas. Third-party holders, oftentimes financial institutions, are required to annually report and transfer all property in their possession that has met the presumptive abandonment period, generally three years, to Respondents for deposit in Texas’ accounts. Tex. Prop. Code §§ 72.101, 74.301, 74.304. One year later, and only if the property is valued at more than \$100, Respondents “may use one or more methods as necessary to provide the most efficient and effective notice” to property owners. *Id.* at §§ 72.201, 72.202. Respondents’ only notice obligation is discretionary; if exercised, Respondents must publish a notice in the county of either the property owner or the holder. *Id.* at § 74.201. While unclaimed property acts have their idiosyncrasies, a common theme is the lack of prior notice and after-the-fact publication notice. *See Taylor v. Yee*, 577 U.S. at 1178 (“As advances in technology make it easier and easier to identify and locate property owners, many States appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property.”).

Unless and until a property owner discovers their property and proves ownership to Respondents’ liking, Texas has free range to invest or spend the private property. *See Tex. Prop. Code § 74.602*; *Tex. Loc. Gov’t Code § 381.004*. Nothing in the UPA burdens

Raymond v. Conine, No. 2:23-CV-01195 (D. Nev.); *Mousseau v. Crum*, No. 3:23-CV-00075 (D. Ala.); *Albert v. Franchot*, No. 1:22-CV-01558 (D. Md.).

Respondents with any obligation to affirmatively try to reunite property owners with their private property, nor do they have any incentive to do so. *See Pet. Compl.* at 8-11.

Petitioners are three longtime Texas residents whose assets were escheated to the State under the UPA despite not meeting the threshold requirements for escheatment; Petitioners neither abandoned nor lost their property, and as longtime Texas citizens, Petitioners whereabouts were never “unknown.” *Pet. Compl.* at 4-6; *see also Tex. Prop. Code § 72.101.* Petitioners’ property remains in Texas’ coffers, subject to appropriation and government expenditures. *Pet. Compl.* at 4-6. Petitioners never received any notice from the holders, Respondents, or anyone else before their property was taken; the only notice provided was an after-the-fact, vague publication on the UPA website. *Id.*

Petitioners allege systemic and ongoing violations of their constitutional rights by the State through Respondents administration of the UPA. After the Western District of Texas allowed Petitioners to proceed on their claims for prospective relief against Respondents, in their official capacities, App. 44-45, Respondents filed an interlocutory appeal on September 14, 2022. The United States Court of Appeals for the Fifth Circuit reversed, concluding: (1) Petitioners lacked standing to seek prospective relief, and (2) sovereign immunity barred their claims because they failed to allege ongoing violations of federal law. App. 16-17.

Petitioners' timely petition for rehearing *en banc* was denied on December 12, 2023. App. 51.

SUMMARY OF THE ARGUMENT

States must “return property when its owners can be located. To do that, States must employ notification procedures designed to provide the pre-escheat notice the Constitution requires.” *See Taylor v. Yee*, 577 U.S. at 1178; *see also Jones v. Flowers*, 547 U.S. 220, 226 (2006). Here, the State takes private property but does not provide pre-escheat notice. Instead, State officials physically take private property while relying solely on archaic and hollow post-deprivation notice procedures. According to the Fifth Circuit, citizens whose property is escheated without notice and whose property it still holds lack standing to challenge the constitutionality of the UPA.

Certiorari is necessary because this case involves an important issue of constitutional law involving the property rights of millions of people in Texas and throughout the United States. Every year, millions of pieces of property are seized without notice and billions of dollars are added to the State’s coffers. The State’s UPA is facially unconstitutional and is being unconstitutionally enforced; the State’s actions will continue unabated unless this Court clarifies its rulings on standing and invoking *Ex parte Young*, 209 U.S. 123 (1908) so that the UPA faces constitutional scrutiny. Moreover, the holding here will impact

unclaimed property laws nationwide due to the largely uniform nature of these state statutes.

To be sure, unclaimed property laws were designed for a noble purpose. That purpose has been lost; replaced with an ignoble purpose of taking billions of dollars out of the hands of citizens (and out of the economy) and placing it in State coffers to falsely inflate the State’s balance sheet with assets that do not belong to it. All of this is done despite the relative ease of identifying property owners in a digital age who have so many “touch points” with the State (e.g., driving records, tax records, voting records, and licensing records).

Certiorari is also needed to remedy these ongoing, unchecked constitutional violations and resolve the Circuit split with the Ninth Circuit created by the Fifth Circuit’s decision regarding the proper standards for demonstrating standing to seek relief where the State still physically holds property, standing to seek prospective relief against the ongoing enforcement of a state statute, and to sufficiently allege an ongoing violation of law for purposes of *Ex parte Young*. See *Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007) (standing); *Suever v. Connell*, 439 F.3d 1142 (9th Cir. 2006) (*Ex parte Young*). The plethora of challenges to State unclaimed property statutes across the country amplifies the necessity of review to ensure proper application of rules and consistent rulings.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit’s Ruling Improperly Allows Unclaimed Property Laws to Evade Constitutional Scrutiny by Holding Property Owners Lack Standing to Challenge the Ongoing Administration of the UPA Despite the State Still Holding Their Property.

Four decades ago, this Court analyzed a citizen’s standing to obtain prospective relief to prevent law enforcement’s use of chokeholds under circumstances that did not threaten death or serious bodily harm. *City of Los Angeles v. Lyons*, 461 U.S. 95, 99-100 (1983). This Court determined Mr. Lyons lacked standing for his equitable claims because he was unable to plausibly allege a realistic threat of being placed in an illegal chokehold again in the future. *Id.* at 106. To have standing, Mr. Lyons would need to allege he would have another encounter with the police, and also assert either, “(1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questions, or (2) that the City ordered or authorized police officers to act in such manner.” *Id.* at 105-06 (emphasis in original). In the context of that case, this Court found Mr. Lyons lacked standing because he could not demonstrate “why [he] might be realistically threatened by police officers who acted within the strictures of the City’s policy.” *Id.* at 106.

The pleading standard that arose from *Lyons* is that to obtain prospective injunctive or declaratory

relief, the plaintiff's injury must be either continuing or sufficiently threatened. *Id.* at 102-04 (emphasis added).

Relying on *Lyons*, the Fifth Circuit below held Petitioners lacked standing to challenge the constitutionality of the UPA because they failed to plausibly allege that additional takings of their property were imminent or certainly impending. App. 12. According to the Fifth Circuit's analysis, Petitioners are similarly situated to the *Lyons* plaintiff: just as Mr. Lyons was unable to demonstrate he would again be placed in an illegal chokehold, Petitioners are likewise unable to demonstrate they will again have their private property taken without due process. App. 10-13.

In rejecting the existence of an impending future injury, the Fifth Circuit seemingly denied that the State's present possession of Petitioners' property is a taking for Fifth Amendment purposes, and thus an existing harm. App. 12. While the factual analogy to *Lyons* is admittedly poor, the legal analogy holds: Petitioners are not merely seeking protection against future "chokeholds" by the State; Petitioners seek relief from the "chokehold" the State currently has them in. Because the State still has their property, Petitioners' injury continues and will continue until their property is returned. Respondents' arguments below that there is a different process to get their money back is no more a legitimate answer than suggesting that a suspect in a police chokehold is stronger than the officer and able to get out of it.

While Petitioners here claim a present harm to satisfy the *Lyons* standard, the Ninth Circuit, contrary to the Fifth Circuit, has recognized that both the prevalence of property escheatment and the need to monitor the unclaimed property websites to determine if your property has been taken without notice constitutes harm sufficient to convey standing. Specifically, the Ninth Circuit held property owners had standing to seek injunctive relief against the enforcement of California's unclaimed property laws because "the defendant had, at the time of the injury, a written policy, and that injury 'stems from' that policy. *Taylor v. Westly*, 488 F.3d at 1199 (quoting *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001)).

Here, pursuant to the UPA, Texas' written policy, Petitioners' private property was escheated on more than one occasion and is still being held by Texas. Without prior notice, Petitioners are never afforded the opportunity to know or even protect against impending or imminent takings of their private property. Rather, Respondents' ongoing administration of the UPA requires Petitioners to continuously spend time and resources monitoring and/or churning their property, as well as scrolling through vague publications on the UPA website with the hopes of learning of additional takings after-the-fact.

Further, the Ninth Circuit, citing *Lyons*, rejected the argument that the property owners' injuries were too remote to confer standing, instead recognizing the costs and time associated with constantly monitoring and churning one's property and scouring the

unclaimed property website to avoid and/or learn of future takings were continuing injuries for purposes of standing to obtain prospective relief. *Taylor v. Westly*, 488 F.3d at 1199-1200. As previously recognized by this Court, standing may be “based on a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.” *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013) (citation omitted). According to the Fifth Circuit, however, the allocation of time and resources to hopefully prevent and/or learn of takings is a self-inflicted harm based on an imaginary future injury. App. 12. Thus, the Circuits disagree.

Poignantly, this is the second time the Fifth Circuit has incorrectly applied *Lyons* to conclude a property owner lacked standing to challenge the constitutionality of the UPA. See *Arnett v. Strayhorn*, 515 F. Supp. 2d 690 (W.D. Tex. 2006), *aff’d sub nom. Arnett v. Combs*, 508 F.3d 1134 (5th Cir. 2007). In *Arnett*, the Fifth Circuit affirmed the decision for the reasons stated in the district court’s opinion, which included the determination that the plaintiff lacked standing to seek prospective relief because he “[did] not, nor [did] the Court reasonably believe he [could], contend he [would] be likely to have property subject to the Texas Unclaimed Property Law in the future.” App. 11-12 (alterations in original).

Moreover, the District of Colorado reached a similar conclusion with respect to property owners’ challenges to Colorado’s unclaimed property act. *Knellinger v. Young*, 2023 WL 120976, at *6 (D. Colo. Jan. 6,

2023) (“Plaintiffs have only alleged hypothetical harm rather than pleading that they have suffered an actual injury in fact that is concrete, particularized, actual, and/or imminent.”). The standing issue raised in *Knellinger* is currently pending before the United States Court of Appeals for the Tenth Circuit. *Knellinger v. Young*, No. 23-1018 (10th Cir.).

Taking the Fifth Circuit’s conclusion at face value, specifically, that Petitioners failed to bring a facial as opposed to an as-applied challenge to the UPA, does not impact the result. App. 15. Notably, the *Arnett* plaintiffs’ constitutional challenge was construed as a facial challenge against the UPA, and the Fifth Circuit still affirmed their lack of standing. Accordingly, whether Petitioners’ complaint is characterized as a facial versus as-applied challenge is evidently immaterial to the Fifth Circuit’s analysis.

Respondents’ enforcement of the UPA raises important constitutional issues concerning the balance between the rights afforded by the Fifth and Fourteenth Amendments and a State’s authority to take private property. Without standing, these important constitutional issues evade review, and the administration of the UPA will continue in perpetuity. Although Petitioners and property owners may seek a return of their property, the Fifth Circuit’s decision renders Petitioners and property owners powerless to protect against continuous and inevitable future injuries caused by the ongoing enforcement of the UPA. Clarification from this Court is necessary.

II. To Ensure a Federal Forum is Available to Challenge States' Administration of Unconstitutional Statutes, the Court Should Clarify the Relationship Between Standing and *Ex parte Young*'s Ongoing Violation Pleading Requirements in the Context of a Takings Without Due Process.

The *Ex parte Young* doctrine is a necessary exception to states' sovereign immunity that allows federal courts to vindicate federal rights and hold state officials accountable to the supremacy of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985). While addressed separately, the Fifth Circuit's standing analysis informed its determination that the *Ex parte Young* exception to sovereign immunity did not apply here. App. 13-14. Accordingly, this Court should also review the requisite pleading standard required to demonstrate an ongoing violation of law in the context of *Ex parte Young* and injuries arising from the ongoing administration of state statutes.

To determine whether *Ex parte Young* applies, the court conducts a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Com'n of Maryland*, 535 U.S. 635, 645 (2002) (alteration in original & citation omitted). The suit must also name the state official in their official capacity. *Id.* 645-46. The merits of the claim are irrelevant to this inquiry. *Id.* at 646.

The Fifth Circuit held sovereign immunity barred Petitioners' claims for prospective relief because Petitioners failed to sufficiently allege an ongoing violation of federal law. App. 13-14, 16. In doing so, the Fifth Circuit was guilty of the same misguided jurisprudence on takings claims that it demonstrated in finding Petitioners lacked standing to sue.

Ex parte Young requires only an allegation of ongoing harm. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). The "straightforward inquiry" is satisfied by a prayer for relief requesting "state officials be restrained from enforcing an order in contravention of controlling federal law." *Verizon Maryland, Inc.*, 535 U.S. at 645. This Court has clarified that "*Ex parte Young* applie[s] to all allegations challenging the constitutionality of official action, regardless of whether the state statute under which the officials purported to act was constitutional or unconstitutional." *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 118 (1984) (citation omitted).

Applying these rules, the Ninth Circuit held that similar allegations satisfied the *Ex parte Young* exception to sovereign immunity and permitted property owners' prospective relief claims against California's unclaimed property act to proceed. *Suever*, 439 F.3d at 1148. Specifically, allegations including "the Controller's practices of publishing constitutionally inadequate notice for property to be escheated, seizing assets that are ineligible for escheat, and misplacing escheated property . . ." were sufficient allegations of an ongoing violation of federal law. *Id.* at 1148.

Petitioners' allegations here mirror the allegations in *Suever*, *see, e.g.*, Pet. Compl. at 4-6, 15, 17, but the Fifth Circuit held them insufficient, in part, based on Petitioners' inability to know when the next taking of their property would occur. App. 13-14. The overlapping relationship between standing to obtain prospective relief and alleging an ongoing violation of law for purposes of *Ex parte Young* further warrants clarification from this Court. Just as a property owner is unable to determine when the next taking of his/her property will occur, because of the lack of notice provided, the constitutionally deficient notice also inhibits his/her ability to demonstrate that the administration of the statute is ongoing according to the Fifth Circuit. Thus, like the issue of standing, Petitioners' claims and allegations should satisfy the *Ex parte Young* exception to sovereign immunity if filed in Ninth Circuit jurisdictions, but not if they were filed in Fifth Circuit jurisdictions. *See Suever*, 439 F.3d at 1148.

The Fifth Circuit's analysis severely limits federal courts' ability to preclude the administration of an unconstitutional state statute, or the state statute being administered in an unconstitutional manner, and departs from this Court's and other Circuits' traditional, straight-forward inquiry. The plethora of challenges currently being brought against States' unclaimed property statutes heightens the necessity of clarification with respect to *Ex parte Young*.

CONCLUSION

If the UPA is ever subjected to constitutional scrutiny, it will not pass muster. It is seemingly being protected from scrutiny in that the Fifth Circuit's ruling suggests it can never be subject to constitutional review. Important constitutional principles of the rights attendant to property ownership, the government's power to take that property, and the due process necessary to do so, are at stake and need clarification. For all the reasons discussed herein, this Court should accept review to clarify the requirements for standing and to invoke *Ex parte Young*.

Dated: March 11, 2024 Respectfully submitted,

JONATHAN GREINER	RICHARD M. PAUL III
CHRISTOPHER ROSS	<i>Counsel of Record</i>
GREINER & ASSOCIATES, PLLC	LAURA C. FELLOWS
401 Austin Highway, Suite 110	DAVID W. BODENHEIMER
San Antonio, Texas 78209	PAUL LLP
Telephone: (210) 824-5528	601 Walnut Street, Suite 300
service@greinerattorneys.com	Kansas City, Missouri 64106
	Telephone: (816) 984-8100
	Rick@PaulLLP.com
	Laura@PaulLLP.com
	David@PaulLLP.com
	<i>Counsel for Petitioners</i>