

No.

In the Supreme Court of the United States

ALBERT F. CATANACH,

Petitioner,

v.

DAVID K. THOMSON, JUDGE, FIRST JUDICIAL DISTRICT COURT
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *Ex Parte v. Young* Prospective Relief doctrine allows for Federal Jurisdiction when state actors are continually violating federal law. A suit under this doctrine is applicable when the state official being sued is violating federal law on an ongoing basis and the official is being sued in his or her official capacity.

The question presented is whether a state Judge can be granted an individual judicial immunity claim under the umbrella of the 1996 Federal Court Improvement Act when sued in his official capacity for an ongoing violation of federal law.

PARTIES TO THE PROCEEDINGS

Petitioner is Albert F. Catanach, President of CNSP, Inc., dba NMSURF and CW3, Retired Military Officer, US Army.

Respondents are The State of New Mexico, First Judicial District Court, Judge David Thomson in his official capacity.

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Albert Catanach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Order and Judgment of the Court of Appeals for the Tenth Circuit, issued on November 20, 2017, is unreported (App. 1-10). The Order of the District Court for the District of New Mexico, issued on June 1, 2017, is unreported (App. 12-20). The Tenth Circuit Court of Appeals denied the Petition for Rehearing and Petition for Rehearing En Banc on December 13, 2017. (App. 21-22).

JURISDICTION

The judgment of the court of appeals was entered on November 20th, 2017 and the re-hearing petition was denied on December 13th, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. The facts of this case are not in dispute. Petitioner Catanach owns and operates: CNSP, Inc., dba NMSURF founded by Albert Catanach in 1997. Catanach's company has evolved from a small dialup ("ISP") company to a ("WISP") with customers in New Mexico. Catanach's main location is in Santa Fe, New Mexico.

Catanach applied to the City of Santa Fe on April 9th, 2015 to consolidate two rooftop towers to one Tower 30 feet to the south of his facility under Section

6409a of The Spectrum Act.¹ The City failed to either deny or grant the request in writing², so Catanach, in writing, notified the City of his “deemed grant”³ federal right on April 28th, 2016. Catanach then waited 30 days before beginning his modifications as required by the FCC order.⁴ Catanach then began his modifications in June of 2016. On July 14th, 2016, The City sued Catanach in The New Mexico State First Judicial District Court for a violation of a city ordinance.⁵ On July 15th, 2016, Catanach removed the case to the US District Court for New Mexico because he was being sued due to a Federal Law that he invoked. The Court concluded that because the City did not file suit claiming a federal law, the Court remanded the case back to the state court. On October 26th, 2016 the state court granted a preliminary injunction against Catanach for not obtaining a city permit for the modifications. The order enjoined Catanach from continuing his modifications but didn’t

¹ 47 U.S.C. § 1455(a), 47 C.F.R. § 1.40001, FCC Order 14-153

² 47 C.F.R. § 1.40001(c)(2). The City admits that they didn’t approve or deny the permit application in their prayer for relief in the state complaint.

³ 47 C.F.R. § 1.40001(c)(4)

⁴ FCC Order 14-153, para 236. The City is barred from suing in any court if they don’t sue within 30 days. They sued 76 days after the “deemed grant” was issued thereby violating the act.

⁵ The City Sued 46 days past the Federal Statute of Limitations, an ongoing violation of Federal Law. FCC Order 14-153, Para 236

require him to reverse any work completed.⁶ The state court released a scheduling order setting a bench trial for April of 2017. On November of 2016, Catanach moved to stay the injunction, moved for an expedited review, moved for summary judgment, moved for recusal, and moved for a jury trial.⁷ The state court denied all motions without an analysis but granted the jury trial motion and set a trial date for October of 2018.⁸ On April 7th, 2017, Catanach filed suit in the US District Court for New Mexico under **47 U.S.C. § 1455(a) (Section 6409a)** of The Spectrum/Telecommunications Act and 42 U.S.C. § 1983 for declaratory and injunctive relief against the state court order for an ongoing violation of Federal law. Concurrently, Catanach filed a Motion for a TRO, Preliminary Injunction, and Permanent Injunction requesting the court enjoin the state court officials and Thomson in his **official-capacity** for a 1983 and **Section 6409a violation** of Catanach's "**deemed grant**" federal right, an **ongoing violation of Federal Law**. On April 12th, 2017, the federal court denied Catanach's Motion for a TRO, but didn't decide on the Preliminary Injunction. Catanach moved for reconsideration of the TRO and the federal court again stated that Catanach wasn't entitled to prospective

⁶ Catanach completed the consolidated tower and replaced six antennas from the original rooftop tower to the ground consolidated tower. Catanach or **his employees cannot finish the remainder of the consolidations.**

⁷ Catanach's Motions were based on Federal Law.

⁸ After the filing of the 10th circuit appeal, the State Court changed the trial date to July 2018.

injunctive relief for a state order that violates federal law. The lower court in its order dated April 17th, 2017 incorrectly concluded that Catanach was asking for retrospective damages and wished the court to rule Thomson erred, however Catanach's complaint was for prospective injunctive relief for an ongoing violation of federal law⁹ because if Catanach continues with his federal "deemed grant" right granted to him under the Spectrum Act (Section 6409a/47 U.S.C. § 1455(a), 47 C.F.R. § 1.40001, FCC Order 14-153), he faces massive fines and jail time due to the state court preliminary injunction. Catanach followed the Federal Law, but due to the State Injunction, he is unable to finish consolidating antennas on his towers, putting his operations at his main facility in limbo due to the state injunction which is an ongoing violation of the Spectrum Act / 1996 Telecom Act. On November 20th, 2017, the 10th Circuit Court of Appeals agreed that the state court's injunction is an ongoing violation of federal law; however, it affirmed the district courts dismissal for a different reason. The court of appeals granted the dismissal based on the Federal Courts Improvement Act of 1996, which provides that injunctive relief against a judicial officer shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. Catanach then filed for a re-hearing because while his 1983 complaint was not on-going, his Section 6409a complaint under the telecommunications act is ongoing and Judge Thomson

⁹ The Federal Law being violated is 47 U.S.C. § 1455(a), Section 6409a of The Spectrum Act which is codified into the 1996 Telecommunications Act. Catanach didn't ask for damages which would imply retrospective relief.

was sued in his official capacity. The circuit court denied a re-hearing request on December 13th, 2017.

REASONS FOR GRANTING THE PETITION

The 10th circuit courts decision presents conflicting decisions within the courts. On one hand the court has consistently granted declaratory and injunctive relief for on-going violations of federal law under the *Ex Parte Young* doctrine involving state actors; however, in other cases where a judge is listed in the suit, it has not allowed for this doctrine and based its decision on the 1996 Federal Improvement Act. This is a conflict because if a Judge is sued in his or her official capacity, it is not a suit against the individual Judge but against the state, so the individual immunity as recognized in the 1996 Federal Courts Improvement Act should not be available in official capacity suits because judicial immunity is an individual immunity. This Court has not decided if Judges sued in their official capacity are entitled to an individual immunity claim under the 1996 Federal Improvement Act.

The question presented is one of exceptional importance, as the court of appeals decision conflicts with other decisions in its own circuit and other circuits and it conflicts with this courts understanding of official and individual immunity claims. In *Crowe & Dunlevy, PC v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the court stated that Judge Stidham was not entitled to judicial immunity because he was sued in his official capacity. In *Opala v. Watt*, 454 F.3d 1154 (10th Cir. 2006), where many Judges were sued the court allowed for the suit because they were all sued in their official capacities. The court further stated that a four part test is required under the *Ex Parte Young*

doctrine. In the 6th circuit case *Alkire v. Irving*, 330 F.3d 802 (6th Cir. 2003), the court stated that when a judge is sued only in his official capacity, individual immunities such as judicial and qualified immunity cannot be claimed. In the 5th circuit court of appeals at *Davis v. Tarrant County, Tex.*, 565 F.3d 214 (5th Cir. 2009), the court stated that a claim for prospective declaratory relief against Judges in their official capacities is not barred by the Eleventh Amendment. In this court, at *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 US 635 (2002), it granted declaratory and injunctive relief under the *Ex Parte Young* doctrine against state commissioners for ongoing violations of federal law. The conflict arises in this case and other cases. In this case, Catanach sued Judge Thomson in his official capacity only, but the 10th circuit based its dismissal affirmation on the 1996 Federal Court Improvement Act codified at 42 U.S.C. § 1983. The court utilized *Swain v. Seaman*, 505 F. App'x 773, 775 (10th Cir. 2012) (unpublished) and stated ("To be sure, Mr. Swain does mention (correctly) that courts generally recognize an exception to Eleventh Amendment immunity for plaintiffs seeking prospective relief from state officials. But Mr. Swain forgets that Congress expressly disallowed injunctive relief against judicial officers unless a declaratory decree was violated or declaratory relief was unavailable.") The court of appeals here is stating that although there is an exception to Eleventh Amendment immunity, this exception does not apply to judicial officers unless a decree was violated or relief was unavailable. The *Swain* case is distinguishable because Swain sued state judges and other individuals in both their individual and official capacities. This case involves only an official capacity claim and also

under a Section 6409a of the Telecommunications Act. Further the 10th circuit recognized that Thomson was only sued in his official capacity but still based it's ruling on an individual claim. The court of appeals in some cases is stating that official capacity claims involving judges does not apply, but in other cases it does. This Court has defined individual and official capacity claims in *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). It is *not* a suit against the official personally, for the real party in interest is the entity.")

A. The *Ex Parte v. Young* Doctrine Allows for Declaratory and Injunctive Relief when State Judges and other State officials are Sued in their Official Capacities

The question here is, is Petitioner entitled to prospective injunctive and declaratory relief from a state order preventing Catanach to continue his Federal rights, i.e. the "deemed grant" federal right of Section 6409a of the Spectrum Act? Catanach in his amended complaint sued Thomson in his official-capacity for 42 U.S.C. § 1983 violations and 47 U.S.C. § 1455(a)(Section 6409a); however, in Catanach's 10th circuit appeal brief, he concentrated on his prospective relief claim under 47 U.S.C. § 1455(a)(Section 6409a) of the Spectrum Act/Telecommunications Act, 47 C.F.R.

§ 1.40001, and FCC-Order 14-153.¹⁰ Consequently, the District Court dismissed all of Catanach's 42 U.S.C. § 1983 claims on the basis of Judicial-Immunity¹¹ and the 10th circuit panel affirmed. The district court dismissed Catanach's prospective relief claim on the basis of Sovereign Immunity and concluded that Catanach was asking for retrospective damages;¹² however, Catanach in his Amended Complaint was not asking the court to rule on past wrongs. Catanach asked for prospective injunctive and declaratory relief for an ongoing violation of Federal Law, the same kind of relief that is allowed under an *Ex Parte Young* doctrine prospective relief claim. The District Court overlooked the ongoing effect of the injunction order which violates Section 6409a/1996 Telecom Act. The 10th circuit panel agreed that the injunction is an ongoing violation but based its dismissal on the 1996 Federal Court Improvements Act which is a 42 U.S.C. § 1983 individual capacity claim. Catanach didn't sue Thomson in his individual capacity, but in his official capacity. Catanach believes that he satisfies the straightforward inquiry of a prospective relief claim.

¹⁰ Catanach didn't abandon the Section 1983 claim, but due to the District Court analysis that the actions are past under Section 1983, Catanach concentrated on his second claim, Section 6409a/1996 Telecom Act, FCC Order 14-153 because the state injunction is an ongoing violation of the Spectrum and Telecom act and FCC order 14-153.

¹¹ Catanach didn't sue Thomson in his individual capacity. He sued in his official-capacity.

¹² The District Court conceded that relief is available under *Ex Parte Young* but concluded that Catanach was seeking retrospective relief under Section 1983 and Section 6409a.

Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) (Here Verizon sought injunctive and declaratory relief, alleging that the Commission's order requiring payment of reciprocal compensation was preempted by the 1996 Act and an FCC ruling.) The State Court Injunction based on the City Ordinance is also preempted by Section 6409a of the Spectrum / Telecom Act and FCC Order 14-153. The 10th circuit panel agreed that Catanach sued Thomson in his official-capacity¹³ but based its ruling on the 1996 Federal Courts Improvement Act which is an individual capacity claim. The panel agreed with Catanach that he would be entitled to prospective injunctive relief because the state injunction is ongoing¹⁴ but affirmed the lower courts decision based on a Section 1983 claim because of the 1996 Federal Courts Improvement Act which is individual capacity claim. The 10th circuit panel further stated that, "Catanach . . . seeks to enjoin Thomson from enforcing the injunction"; however, Thomson was sued in his official-capacity and Catanach's prayer for relief asks for injunctive relief on the First District Court, it's officers and agents and not Thomson in his individual capacity. The 10th circuit panel stated that its basis for denying relief is based on, "Section 1983 that expressly disallows injunctive relief against a judicial officer for an act or omission taken in such officer's judicial capacity¹⁵ . . . unless a declaratory decree was

¹³ See Footnote 2, 10th circuit panel's order.

¹⁴ The 10th circuit panel did not decide the issue, but instead affirmed for a different reason.

¹⁵ Judicial Capacity is an individual capacity claim.

violated or declaratory relief was unavailable.” See *Knox v. Bland*, 632 F.3d 1290, 1292 (10th Cir. 2011).” It further concluded, “(“Although we have previously said that a plaintiff may obtain an injunction against a state judge under 42 U.S.C. § 1983, those statements were abrogated by the Federal Courts Improvement Act of 1996, which provides that injunctive relief against a judicial officer shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”) (citations and quotation marks omitted).”¹⁶

The 10th circuit court either overlooked or erred on the fact that Catanach was not asking for prospective injunctive relief for a Section 1983 complaint based on an individual capacity claim, but based on a 47 U.S.C. § 1455(a), Section 6409a of the Spectrum Act/ Telecommunications Act, 47 C.F.R. § 1.40001 and FCC Order 14-153 under an official-capacity claim for a violation of Federal Law or right that was afforded to Catanach¹⁷. It would appear that the 10th circuit court either erred or overlooked Catanach’s Section 6409a / 1996 Telecom Act as it applies to prospective injunctive relief against officials acting in their official-capacity; however, if the 10th circuit court is emphatically stating that prospective injunctive relief is unavailable in all cases against Judges acting in their official-capacity because of the 1996 Federal Courts Improvement Act, then this ruling conflicts with this court, the 10th circuit court of appeals, and other

¹⁶ See 10th circuit panel’s order, footnote 5.

¹⁷ Opening Brief, page 15-31, Amended Complaint, Section 6409a, paragraph 31 through 88.

circuit court of appeals and this writ is of the utmost importance. Because the State Court has placed a preliminary injunction¹⁸ on Catanach's completed tower, this has barred him from removing, replacing, or collocating additional antennas. This is an ongoing violation of the Spectrum / Telecommunications Act which afforded Catanach this right by way of the "deemed grant" right, the 60 day notice, and the 30 day statute of limitations barring the City from suing Catanach. Thomson granted the preliminary injunction due to a city ordinance in conflict with the Federal "deemed grant" right under the Spectrum Act, the Telecommunications Act, and FCC Order 14-153.

B. The Ex Parte Young Doctrine is Available when a Judge or any State Official is sued in his or her Official Capacity for an Ongoing Violation of Federal Law, Not Involving a Section 1983 Claim.

The central question raised in this writ is whether prospective injunctive relief is available against a Judge acting in his official-capacity for an ongoing violation of Federal Law. This Court stated, "The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment." *Kentucky v. Graham*, 473 US 159,167 (1985). Catanach in his 10th circuit opening brief asked whether or not prospective injunctive relief is available for an ongoing violation of federal law under

¹⁸ If Catanach performs any work on the tower, he faces jail time and fines. This is a classic definition of an on-going violation of federal law.

47 U.S.C. § 1455(a), Section 6409a of the Spectrum/Telecommunications Act, and FCC Order 14-153.[See 10th circuit opening brief pages 15-31] The 10th circuit panel concluded that prospective injunctive relief is not available under a Section 1983 complaint, but Catanach's complaint also included a 47 U.S.C. § 1455(a), Section 6409a of the Spectrum/Telecom Act, and FCC Order 14-153 complaint. [See Amended Complaint]¹⁹ The 10th circuit panel seemed to suggest that Catanach's prospective injunctive relief claim is available because the state order is ongoing but did not decide the issue. Instead it ruled that dismissal was appropriate under an individual capacity Section 1983 claim. It would appear that the 10th circuit panel either erred or overlooked the official-capacity Section 6409a Telecommunications Act claim, but Catanach requested a rehearing and pointed out the individual and official capacity claims and that there is conflicting case law in the 10th circuit, the US Supreme Court and all other circuits. Catanach pointed out that the 10th circuit court in another case did decide the issue of prospective injunctive relief against a Judge²⁰ in his official-capacity which stated:

“Applying the instruction of *Verizon* and logic of *Ex parte Young*, we hold that the alleged

¹⁹ Amended Complaint, Section 6409a, paragraph 31-88.

²⁰ The 10th circuit court in this case held that a tribal order in contravention of controlling federal law is an ongoing violation satisfying the *Ex Parte Young* doctrine and is not barred by the doctrine of sovereign immunity. In the present case, there is a state order in contravention of controlling federal law, ie The Acts, 47 USC 1455(a), Section 6409a, and FCC Order 14-153.

unlawful exercise of tribal court jurisdiction in violation of federal common law is an **ongoing violation of “federal law”**[emphasis added] sufficient to sustain the application of the *Ex parte Young* doctrine. Satisfied that Crowe seeks prospective relief to enjoin a tribal official from enforcing an order in contravention of controlling federal law, we agree with the district court that this action falls within the *Ex parte Young* exception, and therefore is not barred by the doctrine of sovereign immunity.” It further stated, **“Judicial immunity does not apply here because Judge Stidham was not sued in his individual capacity.”** *Crowe & Dunlevy, PC v. Stidham*, 640 F. 3d 1140,1156 (10th Cir. 2011) [Emphasis Added]

This Court agrees that prospective injunctive and declaratory relief is available against state actors for an ongoing violation of federal law²¹, and stated:

“As for Verizon’s prayer for **declaratory relief**: That, to be sure, seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission’s action, so that the past financial liability of private parties may be affected. But no past liability of the State, or of any of its commissioners, is at issue. It does not impose *upon the State* “a monetary loss resulting from a

²¹ This Court decided that **prospective injunctive and declaratory relief is available** for a violation of the Telecommunications Act and FCC Order, the same law Catanach is seeking prospective relief on. The Spectrum Act is codified in the Telecommunications Act.

past breach of a legal duty on the part of the defendant state officials.” *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Insofar as the exposure of the State is concerned, the **prayer for declaratory relief** adds nothing to the **prayer for injunction.**” *Verizon Md. Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 646 (2002) [emphasis added]

The 10th circuit court in another case where Judges were sued in their official-capacities stated that prospective injunctive relief is an exception to Eleventh Amendment immunity. *Opala v. Watt*, 454 F.3d 1154, 1157 (10th Cir. 2006) (A state’s immunity from suit by private individuals in federal court is not absolute. It may be overcome in three instances: . . . (3) the citizen sues a state official pursuant to *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). See *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1286 (10th Cir. 1999)). *Opala v. Watt*, 454 F. 3d 1154, 1158 (10th Cir. 2006). In the 5th Circuit Court of Appeals, the court concluded that claims against Judges in their **official-capacities** isn’t barred by the Eleventh Amendment. *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 228 (5th Cir. 2009) (Davis’s claim for prospective declaratory relief against the defendant judges in their official-capacities is not barred by the Eleventh Amendment.)

It is apparent that the 10th circuit court in this case has concluded that prospective injunctive and declaratory relief isn’t available if a judge is sued in his official capacity for an ongoing violation of federal law and he hasn’t violated a declaratory ruling or declaratory relief is unavailable. The decision in this

case by the appeals court conflicts with many other cases and the logic that this court has defined regarding official and individual capacity claims. The 10th circuit court in another case stated that *Pulliam v. Allen* is inapplicable when a Judge is sued in his **official-capacity**. *Crowe & Dunlevy, PC v. Stidham*, 640 F. 3d 1140, 1156 (10th Cir. 2011) (. . . judicial immunity is likewise inapplicable under the exception for actions seeking prospective injunctive relief set forth in *Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970, 80 L.Ed.2d 565 (1984). See *Harris v. Champion*, 51 F.3d 901, 905 (10th Cir. 1995)). The 10th circuit panel in this case concluded that *Pulliam v. Allen* has been reversed due to the 1996 Federal Court Improvements Act. It isn't clear if this only pertains to 42 U.S.C. § 1983 and does not bar prospective injunctive/declaratory relief for ongoing violations of other sections of Federal law such as Section 6409a of the Spectrum and Telecom Act as allowed by the *Ex Parte Young* doctrine and *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002). Because the *Ex Parte Young* doctrine allows for such relief, the 10th circuit panel's decision in this case and other cases has created conflicting decisions within the courts. The appeals courts decision against Catanach's prospective relief claim suing Thomson in his **official-capacity** for an ongoing violation of Federal law, specifically Section 6409a of the Spectrum/Telecommunications Act and FCC Order 14-153 creates a misunderstanding of official and individual capacity claims as stated by this court in *Kentucky v. Graham*, 473 U.S. 159 (1985) and will likely create much confusion on the subject if the court of appeals ruling is left to stand. As stated above, the 10th circuit court, other circuits, and the Supreme Court have consistently allowed for prospective

injunctive relief against judges and other state actors acting in their official-capacity for an ongoing violation of federal law. Catanach satisfies his prospective relief claim because a) his District Court Amended Complaint asks for declaratory and injunctive relief due to a violation of the Spectrum Act “deemed grant” right afforded to Catanach.[Amended Complaint, Second Cause of Action, Section 6409a, The Spectrum Act] and b) his 10th circuit appeal opening brief claimed a Section 6409a “deemed grant” right.[Opening Brief, pages 15-31]

It is likely that the division in the circuits on this question will likely deepen in the near future because of the confusion surrounding the 1996 Federal Courts Improvement Act and the misunderstandings of what an individual v. an official capacity claim is. This Court’s review is therefore warranted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant this Petition.

Respectfully submitted,

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