No. 18-1056

IN THE

# Supreme Court of the United States

MITZI JOHANKNECHT,
In her official capacity as King County Sheriff,
*Petitioner,*

v.

EVA MOORE AND BROOKE SHAW,
Individually and on behalf of all others similarly situated,
*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the centuries-old equitable doctrine recognized in *Ex parte Young*—which allows litigants to sue government officials to enjoin enforcement of unconstitutional state laws—permits an official-capacity action for declaratory and injunctive relief against a sheriff who enforces an unconstitutional state law.

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## INTRODUCTION

The question the Sheriff asks this Court to decide rests on a false premise: that Plaintiffs' lawsuit is against a "municipality." It is not. Plaintiffs' lawsuit is against the government official charged by state statute with enforcing an unconstitutional state law, and Plaintiffs seek to enjoin enforcement of that law. Contrary to the Sheriff's petition, the Ninth Circuit did not "extend *Ex parte Young* to purely municipal actors." Rather, the Ninth Circuit concluded what this Court has held for more than a century: that when a plaintiff challenges a state law as unconstitutional, the government official who enforces that law is a proper defendant.[1]

More than one hundred years ago, the United States Supreme Court issued a seminal decision recognizing that it is appropriate to assert claims against an official in a suit challenging the constitutionality of a state law if, by virtue of her office, that official has "some connection" with the enforcement of the law and is acting on behalf of the state. *Ex parte Young*, 209 U.S. 123, 156-57 (1908). This theory has been reaffirmed by this Court as recently as 2015. *See Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015) ("[F]ederal courts

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[1] The original caption of this case named John Urquhart, then the King County Sheriff, as a defendant. While the case was on appeal to the Ninth Circuit, Mitzi Johanknecht replaced Mr. Urquhart as King County Sheriff. Following remand, the district court ordered her automatic substitution as the named defendant in this case pursuant to Federal Rule of Civil Procedure 25(d). References to "the Sheriff" throughout this brief refer collectively to Mr. Urquhart and Ms. Johanknecht in their official capacities as King County Sheriff.

may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." (citing *Ex parte Young*)). Here, the official charged with enforcing Washington's unconstitutional eviction statute is the Sheriff. The decision below—that Plaintiffs may sue the Sheriff to enjoin enforcement of that statute—is a faithful application of this Court's well-established precedent. Indeed, in cases throughout the country, circuit courts have held that when sheriffs are charged with enforcing state law, they are appropriate defendants for constitutional challenges to the law being enforced.

## STATEMENT OF THE CASE

### A. Washington's Residential Landlord-Tenant Act

Washington's Residential Landlord-Tenant Act provides two distinct procedures by which a landlord may pursue eviction of a residential tenant. The first, Revised Code of Washington section 59.18.370, is available in all eviction cases, and the second, Revised Code of Washington section 59.18.375, is available only in cases where the basis for eviction is the nonpayment of rent. Under both procedures, the landlord begins the eviction process by filing an action in superior court and serving the tenant with a summons and complaint.

Once the summons and complaint are served, a landlord opting to seek a writ of restitution under the first procedure, Section 370, must first ask the superior court to set a show cause hearing and must then notify the tenant of the hearing date and time. Wash. Rev. Code § 59.18.370 (2019). The tenant cannot be served with a writ of restitution, nor evicted from her

home, until after the scheduled hearing has occurred. *Id.*; Wash. Rev. Code § 59.18.380 (2019).

At issue in this case is the second procedure, Section 375, which allows the landlord to serve the tenant with a statutorily-mandated notice of "Payment or Sworn Statement Requirement" concurrent with or after service of the summons and complaint. Wash. Rev. Code § 59.18.375(7) (2019). The notice informs the tenant that "[t]he landlord is entitled to an order from the court directing the sheriff to evict you without a hearing" unless the tenant takes one of two actions by the deadline. Wash. Rev. Code § 59.18.375(7)(f) (emphasis added). Those two actions are spelled out in the statutory notice as follows:

> YOU MUST DO THE FOLLOWING BY THE DEADLINE DATE:
>
> 1. Pay into the court registry the amount your landlord claims you owe set forth above and continue paying into the court registry the monthly rent as it becomes due while this lawsuit is pending;
>
> OR
>
> 2. If you deny that you owe the amount set forth above and you do not want to be evicted immediately without a hearing, you must file with the clerk of the court a written statement signed and sworn under penalty of perjury that sets forth why you do not owe that amount.

*Id.*

Once the notice of Payment or Sworn Statement Requirement is served on the tenant, the landlord

simply waits for the compliance deadline to pass. If the tenant does not timely comply, the landlord may apply to the court for the "immediate issuance of a writ of restitution." Wash. Rev. Code § 59.18.375(4) (emphasis added). The landlord is entitled to the writ without a hearing even if the tenant has filed a response to the summons and complaint.

Section 375 specifically directs county sheriffs to enforce the statute by serving and executing writs of restitution. *Id.* (if a tenant fails to take one of the two required actions, their landlord is entitled to "issuance of a writ of restitution … directing the sheriff to deliver possession of the premises" to the landlord) (emphasis added); Wash. Rev. Code § 59.18.375(7)(f) ("The landlord is entitled to an order from the court directing the sheriff to evict you without a hearing.") (emphasis added). The state of Washington charges county sheriffs with a general duty to "execute the process and order of the courts of justice or judicial officers, when delivered for that purpose, according to law" as well as "attend the sessions of the courts of record held within the county, and obey their lawful orders or directions." Wash. Rev. Code § 36.28.010 (2019).

As a result of these state laws, the Sheriff is obligated to follow the specific direction given by a state court to serve and execute writs of restitution issued under Section 375. Because the statute directs the Sheriff to enforce it, Plaintiffs brought this lawsuit seeking to enjoin the statute's enforcement against the Sheriff in her official capacity.

**B. Proceedings Below**

Plaintiffs Eva Moore and Brooke Shaw are residential tenants in King County, Washington. In

May 2016, Plaintiffs' landlord brought an unlawful detainer action against them and served them with a notice of Payment or Sworn Statement Requirement document under the procedure outlined in Section 375. Plaintiffs, who live paycheck to paycheck, were unable to immediately pay the full amount the landlord alleged they owed, largely because Ms. Moore had been temporarily unable to work after breaking her ankle on faulty flooring in her apartment building. And Plaintiffs could not file a sworn statement attesting that they did not owe the rent allegedly due because they believed they did owe at least some of the rent. Therefore, Plaintiffs could not perform either of the actions required by the statute to prevent eviction without a hearing. They did, however, file a response to the summons and complaint, raising several legal and equitable defenses that would have entitled them to retain possession of their home. They also requested a hearing, but the superior court issued a writ of restitution permitting Plaintiffs' eviction without one. The King County Sheriff subsequently served the writ on Plaintiffs.

In this action, Plaintiffs challenge the constitutionality of Section 375, which they allege violates due process by allowing an eviction without a hearing. "Both the United States Constitution and the Washington Constitution require, at a minimum, that a defendant subject to an action for unlawful detainer be afforded a 'meaningful opportunity to be heard.'" *Leda v. Whisnand*, 207 P.3d 468, 475 (Wash. App. 2009) (quoting *Carlstrom v. Hanline*, 990 P.2d 986, 991 (Wash. App. 2000)); *see also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("The constitutional right to be heard is a basic aspect of the duty of govern-

ment to follow a fair process of decisionmaking when it acts to deprive a person of his possessions."). "[The] law simply does not countenance eviction of people from their homes without first affording them some opportunity to present evidence in their defense." *Leda*, 207 P.3d at 475.

Plaintiffs Moore and Shaw filed this action in King County Superior Court in July 2016, and the Sheriff removed the case to federal court. Shortly after answering, the Sheriff filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing there were multiple grounds for dismissal. The district court granted the Sheriff's motion primarily due to a misinterpretation of the Residential Landlord-Tenant Act, erroneously believing that evictions under Section 375 cannot be completed without a hearing. In dicta, however, the district court analyzed whether the Sheriff was a state actor for purposes of an *Ex parte Young* action. In that regard, the court concluded that the Sheriff acts on behalf of the state of Washington when serving and executing writs of restitution issued by the state's courts under the Section 375 procedure. *See* Pet. App. 32-33.

Plaintiffs appealed the district court's dismissal, and the Ninth Circuit reversed, holding that the district court had misread the statute. The Ninth Circuit also rejected all of the Sheriff's alternative arguments for dismissal.

On the argument the Sheriff raises in her petition—that she is not a proper defendant under *Ex parte Young*—the Ninth Circuit held that the Sheriff's position is meritless. First, citing this Court's decision in *Armstrong*, the Ninth Circuit concluded that

under the principle recognized in *Ex parte Young*, whereby courts of equity may enjoin the enforcement of unconstitutional state statutes, Plaintiffs have a cause of action in equity to challenge the constitutionality of Section 375. *See* Pet. App. 17. Second, the Ninth Circuit concluded that the Sheriff is a proper defendant for such an action because "Washington law assigns county sheriffs the power and duty to serve and execute writs of restitution issued under § 375." *Id.* at 18. Under *Ex parte Young*, the proper defendant in a suit seeking to enjoin the enforcement of an unconstitutional state law is the official who has "'some connection' to enforcement of the allegedly unconstitutional statute." *Id.*; *Ex parte Young*, 209 U.S. at 157.[2]

Shortly after the case was remanded to the district court, the Sheriff filed a notice of her intention not to defend the constitutionality of the challenged statute, indicating she would abide by any judgment declaring the statute unconstitutional and would comply with any injunction as to all tenants subject to eviction proceedings under the statute. Plaintiffs then moved for summary judgment on the constitu-

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[2] Though not directly relevant to the legal issues raised in the Sheriff's petition, Plaintiffs wish to correct one particular mischaracterization of the Ninth Circuit opinion. The Sheriff is incorrect in suggesting that the Ninth Circuit held that Plaintiffs have no viable cause of action under 42 U.S.C. section 1983. To the contrary, the Court of Appeals concluded it need not decide the issue because of ample precedent establishing an equitable cause of action to enjoin enforcement of unconstitutional state laws that does not depend on any statute. *See* Pet. App. 17 ("To obtain [declaratory and injunctive] relief, [P]laintiffs do not need a statutory cause of action.") (emphasis added).

tionality of Section 375, seeking declaratory relief and an injunction preventing the Sheriff from serving and executing writs issued pursuant to that statute. That motion is fully briefed and is currently stayed pending resolution of the petition.

## REASONS FOR DENYING THE WRIT

In her petition for certiorari, the Sheriff conflates two distinct questions. The first is whether an independent cause of action exists in equity to enjoin enforcement of an unconstitutional state statute, as this Court recognized in *Ex parte Young*. The second is whether the Sheriff is a proper defendant under *Ex parte Young*. Applying this Court's precedents, the Ninth Circuit correctly answered both questions in the affirmative.

That is precisely how this Court has answered similar questions for more than one hundred years. Contrary to the Sheriff's assertion, there is no conflict between the Ninth Circuit's decision in this case and any decision of this Court. Nor is there a circuit split that would be resolved by a grant of the Sheriff's petition.

Moreover, this case is not a proper vehicle for resolving the question the Sheriff asks the Court to decide because this case does not present that question. The Sheriff asks the Court to determine whether *Ex parte Young* permits Plaintiffs to use a judge-made cause of action to obtain prospective relief against a municipality. But Plaintiffs do not seek relief against a municipality. Plaintiffs challenge the constitutionality of a state law that the Sheriff enforces. A party may seek an injunction against the enforcement of an unconstitutional state statute by suing the govern-

ment official charged with enforcing it. The Court, therefore, should deny the writ.

## A. The Ninth Circuit's decision does not conflict with this Court's precedent.

### 1. The decision below is consistent with *Ex parte Young* and *Armstrong*.

Throughout her petition, the Sheriff harps on the Ninth Circuit's supposed creation of a "judge-made cause of action … against a municipality." Pet. i. But the question presented by the Sheriff conflates two distinct issues: (1) whether a cause of action in equity exists for Plaintiffs' claims, and (2) if so, who is a proper defendant for such a cause of action.

The Ninth Circuit, citing to Justice Scalia's majority opinion in *Armstrong*, answered the first question in the affirmative, stating: "[Plaintiffs] can rely on the judge-made cause of action recognized in *Ex parte Young*, 209 U.S. 123 (1908), which permits courts of equity to enjoin enforcement of state statutes that violate the Constitution or conflict with other federal laws." Pet. App. 17 (citing *Armstrong*, 135 S. Ct. at 1384). This holding is consistent with both *Ex parte Young* and *Armstrong*.

This Court has consistently held that equity provides a cause of action against an official charged with enforcing state law to challenge the constitutionality of that law. *Ex parte Young*, 209 U.S. at 156-57. Just a few years ago in *Armstrong*, the Court reaffirmed the existence of this cause of action. 135 S. Ct. at 1384. The Court discussed the continued vitality of the remedy, which is the "creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.*; *see also, e.g., Friends of the E. Hampton Airport,*

*Inc. v. Town of E. Hampton*, 841 F.3d 133, 145 (2d Cir. 2016) ("Such a claim falls squarely within federal equity jurisdiction as recognized in *Ex parte Young* and its progeny."). Thus, the Ninth Circuit's determination that an independent cause of action in equity allows Plaintiffs to challenge the constitutionality of Washington's statute permitting eviction without a hearing is a faithful application of this Court's precedent.

2. The decision below does not conflict with *Humphries* or *Monell*.

Contrary to the Sheriff's contention, the Ninth Circuit's decision does not conflict with *Humphries* or *Monell*. Both cases address whether and under what circumstances a local government can be held liable as a municipality for civil rights violations under 42 U.S.C. section 1983. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (discussing circumstances in which "municipalities and other local government units" can be liable under section 1983); *Los Angeles Cnty., Cal. v. Humphries*, 562 U.S. 29, 39 (2010) (clarifying that *Monell*'s "policy or custom" requirement for imposing municipal liability applies not just to damages actions, but also to suits for prospective relief). Here, Plaintiffs' claims do not concern municipal liability. When the Sheriff serves and executes writs of restitution issued under Section 375, she enforces state law, not county policy. The Sheriff's petition glosses over this important distinction. This Court's precedent makes clear that when an officer is enforcing state law, neither *Monell* nor *Humphries* applies.

As this Court has explained, there are two possible meanings of an official-capacity suit against a

sheriff. If a plaintiff sues a sheriff in his or her official capacity for actions taken on behalf of a county, the suit is treated as a suit against the county. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) ("Official-capacity suits … 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' 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." (quoting *Monell*, 436 U.S. at 690 n.55)). Under such circumstances, the plaintiff must prove that a policy or custom of the county caused the alleged violation. This is the box into which the Sheriff seeks to put this case.

But when a state deputizes its sheriffs to enforce state law, a suit for prospective relief against the sheriff challenging the constitutionality of that law is not treated as a lawsuit against the county. Instead, it is a mechanism for challenging the state law without implicating state sovereign immunity under the Eleventh Amendment.

This Court explained these two types of official-capacity actions in *Graham* as follows:

> There is no longer a need to bring official-capacity actions against local government officials, for under *Monell* … local government units can be sued directly for damages and injunctive or declaratory relief.… Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief

> sought…. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State.

473 U.S. at 167 n.14. Thus, while suits against the state itself are generally barred by sovereign immunity, *Ex parte Young* provides that a plaintiff can challenge the constitutionality of state law or policy by suing an official responsible for its enforcement. 209 U.S. at 157.

*Humphries* and *Monell* have no applicability where a plaintiff sues an official under *Ex parte Young* to enjoin enforcement of a state statute, for in that situation no relief is being sought against a municipality. By their express language, *Monell* and *Humphries* apply only to suits against municipalities. *Monell*, 436 U.S. at 690 n.54 ("Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."); *Humphries*, 562 U.S. at 33 ("We conclude that *Monell*'s holding applies to § 1983 claims against municipalities for prospective relief as well as to claims for damages."). As this Court has explained, *Monell* and *Humphries* therefore do not apply to cases brought to enjoin the enforcement of state statutes under *Ex parte Young*. *See Quern v. Jordan*, 440 U.S. 332, 337-38 (1979) (holding *Monell* does not affect *Ex parte Young*); *see also Ambrose v. Godinez*, 510 Fed. App'x 470, 472 (7th Cir. 2013) ("[G]overnmental liability under *Monell* … is limited to municipalities, which a state is not."); *Rounds v. Clements*, 495 Fed. App'x 938, 941 (10th Cir. 2012) ("[T]he 'policy or custom' standard isn't just a liability standard, it's a liability standard for suits against

municipalities—entities not immune from suit under the Eleventh Amendment—and it has no applicability to state officers who are immune from suit for damages but susceptible to suit under *Ex parte Young* for injunctive relief.").

As they have repeatedly made clear, Plaintiffs bring this suit against the Sheriff as a state actor pursuant to *Ex parte Young*. It is the "implementation of state policy or custom" that Plaintiffs challenge. *Graham*, 473 U.S. at 167 n.14. Washington has a state policy, embodied in Section 375, that requires the Sheriff to perform the nondiscretionary acts of serving and executing writs of restitution issued pursuant to the procedures outlined in the statute. *See* Wash. Rev. Code § 59.18.375(4); Wash. Rev. Code § 59.18.375(7)(f); Wash. Rev. Code § 36.28.010. The Sheriff, whom the state of Washington specifically charges with enforcing this state law, is the official responsible for "implementation" of the state's policy. As a result, Plaintiffs properly named the Sheriff in her official capacity as a defendant. Numerous circuit court decisions support that conclusion.[3] The Ninth

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[3] *See, e.g., Bland v. Roberts*, 730 F.3d 368, 390 (4th Cir. 2013) (finding sheriffs acted as arms of the state and were thus proper defendants under *Ex parte Young*); *Huminski v. Corsones*, 396 F.3d 53, 72-73 (2d Cir. 2005) (finding county sheriff acted on behalf of state based on state law authorizing the sheriff's actions as "the most important factor" in the state actor analysis under *Ex parte Young*); *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (finding county sheriff was enforcing state garnishment statute and thus was a proper defendant under *Ex parte Young*); *see also Jones v. Hamilton Cnty. Sheriff*, 838 F.3d 782, 784-86 (6th Cir. 2016) (sheriff acts on behalf of state when taking actions required by state law); *Scott v. O'Grady*, 975 F.2d

(*Footnote continued*)

Circuit was therefore correct to hold that "because Washington [state] law assigns county sheriffs the power and duty to serve and execute writs of restitution issued under § 375, … [t]he Sheriff's role in executing those writs makes [her] a proper defendant in an *Ex parte Young* suit." Pet. App. 18.

A contrary rule would permit states to avoid challenges to unconstitutional statutes entirely, simply by requiring county-level officials to enforce those statutes. Indeed, if a county official is performing a non-discretionary duty required by the state, the official will never be acting pursuant to a local policy as required for municipal liability under *Monell*. Thus, where a state statute requires a county-level official to enforce state law, that official is a proper *Ex parte Young* defendant for challenges to the constitutionality of the law, for she must be acting on behalf of the state if the state is requiring her to take such action.

Imagine a state passes a law mandating that when a county sheriff serves a search warrant on a residential property, the sheriff must arrest any black persons present at the location. Such a law would certainly be an unconstitutional state policy. But *Monell* liability would not attach to the county, for the sheriff's actions in enforcing the law would not be attributable to a county policy or custom. And contrary to the Sheriff's suggestion, *Ex parte Young* would not allow a claim against the state attorney general or another individual with general executive power because those officials lack a specific connection to the enforcement of the state statute. *See* 209

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366, 371 (7th Cir. 1992) (sheriff acts on behalf of state when enforcing orders issued by state courts).

U.S. at 157 (explaining that the officer must have "some connection with the enforcement of the act … alleged to be unconstitutional").[4] Finally, a suit against the state itself would be barred by sovereign immunity. Thus, unless the county sheriff can be sued under an *Ex parte Young* theory, there is no way to challenge the facially unconstitutional statute.[5]

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[4] *See also, e.g., Digital Recognition Network, Inc. v. Hutchison*, 803 F.3d 952, 962 (8th Cir. 2015) (holding neither state attorney general nor governor had sufficient connection to enforcement of state statute to be a proper defendant under *Ex parte Young*); *Peterson v. Martinez*, 707 F.3d 1197, 1207 (10th Cir. 2013) ("[W]hen state law explicitly empowers one set of officials to enforce its terms, a plaintiff cannot sue a different official absent some evidence that the defendant is connected to the enforcement of the challenged law."); *McBurney v. Cuccinelli*, 616 F.3d 393, 399-401 (4th Cir. 2010) (holding state attorney general had insufficient connection to enforcement of statute because he "ha[d] no specific statutory enforcement authority" under the challenged statute).

[5] As a policy matter, the Sheriff also argues that she should not be a defendant here because she simply follows the directives of state law and that allowing suit against her in this circumstance will cause her to have to second-guess facially valid orders. Both assertions are wrong.

First, although the Sheriff serves and executes writs of restitution pursuant to a Washington state law, she lacks authority to perform acts that violate constitutional rights. *See Ex parte Young*, 209 U.S. at 159-60 ("If the act which the [officer] seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution."). It would work "an injury to complainant" to allow an official to "enforce penalties under an unconstitutional enactment." *Id.* at 160; *see also Finberg*, 634 F.2d at 54 ("Once the prothonotary and the sheriff have relied on the authority conferred by the Pennsylvania procedures to work an injury to the plaintiff, they may not

(*Footnote continued*)

Contrary to the Sheriff's argument, the decision below does not conflict with *Humphries* or *Monell*. Plaintiffs are neither proceeding against the Sheriff as a county actor nor challenging a county policy. The Ninth Circuit correctly concluded that under the principle recognized in *Ex parte Young*, the Sheriff's role in enforcing the challenged state law makes her a proper defendant in this action for prospective relief.

3. The decision below does not conflict with *Ziglar*.

The Sheriff argues that the Ninth Circuit's decision conflicts with *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), but this is wrong for at least three reasons. First, the essential holding of *Ziglar* was that federal courts should avoid creating new judge-made causes of action. *See generally* 137 S. Ct. 1843. But the doc-

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disclaim an interest in the constitutionality of these procedures. That course of action would be inconsistent with their obligations to respect the constitutional rights of citizens."). The interest in permitting suit against the Sheriff to prevent ongoing constitutional harms that are caused by the Sheriff's actions thus outweighs the Sheriff's interest in avoiding suit.

Second, lawsuits seeking only prospective relief do not cause officials to "second-guess" facially valid orders. Nothing in this action seeks redress for the harms caused by past violations of Plaintiffs' due process rights. Rather, "prospective relief merely compels the state officers' compliance with federal law in the future." *Doe v. Wigginton*, 21 F.3d 733, 737 (6th Cir. 1994); *see also Ex parte Young*, 209 U.S. at 159 ("[T]he officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."). The Sheriff does not have an interest in continuing to enforce unconstitutional laws in the future.

trine recognized in *Ex parte Young* is not new, and its application to the circumstances of this case is unexceptional. As discussed above, this Court recognized in *Armstrong* that suits to enjoin enforcement of unconstitutional state statutes are "the creation of courts of equity, and reflect[] a long history of judicial review of illegal executive action, tracing back to England." 135 S. Ct. at 1384. In citing *Armstrong* and relying on *Ex Parte Young*, the Ninth Circuit did not create a "new" cause of action. Instead, it relied on one recognized in a seminal decision from more than one hundred years ago.

Second, the Court's decision in *Ziglar* cautioned against the creation or expansion of judge-made causes of action for damages, not for prospective relief. *See, e.g.*, 137 S. Ct. at 1855 ("Later, the arguments for recognizing implied causes of action for damages began to lose their force." (emphasis added)); *id.* at 1857 ("[T]he Court declined to create an implied damages remedy in the following cases." (emphasis added)); *id.* at 1861 ("Allowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch." (emphasis added)). Indeed, the word "damages" appears no less than fifty-two times in the majority opinion in *Ziglar*. *See generally id.*

In fact, in *Ziglar* this Court explicitly distinguished between damages and equitable remedies. *Id.* at 1856 ("When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider."); *id.* at 1858 ("It is true that, if equitable remedies prove in-

sufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide.") (emphasis added). *Ziglar* has no applicability to this case, where Plaintiffs seek only declaratory and injunctive relief.

Third, the separation-of-powers concerns at the heart of *Ziglar* are not present here. In *Ziglar*, the implied cause of action the Court considered was a *Bivens* action against a federal officer. *See id.* at 1856 ("[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."). Where a cause of action is brought against a state official, the separation of powers between branches of government is not germane to the analysis. Rather, the focus is on federalism and the supremacy of federal law over state law. Here, the whole purpose of *Ex parte Young* is to permit federal courts to enjoin unconstitutional state actions. *See Ex parte Young*, 209 U.S. at 159-60 (explaining that an officer who "seeks to enforce [an act that is] a violation of the Federal Constitution … comes into conflict with the superior authority of that Constitution" and that the officer has no "immunity from responsibility to the supreme authority of the United States").

Thus, nothing in the Ninth Circuit opinion is inconsistent with this Court's ruling in *Ziglar*.

**B. There is no circuit split.**

The Sheriff argues that the decision below creates a circuit split by recognizing an independent, judge-

made cause of action under *Ex parte Young*. The purported circuit split is nonexistent.

The Sheriff relies primarily on a Sixth Circuit case for the proposition that courts may not enjoin the enforcement of unconstitutional state statutes absent a statutory cause of action. *See* Pet. 25 (citing *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895 (6th Cir. 2014)). But the Sixth Circuit case predates this Court's 2015 decision in *Armstrong*, which held to the contrary. 135 S. Ct. 1378. As discussed above, the *Armstrong* Court explained that absent a statute limiting the authority of courts to provide equitable relief, courts have the inherent power to enjoin enforcement of unconstitutional state statutes. *Id.* at 1384-85. The Sixth Circuit's decision to the contrary, therefore, is no longer good law.

The Sheriff fares no better in citing *Negron-Almeda v. Santiago*, another pre-*Armstrong* decision that, even on its own terms, does not conflict with the decision below. 528 F.3d 15, 24-25 (1st Cir. 2008). The case holds that because the plaintiff had pleaded a section 1983 cause of action, it was unnecessary for the Court to decide whether a separate, implied cause of action existed under *Ex parte Young*. *See id.* In other words, the First Circuit declined to answer the question. Thus, there is no conflict between *Negron-Almeda* and the decision below.

On this issue, the Sheriff fails to cite a single case that was decided after this Court's ruling in *Armstrong*, which reaffirmed and clarified the existence of an equitable cause of action to challenge unconstitutional state laws. And recent decisions applying *Armstrong* confirm that an equitable remedy exists allowing suits to proceed under *Ex parte Young*. *See,*

*e.g.*, *Friends of the E. Hampton Airport, Inc.*, 841 F.3d at 144-45 (discussing *Ex parte Young* and *Armstrong* as part of long history of recognizing a cause of action in equity to enjoin enforcement of "orders alleged to violate federal law" and allowing suit to proceed on the basis of "federal equity jurisdiction"); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 898-904 (10th Cir. 2017) (discussing enforcement of federal rights through suits in equity).

Thus, the Ninth Circuit's decision accords with *Ex parte Young*, *Armstrong*, and decisions of other circuits interpreting *Armstrong*. There is no circuit split.

### C. This case is not a good vehicle to decide the question the Sheriff presents.

The Sheriff asks this Court to determine whether *Ex parte Young* permits a cause of action against a municipality. But as discussed in detail above, this appeal does not present that question. *Ex parte Young* is a mechanism for challenging state policy or state action while avoiding Eleventh Amendment sovereign immunity. As the district court properly held, the Sheriff is a state actor when she enforces Section 375, the law Plaintiffs challenge as unconstitutional. *See* Pet. App. 32-33. Thus, the Sheriff's question regarding municipal liability has no place here.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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