No. 24-714

IN THE

Supreme Court of the United States

T.W.,

Petitioner,

v.

NEW YORK STATE BOARD OF LAW EXAMINERS, et al.,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether petitioner's disability-discrimination claim against the New York State Board of Law Examiners can proceed under *Ex parte Young*, 209 U.S. 123 (1908), where petitioner does not seek to remedy an alleged ongoing violation of federal law and the only relief that petitioner continues to seek is expungement of sealed bar exam records that respondents are prohibited from disclosing by state law.

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INTRODUCTION

Respondent New York State Board of Law Examiners administers New York's bar examination. The Board's responsibilities include evaluating candidates' applications for testing accommodations. Petitioner T.W. brought this action against the Board and its members in their official capacities, alleging that the Board failed to provide petitioner with adequate testing accommodations during two prior administrations of the bar exam in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (ADA).[1]

The U.S. District Court for the Eastern District of New York dismissed the complaint. (Pet. App. 42a-61a.) The U.S. Court of Appeals for the Second Circuit affirmed, holding that the Eleventh Amendment barred petitioner's damages claim and that petitioner's claim for injunctive relief could not proceed under *Ex parte Young*, 209 U.S. 123 (1908), because it did not seek to address any ongoing violation of federal law. (Pet App. 1a-41a.) Petitioner now seeks certiorari, solely as to the Second Circuit's application of *Ex parte Young*. The petition should be denied.

First, petitioner lacks standing to pursue prospective injunctive relief in the form of expungement of her sealed bar examination records. Petitioner does not allege that any person has sought the Board's sealed records or that the Board would disclose them; instead, she speculates that a prospective employer might learn about her bar exam failures and deny her employment on that basis. These allegations fail to establish any

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[1] Petitioner also brought multiple other claims not at issue here. See *infra* at 4-5 & n.2.

element of Article III standing, making this case a poor vehicle to address the question presented.

Second, and in any event, the Second Circuit correctly applied settled law to hold that petitioner's claim for injunctive relief cannot proceed under *Ex parte Young* because it does not seek to remedy an ongoing violation of federal law. The ongoing-violation requirement has its roots in historical practice and is an important limit on federal courts' equitable authority. Because petitioner does not allege that respondents' maintenance of her records is unlawful, the Eleventh Amendment bars her claim. And contrary to petitioner's assertions, this Court has never held that a claim may proceed under *Ex parte Young* so long as the plaintiff can identify some lingering harm from a past violation of federal law.

Third, there is no split in authority requiring this Court's intervention. The federal courts of appeals broadly agree that ongoing conduct alleged to violate federal law is required to sustain a claim for relief under *Ex parte Young*. And the cases on which petitioner relies involving the expungement of records arose from materially distinguishable facts, including that none addressed a plaintiff's request to expunge records that were sealed and not otherwise subject to disclosure.

STATEMENT

A. Legal Background

The New York Court of Appeals has delegated the responsibility of administering the State's bar examination to the Board of Law Examiners. Rules of Ct. of Appeals for Admission of Att'ys & Couns.-at-Law, 22 N.Y.C.R.R. § 520.2(a). The Board sets the passing score,

time, and location of the bar exam, among other requirements. *See* Rules of State Bd. of L. Exam'rs, 22 N.Y.C.R.R. §§ 6000.3, 6000.8.

In administering the bar exam, the Board also considers "applications for special arrangements from any person applying for examination for admission to practice as an attorney." N.Y. Jud. Law § 460-b(1). Based on an application, the Board staff determines the appropriate accommodations and then affords the applicant a right to appeal the determination directly to the members of the Board. *Id.*; *see* 22 N.Y.C.R.R. § 6000.7(d)-(f). If still dissatisfied, the applicant may file a petition in state court for judicial review of the Board's final decision. *See* C.P.L.R. 7804(b).

Once an applicant passes the bar exam, and satisfies the State's character and fitness requirements, the applicable Judicial Department of the Appellate Division admits the person to practice as an attorney in the State. *See* Jud. Law §§ 90(1), 464. Records relating to an individual's bar exam and admission remain "sealed" and "private and confidential," absent an Appellate Division disclosure order. *Id.* § 90(10).

B. Factual Background

Petitioner T.W. is a 2013 graduate of Harvard Law School for whom the Board provided disability accommodations for three administrations of the bar exam. Petitioner alleges that she had several disabilities, including depression, anxiety, and cognitive limitations that resulted from various head injuries. For the July 2013 bar exam, the Board granted petitioner stop-clock breaks so that she could pause the test without having the time run, and also a smaller testing room. For the July 2014 bar exam, the Board granted petitioner fifty

percent extra testing time and a smaller testing room. Petitioner did not pass the bar on either occasion. (Pet. App. 3a-4a; CA2 J.A. 20-28.)

Petitioner registered for the February 2015 bar exam and again requested an accommodation. The Board granted petitioner 100 percent extra testing time and a smaller testing room. Petitioner passed the bar on this third attempt. In the meantime, petitioner's law firm terminated her employment effective February 2015 pursuant to the firm's policy. (Pet. App. 4a; CA2 J.A. 27, ECF No. 33.)

Following her termination, petitioner unsuccessfully pursued employment at other "top law firms." (CA2 J.A. 28.) Those firms, according to petitioner, were not interested in hiring her after learning that she had less experience "due to the disruptions caused by her bar examination failure" and allegedly "do not wish to employ someone who failed the bar examination twice." (CA2 J.A. 28.) But no prospective employer has sought records of petitioner's bar exam scores, nor does petitioner allege that the Board will disclose that information. Instead, petitioner fears that she personally will be required to disclose her bar exam failures during a future job search. Yet petitioner does not allege that she is currently unemployed or seeks to change legal employers. (*See* CA2 J.A. 28-29.)

C. Procedural Background

In 2016, petitioner commenced this action against the Board and its members under Title II of the ADA and § 504 of the Rehabilitation Act, 29 U.S.C. § 794 et

seq.[2] Petitioner alleged that the Board discriminated against her on the basis of her disabilities, harming her career. Petitioner requested money damages and equitable relief precluding the Board from maintaining her exam records. (Pet. App. 4a.)

The district court initially denied the Board's motion to dismiss, holding that the Board had waived its Eleventh Amendment immunity for purposes of petitioner's Rehabilitation Act claim because the Board is a program or activity of a department or agency that receives federal funds. The court declined to reach whether Title II of the ADA abrogated the Board's Eleventh Amendment immunity because § 504 of the Rehabilitation Act provided comparable remedies to the ADA. On appeal, the Second Circuit reversed and held that the Eleventh Amendment barred petitioner's Rehabilitation Act claim and remanded to the district court to consider the Title II claim. (Pet. App. 2a-3a.) *See T.W. v. New York State Bd. of L. Exam'rs*, 996 F.3d 87, 93-102 (2d Cir. 2021).

On remand, the district court dismissed petitioner's Title II claim. First, the court held that the Board is an arm of the State that shares in its Eleventh Amendment immunity, and the ADA does not abrogate the Board's immunity. (Pet. App. 43a-59a.) Second, the district court held that the exception to immunity for prospective declaratory or injunctive relief against state officers, embodied in *Ex parte Young*, does not apply to this suit. The court found that any declaratory relief regarding the Board's decisions on petitioner's requests for accommodations would be purely retrospective, and that

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[2] Petitioner also asserted claims under Title III of the ADA and the New York City Human Rights Law, N.Y.C. Admin. Code tit. 8, which she subsequently withdrew. (Pet. App. 1a-2a.)

petitioner lacked standing to seek injunctive relief in the form of expungement of her sealed exam records because she had not alleged that any person has ever sought the records or that the Board would disclose them. (Pet. App. 59a-61a.)

The Second Circuit affirmed. The court agreed that the Eleventh Amendment barred petitioner's claim for money damages under Title II. (Pet. App. 7a-32a.) And the court held that petitioner's claims for declaratory and injunctive relief could not proceed under *Ex parte Young* because the requested declaratory relief is purely retrospective and the requested injunctive relief "is not sufficiently tied to an allegation of ongoing violations of federal law." (Pet. App. 33a.) The court denied petitioner's subsequent petition for rehearing en banc without any noted dissents. (Pet. App. 62a-63a.)

REASONS FOR DENYING THE PETITION

A. This Case Is a Poor Vehicle to Address the Question Presented Because Petitioner Lacks Standing to Seek Prospective Relief.

Petitioner no longer challenges the Board's sovereign immunity with respect to her damages claim. The only question presented in the petition is whether the claim for injunctive relief can proceed under *Ex parte Young*. This case is a poor vehicle to address the question presented because petitioner's claim for injunctive relief fails on threshold standing grounds, as the district court correctly held.[3] (*See* Pet. App. 60a-61a.) "To establish Article III standing, an injury must be

[3] The court of appeals did not address petitioner's standing and instead affirmed on an alternate jurisdictional ground. (Pet. App. 37a.)

concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation marks omitted). None of these requirements is met here.

1. To pursue prospective relief such as an injunction, an injury must be "certainly impending," based on a "credible threat" of future harm. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (quotation marks omitted); *see FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 381 (2024).

Petitioner's asserted injury is that her prior bar exam failures have prevented her from obtaining employment with certain top law firms. But petitioner does not allege that she is currently unemployed or seeking to change legal employers in the near future. Instead, the complaint alleges that petitioner unsuccessfully pursued employment with multiple law firms at some point in the past. (*See* CA2 J.A. 28.) As the district court recognized, petitioner "never alleges that a prospective employer has inquired about her bar examination record much less made a hiring decision based on that record." (Pet. App. 60a.) Nor could petitioner establish an imminent injury by alleging that the Board would disclose her sealed exam records, as an unauthorized disclosure would violate the confidentiality provisions of New York's Judiciary Law § 90(10). (Pet. App. 60a-61a.)

Petitioner's theory of harm impermissibly depends on a "'speculative chain of possibilities.'" *See Murthy v. Missouri*, 603 U.S. 43, 70 (2024) (quoting *Clapper*, 568 U.S. at 414). Specifically, this theory presupposes that petitioner will seek employment with an unspecified law firm sometime in the future, that the firm will inquire

about petitioner's bar exam records, and that the firm will reject petitioner's application based on her sealed, decade-old bar exam records. The likelihood of each event occurring is "no more than conjecture." *See id.* at 72 (quotation marks omitted).

2. Petitioner also fails to demonstrate causation, which is "substantially more difficult to establish," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quotation marks omitted), where the alleged injury is "the result of the independent action of some third party not before the court," *id.* at 560 (alteration and quotation marks omitted). The causation requirement precludes speculative or attenuated links based on insufficiently predictable or distant third-party conduct. *Alliance for Hippocratic Med.*, 602 U.S. at 383.

Petitioner does not allege that the Board will disclose her bar exam records or require others to do so. She alleges only that a prospective employer might require her personally to disclose her past results or that she may feel compelled to do so on her own accord. (*See* CA2 J.A. 28-29.) But these allegations do not support causation because they depend on "'speculation about the unfettered choices made by independent actors not before the courts.'" *See Alliance for Hippocratic Med.*, 602 U.S. at 383 (quoting *Clapper*, 568 U.S. at 415 n.5). Moreover, petitioner's allegation that law firms might not wish to hire her because she has been unable to obtain the experience the firms seek (Pet. App. 60a) is not traceable to the Board's maintenance of her bar exam records.

3. Relatedly, petitioner cannot show that her asserted injury "is likely to be redressed by judicial relief." *Haaland v. Brackeen*, 599 U.S. 255, 292 (2023) (quotation marks omitted). If a prospective employer

questions petitioner about past administrations of the bar exam, it does not matter what records the Board maintains. As the district court reasoned, even if a court required the Board to expunge its records, an employer could still ask petitioner to describe what happened in the past. Because courts "cannot rewrite history," an injunction would not allow petitioner to claim to have passed the bar exam any earlier or to have obtained experience she does not possess. (Pet. App. 60a.) Thus, an injunction requiring the Board to expunge petitioner's records would offer no "legally enforceable protection" from the alleged harm. *See Brackeen*, 599 U.S. at 293; *see also Murthy*, 603 U.S. at 73 (injunction against government would not redress injuries flowing from the independent conduct of third parties).

B. The Court of Appeals Correctly Applied Settled Law to Hold That Petitioner Cannot Seek Relief Under *Ex parte Young*.

The Second Circuit correctly rejected petitioner's claim for injunctive relief under *Ex parte Young* because "it does not seek to remedy an alleged *ongoing violation* of federal law." (Pet. App. 40a.)

1. Under the Eleventh Amendment, "absent waiver or valid abrogation, federal courts may not entertain a private person's suit against the State." *Virginia Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011). The Eleventh Amendment likewise bars suits against individual state actors in their official capacities. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984).

This Court recognizes a narrow exception to Eleventh Amendment immunity for suits against state officials that allege "an ongoing violation of federal law

and seek[] relief properly characterized as prospective." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quotation marks omitted). This rule derives from *Ex parte Young*, which held that a state attorney general could be enjoined from enforcing an unconstitutional state law. 209 U.S. 123, 159-60 (1908). The attorney general's unlawful conduct "stripped" him "of his official or representative character" and subjected him to suit. *Id.* at 160. Put another way, the doctrine of *Ex parte Young* provides that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Stewart*, 563 U.S. at 255.

The doctrine's ongoing-violation requirement is rooted in federal courts' traditional equitable authority to "enjoin named defendants from taking specified unlawful actions." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021). Indeed, the availability of relief under *Ex parte Young* is "limited to that precise situation." *Stewart*, 563 U.S. at 255. Without a specific unlawful action to enjoin, courts have no independent power to issue "judgments against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

Accordingly, this Court has consistently reaffirmed that the doctrine of *Ex parte Young* is limited to cases involving ongoing violations of federal law "as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). For example, in *Green v. Mansour*, the Eleventh Amendment barred a suit alleging the past miscalculation of welfare benefits, where the State had since conformed its

conduct to federal law. 474 U.S. 64, 65-66 (1985). Because the case involved no continuing violation of federal law, nor any threatened future violation, *Ex parte Young* did not apply. *Id.* at 73.

This Court's refusal to allow cases to proceed in the absence of an ongoing violation of federal law recognizes that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law," while "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green*, 474 U.S. at 68. "When the federal interest is no longer so pressing—when there is no continuing conduct that states must change to comply with federal law—the reason for the rule of *Young* no longer applies." *Watkins v. Blinzinger*, 789 F.2d 474, 484 (7th Cir. 1986) (Easterbrook, J.). Thus, far from being an "empty formalism" (Pet. 28 (quotation marks omitted)), the ongoing-violation requirement safeguards state sovereignty.

2. The Second Circuit's holding in this case follows directly from these foundational principles. Petitioner alleges completed violations of federal law in the form of *past* failures to accommodate her disability. For example, she alleges that the Board failed to provide her with adequate testing accommodations in 2013 and 2014. But it is undisputed that the Board subsequently provided petitioner with further testing accommodations, that petitioner passed the bar exam in 2015, and that petitioner has no plans to sit for the bar exam again in the future. (*See* Pet. App. 4a.) Moreover, to the extent petitioner challenges the Board's current testing policies and practices, expunging petitioner's records would not

address those concerns. (Pet. App. 38a-39a.) And petitioner lacks standing to vindicate the rights of future test takers in any event. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983).

Nor does petitioner allege that respondents will (or could) wield her prior bar exam failures against her. Now that petitioner has been admitted to the bar, her two failing scores are of no legal consequence. And New York law prohibits the Board from reporting or otherwise disclosing petitioner's records. *See* Jud. Law § 90(10). There are no steps respondents could take to enforce or otherwise act upon petitioner's bar exam failures to her detriment, and there is thus no need to "enjoin state officials to conform their future conduct to the requirements of federal law." *See Quern v. Jordan*, 440 U.S. 332, 337 (1979); *see also Green*, 474 U.S. at 73.

3. Petitioner acknowledges that respondents are not engaged in any "ongoing illegality" and instead argues that her suit may proceed if she can identify some "ongoing harm" arising from "past illegality." (Pet. 29.) There is no basis for this expansion of *Ex parte Young*.

This Court has never suggested that a state official's conduct constitutes an ongoing violation of law for purposes of *Ex parte Young* so long as it perpetuates some "harm inflicted by a past violation." (*See* Pet. 27.) To the contrary, this Court has rejected the same argument in the context of state officials' withholding of accrued benefits. *See Edelman v. Jordan*, 415 U.S. 651, 664-68 (1974); *Papasan*, 478 U.S. at 280-81. Awarding relief to address a "past breach of a legal duty," *Edelman*, 415 U.S. at 668, does not serve "directly to bring an end to a present violation of federal law," *Papasan*, 478 U.S. at 278.

Petitioner's cited cases do not support her attempt to rewrite the governing legal standard. In *Milliken v. Bradley*, this Court considered the scope of a district court's power to craft a desegregation decree following an unchallenged finding of de jure segregation in the Detroit public school system. 433 U.S. 267, 269 & n.1 (1977). The challenged decree, in relevant part, required the State to share in the future costs of remedial education. *Id.* at 289. This Court held that *Ex parte Young* authorized the decree's educational components, which were "designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system." *Id.* at 290.

But *Milliken* did not hold that state officials are subject to suit based solely on the lingering effects of past misconduct. (*Contra* Pet. 27.) Rather, the plaintiffs in *Milliken* alleged an ongoing violation of federal law: the challenged policies were in effect when the complaint was brought and declared unlawful in the same litigation. 433 U.S. at 269 n.1. This Court's references to the defendants' "past misconduct" and "antecedent violation" of law, *id.* at 290, simply reflected the case's procedural posture. By the time the case returned to this Court for a second time, the only issue in dispute was the scope of the prospective relief. *See id.* at 289. There was no question that plaintiffs had adequately alleged an ongoing constitutional violation sufficient to allow the suit to proceed in the first instance. *See id.* at 282 (explaining that the relief ordered "flowed directly from constitutional violations by both state and local officials").

Papasan similarly involved an ongoing violation of federal law: the complaint alleged a "present disparity" in the distribution of educational benefits in violation of the Equal Protection Clause. 478 U.S. at 282. This Court

explained that "the Eleventh Amendment would not bar relief necessary to correct a current violation of the Equal Protection Clause." *Id.* And nothing in the Court's decision remotely suggested that relief under *Ex parte Young* is available where "the conduct at issue occurred solely in the past." (*See* Pet. 28 (emphasis and quotation marks omitted).)

Petitioner quotes *Papasan* out of context to suggest that the case involved only past conduct. (*See* Pet. 28.) Specifically, she points to the Court's observation that the alleged disparity in benefits may have resulted from the State's past violation of its trust obligations. That past conduct was the subject of a separate breach-of-trust claim, which the Court determined was barred by the Eleventh Amendment because it sought only retrospective monetary relief. *Papasan*, 478 U.S. at 279-81. But "the essence of the equal protection allegation [was] the present disparity in the distribution of the benefits of state-held assets and *not* the past actions of the State." *Id.* at 282 (emphasis added). And that disparity persisted under the State's continuing annual appropriations. *See id.* at 272-73.

4. Finally, petitioner misreads the Second Circuit's decision to "eliminate" the remedy of expungement for federal plaintiffs (*see* Pet. 24) and warns of "devastating consequences for plaintiffs suffering disability discrimination" (Pet. 23). To the contrary, the Second Circuit expressly recognized that petitioner's claim for injunctive relief "may well have survived" if it had been properly pleaded. (Pet. App. 39a.) And, as discussed below (at 17-21), numerous courts have allowed claims for expungement of records to proceed under *Ex parte Young* where they sought to remedy an ongoing violation of federal law, as required. Petitioner's disagreement with the Second Circuit's application of estab-

lished law to the facts of her case does not warrant certiorari. *See* Sup. Ct. R. 10.

C. There Is No Split in Authority Requiring This Court's Intervention.

Petitioner argues that the Second Circuit created a circuit split when it held that a plaintiff must show that a state official's "continuing conduct is *itself* independently unlawful" to obtain relief under *Ex parte Young*. (Pet. 12.) Yet the courts of appeals broadly agree with this correct statement of the law. And the cases on which petitioner relies involving the expungement of records arose from materially different facts.

1. Consistent with this Court's precedents (see *supra* at 9-11), there is broad consensus among the courts of appeals that an ongoing violation of federal law occasioned by continuing conduct, as opposed to ongoing harm occasioned by past conduct, is required to sustain a claim for relief under *Ex parte Young*.[4]

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[4] *See, e.g.*, *Cotto v. Campbell*, 126 F.4th 761, 771 (1st Cir. 2025) (relief unavailable under *Ex parte Young* where it "would not serve to end an ongoing violation of federal law because plaintiffs allege only a past wrong"); *Merritts v. Richards*, 62 F.4th 764, 772 (3d Cir. 2023) ("Although those earlier actions may have present effect, that does not mean they are ongoing."); *Industrial Servs. Grp., Inc. v. Dobson*, 68 F.4th 155, 165 (4th Cir. 2023) (distinguishing retroactive expungement of past safety violations from prospective injunction against current unlawful practices); *S&M Brands, Inc. v. Cooper*, 527 F.3d 500, 510 (6th Cir. 2008) ("The alleged constitutional deficiency here is a one-time, past event; the Plaintiffs do not seek a prospective injunction that requires the Attorney General to conform his conduct in an ongoing, continuous fashion."); *R. W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1225 (9th Cir. 2023) (distinguishing between "an ongoing violation and ongoing harm from a past violation"); *Drown v. Utah State Off. of Educ.*, 767 F. App'x 679, 685 (10th Cir. 2019) (continued retention of reprimand letter

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Petitioner's cited cases (Pet. 20-21) demonstrate this point. For example, the Fifth Circuit in *Green Valley Special Utility District v. City of Schertz* explained that a plaintiff may seek an injunction "to restrain state officials from enforcing an unlawful order," because that relief is aimed at the defendant's "continuing conduct." 969 F.3d 460, 473 (5th Cir. 2020) (en banc) (emphasis and quotation marks omitted). But merely seeking to vacate a past order is "out of bounds under *Young*." *Id.*

Similarly, the Seventh Circuit in *Driftless Area Land Conservancy v. Valcq* explained that "[a] permit issued in violation of due process remains unlawful as long as it is in force and in effect." 16 F.4th 508, 523 (7th Cir. 2021). And it contrasted a case where the defendant had been deprived of a pretermination hearing but later received a postdeprivation hearing that complied with due process. Although the defendant complained that he was never reinstated—meaning that the harm from the past violation remained—he failed to establish any ongoing violation of federal law.[5] *Id.* at 523-24 (citing *Sonnleitner v. York*, 304 F.3d 704, 718 (7th Cir. 2002)).

The Sixth Circuit's precedents are not to the contrary. (*See* Pet. 19, 28.) Despite that court's suggestion that a claim may proceed based on "ongoing effects from constitutional violations, even if the conduct at issue occurred solely in the past," *Waid v. Earley (In re*

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was not an ongoing violation of federal law), *Nicholl v. Attorney General*, 769 F. App'x 813, 816 (11th Cir. 2019) ("That plaintiff's grade remains 'B' does not transform a one-time past event into a continuing violation.").

[5] By contrast, *Columbian Financial Corporation v. Stork* involved an ongoing violation of federal law in the form of "defendants' ongoing refusal to provide a fair and impartial hearing." 702 F. App'x 717, 721 (10th Cir. 2017).

Flint Water Cases), 960 F.3d 303, 334 (6th Cir. 2020), the case on which the court relied for that proposition held the opposite. In *Boler v. Earley*—which involved identical claims for relief also arising from the Flint water crisis—the same court rejected the claims in one of the two consolidated cases for failure to sufficiently allege ongoing violations of federal law yet allowed the other set of claims to proceed based on continuing unlawful conduct. *See* 865 F.3d 391, 412-13 (6th Cir. 2017). And the Sixth Circuit has since correctly observed that *Ex parte Young* allows federal courts "to enjoin state officials from ongoing unlawful conduct." *T.M. ex rel. H.C. v. DeWine*, 49 F.4th 1082, 1088 (6th Cir. 2022).

2. The cases on which petitioner relies concerning the expungement of records arose from materially different facts, including that none addressed a plaintiff's request to expunge records that were sealed and not otherwise subject to disclosure. These decisions thus do not conflict with the decision below.

a. In *Morgan v. Board of Professional Responsibility of the Supreme Court of Tennessee*, the Sixth Circuit held that "expungement of negative governmental records *may* qualify as prospective relief to remedy a constitutional violation." 63 F.4th 510, 516 (6th Cir. 2023) (emphasis added). But the court's determination that *Ex parte Young* authorized the requested relief turned on the case's specific facts. The plaintiff, who had been terminated from state employment, sought an injunction (i) restraining the defendants from opening any post-termination disciplinary files against him based on his protected speech and (ii) requiring defendants to expunge any reference to prior discipline from his employment record. *Id.* The plaintiff sought expungement of his employment record—and not any disciplinary files—because Tennessee law protected

disciplinary files from disclosure yet prospective employers could obtain employment records. Br. of Appellant at 26 n.8, *Morgan*, 63 F.4th 510 (No. 22-5200), 2022 WL 1694568. Because the requested relief was not "based entirely on past acts" but rather involved the defendants' "continuing conduct," *Morgan*, 63 F.4th at 515 (quotation marks omitted), it satisfied *Ex parte Young*'s requirement that a plaintiff demonstrate an "ongoing constitutional violation," *id.* at 516.[6]

Here, unlike in *Morgan*, there is no action that respondents could take based on petitioner's bar exam records in derogation of her rights. To the contrary, respondents are prohibited by statute from disclosing petitioner's records and, having certified petitioner for bar admission, have no authority to take any action against her. *See* Jud. Law § 90(10). By contrast, the

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[6] Other cases in which the Sixth Circuit has approved the expungement of records arose from similar facts. *See, e.g.*, *Ashford v. University of Mich.*, 89 F.4th 960, 969 (6th Cir. 2024) (plaintiff sought expungement of discipline after being threatened with escalating discipline based on those prior findings); *Thomson v. Harmony,* 65 F.3d 1314, 1317 n.1, 1320-21 (6th Cir. 1995) (plaintiff sought reinstatement together with expungement of personnel files to allow plaintiff to seek research fellowship).

Similarly, the district court cases on which petitioner relies (Pet. 18-19) involved the claims of current students where, absent expungement, the university would continue to enforce the challenged discipline. *See Garcia v. Metropolitan State Univ. of Denver*, No. 19-cv-02261, 2020 WL 886219, at *8-9 (D. Colo. Feb. 24, 2020) (request for expungement accompanied by request for injunction against future enforcement of sanctions and for reinstatement); *Johnson v. Western State Colo. Univ.*, 71 F. Supp. 3d 1217, 1230 (D. Colo. 2014) ("Plaintiff claims that the inclusion of the [discipline] on his official academic record violates his First Amendment free speech rights on an ongoing basis, which is an ongoing violation of federal law.").

employer in *Morgan* had both the power to open new disciplinary files against the plaintiff post-termination and the legal obligation to disclose the plaintiff's records at the request of prospective employers. And taking either action would have arguably violated the plaintiff's free-speech rights. Such continuing purportedly unlawful conduct is absent from the current case.

b. The Seventh Circuit cases on which petitioner relies are similarly distinguishable. They, too, involved ongoing conduct alleged to violate federal law.

In *Malhotra v. University of Illinois at Urbana-Champaign*, the plaintiff alleged that the university suspended him without a proper hearing in violation of due process and sought to expunge his disciplinary record. 77 F.4th 532, 535 (7th Cir. 2023). He further alleged that "defendants will invariably disclose his disciplinary record to any graduate school or employer to which he applies." *Id.* at 537-38 (quotation marks omitted). The court concluded that these allegations were sufficient to show that university officials were "actively flouting the law" and, for that reason, the Eleventh Amendment did not bar plaintiff's claims (which failed on other grounds). *Id.* at 536.

In *Doe v. Purdue University*, the plaintiff sought expungement of a disciplinary finding of sexual violence obtained by an allegedly unconstitutional process that resulted in his expulsion from the Navy ROTC program. 928 F.3d 652, 656 (7th Cir. 2019). The plaintiff did "not claim simply that he might someday have to self-publish the guilty finding to future employers" but rather that "he had an obligation to authorize Purdue to disclose the proceedings to the Navy." *Id.* at 662. The court thus concluded that the plaintiff's "marred record is a continuing harm for which he can seek redress." *Id.* at 666.

And the court observed that "if the guilty finding is expunged, a career in the Navy may once again be open to him." *Id.*

In both cases, the plaintiffs alleged that the universities never afforded them a hearing that complied with due process and that the universities would take additional, concrete actions in violation of those plaintiffs' rights by disclosing their disciplinary records to future employers. Here, by contrast, it is undisputed that the Board provided petitioner with all requested accommodations for the February 2015 bar exam, which petitioner passed, and that New York law prevents the Board from disclosing petitioner's earlier bar exam records. See *supra* at 3-4. Respondents are not engaged in any continuing conduct alleged to be unlawful, and the Board's role in petitioner's career ended when it certified her for admission to the New York bar. *See* Jud. Law § 464.

c. Contrary to petitioner's assertion (Pet. 16-18), *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007), did not address the same issue as the question presented here.[7] In *Flint*, the plaintiff sought to expunge records related to his censure and the denial of his student senate seat,

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[7] Other recent decisions from the Ninth Circuit allowing requests for expungement of records to proceed under *Ex parte Young* are similarly distinguishable. *See Jensen v. Brown*, 131 F.4th 677, 696-97 & n.14 (9th Cir. 2025) (confirming that *Ex parte Young* does not allow for relief based solely on a past violation and concluding that plaintiff alleged an ongoing violation where his employer could rely on negative documents in his personnel file to his detriment); *K. J. ex rel. Johnson v. Jackson*, 127 F.4th 1239, 1251-54 (9th Cir. 2025) (current student sought to expunge disciplinary file on which administrators and teachers would continue to rely containing information that must be disclosed on college applications).

which arose from an allegedly unconstitutional policy limiting spending on student-government elections. *Id.* at 822, 825. The Ninth Circuit observed that the requested relief was not "limited merely to past violations" because it served to prevent "present and future harm." *Id.* at 825. But the court did not address whether injunctive relief would have been available if aimed, as here, "exclusively at a past violation." (Pet. App. 40a (emphasis omitted).) Nor did the court explain the nature of the university's continuing conduct related to the disputed records. *See Flint*, 488 F.3d at 825. The Second Circuit here correctly distinguished *Flint* on these grounds.[8] (*See* Pet. App. 40a.)

3. Finally, petitioner is mistaken that the decision below will affect the availability of other equitable remedies, such as reinstatement. To the contrary, the Second Circuit (like every other circuit to address the issue) holds that claims for reinstatement may proceed under *Ex parte Young*. *E.g.*, *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007). In such cases, so long as the defendant continues to deny the plaintiff employment, the defendant is engaged in continuing conduct that violates federal law. *Id.* at 97. Again, such continuing conduct is absent from this case.[9]

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[8] Fourth Circuit authority does not conflict with the decision below, either. (*Contra* Pet. 19 n.2.) The defendants in *Constantine v. Rectors & Visitors of George Mason University* did not contest that the plaintiff had alleged an ongoing violation of federal law. *See* 411 F.3d 474, 496 (4th Cir. 2005). And the court has more recently held that "continuing consequences" stemming from the maintenance of medical board disciplinary records did not support relief under *Ex parte Young*. *Jemsek v. Rhyne*, 662 F. App'x 206, 210-12 (4th Cir. 2016).

[9] Petitioner misplaces her reliance (Pet. 4, 24) on a D.C. Circuit decision concerning the expungement of arrest records that refer-

(*continues on next page*)

At bottom, petitioner merely collects cases in which different facts yielded different results. But such fact-bound variation is both appropriate and to be expected considering that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman*, 415 U.S. at 667. And it provides no basis to grant certiorari in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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enced sovereign immunity only in passing and did not address the question presented. *See Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 & n.3 (D.C. Cir. 2004).