No. 24-714

In The
Supreme Court of the United States

T.W.,
Petitioner,

v.

NEW YORK STATE BOARD OF LAW EXAMINERS, DIANE BOSSE, JOHN J. MCALARY, BRYAN WILLIAMS, ROBERT MCMILLEN, E. LEO MILONAS, MICHAEL COLODNER,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The opposition confirms that this case is a straightforward grant. Respondents ("BOLE" or the "Board") acknowledge that the decision below establishes a legal rule of enormous consequence: A plaintiff cannot obtain injunctive relief under *Ex parte Young*, even when the government engages in ongoing conduct perpetuating ongoing harm, unless she can *also* show that the government's "'continuing conduct is *itself* independently unlawful.'" BIO15. BOLE does not dispute that this rule will affect countless claimants in the many circumstances where a "marred record" can permanently damage a person's livelihood. BIO19 (quoting *Doe v. Purdue Univ.*, 928 F.3d 652, 666 (7th Cir. 2019) (Barrett, J.)). Nor can it seriously deny a circuit split. The decision below does not just set forth a legal rule incompatible with rules in four other circuits; it does so in the *exact* factual context at issue here—expungement of records tainted by illegality. The result is that in four circuits, plaintiffs can obtain the precise relief that was denied to T.W. That is as clear as a circuit conflict gets.

Moreover, that conflict has only sharpened since the decision below, because (1) the Fourth Circuit has joined the courts rejecting the Second Circuit's position; (2) a later Second Circuit panel has doubled down on the panel's decision; and (3) the Ninth Circuit has re-affirmed its position in direct opposition to the Second Circuit's. *Infra* at 3-4. As one court recently noted, it is now beyond doubt that the circuits have reached "diverging conclusions on whether expungement is a form of relief permitted by *Ex parte Young*." *Morrill v. Aarhaus*, No. 24-cv-199, 2025 WL 815383, at *7 (D. Colo. Mar. 14, 2025).

Tellingly, BOLE trains almost all of its attention on a *different* question, not addressed by the Second Circuit. In its view, T.W.'s claim should fail on the alternative ground that BOLE's ongoing conduct does not harm her, because her exam results are "sealed" under state law. That assertion is baseless and irrelevant. Regardless whether the physical records are "sealed," T.W. must self-disclose the results to prospective employers if asked. And the results are also publicly available on BOLE's website. Thus, as even the Second Circuit acknowledged, T.W. has adequately alleged injury based on BOLE's maintenance of—and failure to disavow—its bar-exam results. In any event, because standing and sovereign immunity are both threshold jurisdictional questions—and "there is no mandatory 'sequencing of jurisdictional issues,'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007)—this Court can simply leave BOLE's meritless standing objection to be addressed on remand. It supplies no basis to let stand an erroneous legal rule of vast importance, over which the circuits are divided.

Finally, on the merits, BOLE offers no principled defense of the Second Circuit's senseless and arbitrary rule, which leaves federal courts powerless to prevent state officials from engaging in harmful conduct stemming from their prior unlawful actions. Just like the Second Circuit, BOLE cannot offer any reason *why* a federal court's remedial power should be limited in this manner. Instead, it simply reads language from this Court's cases out of context to erect an arbitrary barrier that will cause enormous harm. This Court should grant the petition, and ensure nationwide uniformity in the remedies available to victims of unlawful state action.

ARGUMENT

A. There Is A Deepening Circuit Split On The Meaning Of *Ex Parte Young*'s "Ongoing Violation" Requirement

BOLE acknowledges—and ardently defends—the Second Circuit's sweeping holding that "a plaintiff must show that a state official's 'continuing conduct is *itself* independently unlawful' to obtain relief under *Ex parte Young*." BIO15. Because "maintenance of … records is [not] unlawful," BOLE argues, "the Eleventh Amendment bars [the] claim[s]" of those seeking injunctive relief to expunge those records. BIO2. As BOLE puts it, "'ongoing harm' arising from 'past illegality' is insufficient to satisfy *Ex parte Young*." BIO12. Instead, "ongoing conduct alleged to violate federal law"—in addition to ongoing conduct that harms a plaintiff—"is required to sustain a claim for relief under *Ex parte Young*." BIO2.

But several other circuits disagree. In published decisions, the Sixth, Seventh, Ninth, and—just this month—Fourth Circuits have held that *Ex parte Young* relief is available to require the expungement of records resulting from past illegal conduct, because the ongoing harm caused by those illegal records satisfies the "ongoing violation" requirement. Pet.13-18 (collecting cases). As Judge Wilkinson recently explained in a case addressing a public university's denial of due process to a student accused of sexual misconduct, "[s]everal of our sister circuits have held that an erroneous disciplinary record is an ongoing injury … for which [a] student can seek equitable relief." *Doe v. Univ. of N.C. Sys.*, 133 F.4th 305, 310, 319 (4th Cir. 2025). The Ninth Circuit also recently reaffirmed its position on this question. *See Jensen v.*

Brown, 131 F.4th 677, 683 (9th Cir. 2025). As the court explained in unequivocal terms, "Ninth Circuit case law establishes that expungement of records constitutes prospective relief and so is not barred by sovereign immunity." *Id.* at 696; *see id.* at 698 (An "alleged violation … is ongoing insofar as the [unlawful] records continue to exist."). At the same time, the Second Circuit has already reiterated that its rule is the opposite, making clear that *Ex parte Young* categorically does *not* apply to requests to "expunge [a] disciplinary record." *Jones v. New York*, No. 23-689, 2025 WL 453415, at *2 (2d Cir. Feb. 11, 2025). Lower courts have thus acknowledged that the "Second and Ninth Circuits have reached diverging conclusions on whether expungement is a form of relief permitted by *Ex parte Young*." *Morrill*, 2025 WL 815383, at *7-8 (citing Ninth Circuit decision in *Jensen* and the decision below).

BOLE makes only the most cursory effort to downplay this division of authority. Its sole argument is that the cases finding *Ex parte Young* relief available did not "address[] a plaintiff's request to expunge records that were sealed and not otherwise subject to disclosure." BIO17. But BOLE never explains why that is remotely relevant to the question presented. The decision below did not turn on whether T.W.'s records were "sealed"—indeed it did not even *mention* that fact. To the contrary, the Second Circuit acknowledged that—sealed or not—BOLE's maintenance of records *did* cause T.W. "ongoing *harm*"; it simply found that fact to be "unresponsive" to the *Ex parte Young* inquiry because BOLE's maintenance of, and refusal to disavow, the records was not *itself* unlawful. App.39a-40a.

The decisions on the other side of split likewise have nothing to do with whether the relevant records were "sealed." Consider *Morgan v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 63 F.4th 510 (6th Cir. 2023). Digging into a footnote from one of the party's briefs, BOLE suggests that the real reason the court found expungement relief available was that "prospective employers could obtain employment records" from the defendant. BIO17-18. But good luck finding any such reasoning in the Sixth Circuit's decision. Instead, its holding was based on the simple fact that the plaintiff "posit[ed] that he is and will be harmed by the [defendant's] continued maintenance of disciplinary records against him"—just like T.W. alleged here. *Morgan*, 63 F.4th 516; s*ee, e.g.*, CAJA29 (¶¶ 72-73). Similarly for *Malhotra v. University of Illinois at Urbana-Champaign*, 77 F.4th 532 (7th Cir. 2023), BOLE stitches together quotes from a merits discussion that was unrelated to the *Ex parte Young* analysis to suggest that the latter turned on the "invariabl[e] disclos[ure]" of records by the defendant. BIO19 (quoting 77 F.4th at 536-38). Really, the court simply held—based on then-Judge Barrett's prior decision in *Doe*—that a "'marred [disciplinary] record' *is* a continuing harm," and so permits *Ex parte Young* relief. *Malhotra*, 77 F.4th at 536 (alteration in original) (emphasis added) (quoting *Doe*, 928 F.3d at 666). The Ninth Circuit's rule is the same. *See Jensen*, 131 F.4th at 696-98 (citing *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007)).

In each case, the court found that expungement is available under *Ex parte Young* when a plaintiff suffers ongoing harm caused by a state official's unlawful conduct—*without* a separate allegation that

the official's "'continuing conduct is *itself* independently unlawful.'" BIO15.[1] BOLE concedes that the Second Circuit required the latter. *Id.* And it defends it as a "correct statement of the law." *Id.*; *see* BIO9-15. BOLE's focus on "seal[ing]" is thus an obvious (and fruitless) effort to distract from the circuits' open conflict on the correct legal rules. BIO6-8.

The split also stretches beyond expungement. BOLE concedes (at 16-17) that *Waid v. Earley (In re Flint Water* Case*)* is contrary to its position. 960 F.3d 303, 334 (6th Cir. 2020). And BOLE's attempt to distinguish *Boler v. Earley* fails: Although "[d]amage to the water pipes ha[d] been done" before suit, the unlawful conduct causing that damage was found to "ha[ve] ongoing effects … sufficient to show an ongoing violation." 865 F.3d 391, 412-13 (6th Cir. 2017). *Boler* held a *different* claim insufficient simply because "it [wa]s not clear what injunctive relief [wa]s sought." *Id.* at 412. But on the ongoing-violation issue, *Boler* is incompatible with the rule announced below.

BOLE also fails to distinguish the other cases cited in the petition. In *Green Valley Special Utility District v. City of Shertz*, for example, the en banc Fifth Circuit held that "'[a]s long as the claim seeks prospective relief for ongoing harm,'" *Ex parte Young* relief is available. 969 F.3d 460, 471-72 (2020) (alteration in original). That is the opposite of the Second Circuit's holding that, even though T.W. sought "prospective" relief, her "ongoing *harm*" was

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[1] BOLE also cites some unpublished cases suggesting that other circuits might share the Second Circuit's confusion on the expungement issue. *See* BIO15 n.4 (citing *Nicholl v. Att'y Gen.*, 769 F. App'x 813, 816 (11th Cir. 2019), and others). But that just confirms the need for this Court's review.

"unresponsive" to the "ongoing violation" issue. App.39a-40a; *see Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 514-15, 522 (7th Cir. 2021) (permitting *Ex parte Young* relief to "undo[] or expunge[] a past state action").

B. The Question Presented Is Undeniably Important And BOLE Identifies No Impediment To This Court's Review

1. BOLE does not seriously dispute the importance of the question presented—including the "devastating consequences for plaintiffs suffering from disability discrimination" that the decision below will create. Pet.23. For good reason. As *fifteen* groups who advocate for individuals with disabilities explained, "the decision below eliminated … an entire category of … vitally important" remedies. Disability Advocacy Groups Br. 3-4.

Nor does BOLE deny that the decision below will wreak havoc for plaintiffs outside the disability context. That includes students seeking due process before expulsion from college. *See, e.g.*, *Doe*, 133 F.4th at 310, 319 (sexual-misconduct proceedings); *Doe*, 928 F.3d at 666 (same); *Malhotra*, 77 F.4th at 534-36 (violation of COVID restrictions). It includes public employees punished for criticizing their employers, *see, e.g.*, *Jensen*, 131 F.4th at 683, 696-98, or for speech outside their employment, *see, e.g.*, *Morgan*, 63 F.4th at 513, 516-17 (alleged anti-Muslim tweets by lawyer pre-hiring). And it includes individuals wrongly subject to arrests and convictions. *See, e.g.*, *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148, 1152 & n.3 (D.C. Cir. 2004) (Roberts, J.). In all these areas, access to a vital federal remedy now turns on the happenstance of geography.

2. BOLE also fails to identify any impediment to this Court's review. It does not dispute that the question presented is purely legal, that it was raised and squarely decided below, or that it was the sole basis for the Second Circuit's decision. Its only "vehicle" objection is its own proffer of an alternative basis to reject T.W.'s claim. In BOLE's telling, the fact that T.W.'s records are "sealed" under state law means that she has not suffered any cognizable injury, and so lacks standing to seek expungement. BIO6-9. That argument is flawed many times over.

First, as numerous courts have recognized, a public body's maintenance of—and refusal to disavow—a record tainted by illegality unquestionably causes tangible harm. As then-Judge Barrett explained, "[a] marred record is a continuing harm for which [a person] can seek redress." *Doe*, 928 F.3d at 666. Or, as then-Judge Roberts explained as to arrest records, "expungement … would relieve [the plaintiff] of the burden of having to respond affirmatively to the familiar question, 'Ever been arrested?' on application, employment, and security forms." *Hedgepeth*, 386 F.3d at 1152. A plaintiff seeking such relief "accordingly has Article III standing." *Id.* Tellingly, BOLE fails to identify *any* court of appeals finding that maintenance of unlawful records causes no cognizable injury.

Second, as T.W. explained in her complaint, it is immaterial whether employers can physically access the records at issue because they can—and do—*ask her* about her bar results, and she must "disclose and struggle to explain failure on the bar examination in her job search." CAJA29 (¶ 73). This has "hindered *and continues to hinder*" her job prospects by requiring her to disclose her disability even though

the law "protects her from such disclosure." *Id.* (¶ 74) (emphasis added). Indeed, T.W. specifically pled that she "has [been] required … to disclose her disability" and bar results to prospective employers. BOLE's implied suggestion that no employer will be aware of T.W.'s failures is baseless, and directly contradicted by the allegations in T.W.'s complaint.

Third, and in any event, BOLE vastly overstates the barriers to disclosure under New York law. True, New York's Judiciary Law § 90(10) makes bar-exam results confidential by default. But BOLE publishes a list of all those who pass the bar for each administration, making it extremely easy to tell if someone passed or not. *See* N.Y. State Board of Law Examiners, *Bar Exam Pass Result Lookup*, https://www.nybarexam.org/lookup.html (last visited Apr. 24, 2025). And the sealing of bar-exam results is just a default; justices of New York's appellate courts, "in their discretion," can order release of those results "without notice to the persons … affected thereby." N.Y. Jud. Law § 90(10). It defies reality to suggest that BOLE's maintenance of—and refusal to disavow—these tainted results cause T.W. no harm.

It is thus unsurprising that the Second Circuit itself refused to embrace this argument below—even though it was the basis for the district court's decision. *See* CAJA50-51. Indeed, the Second Circuit all-but-affirmatively rejected BOLE's lead argument on expungement relief below (that T.W. lacked standing), *see* CA2.BOLE.Br.39-41, by *accepting* that T.W. had alleged "'ongoing *harm*'" that could be redressed by "prospective" expungement relief, and instead resting entirely on the alternative "*ongoing violation*" theory, App.39a-40a.

Regardless, even if BOLE's standing argument had any merit, the mere presence of an alternative argument is not an impediment to this Court's review. Both standing and sovereign immunity are threshold jurisdictional questions, and "there is no mandatory 'sequencing of jurisdictional issues.'" *Sinochem*, 549 U.S. at 431; *see* BIO6 n.3. Thus, the Court has the flexibility either to provide guidance on the standing requirements for those seeking expungement relief, or to leave that question for the Second Circuit on remand. There is no barrier to the Court's review.

C. The Second Circuit Is Wrong

Finally, BOLE's defense of the decision below is meritless. Mostly, it intones that *Ex parte Young* relief is available only if there is an "ongoing violation" of federal law. BIO9-11. But that is common ground. The question is whether the "ongoing violation" requirement is *satisfied* by ongoing conduct perpetuating a past unlawful act, or whether the ongoing conduct must *itself* violate the law. "The question is … what constitutes an 'ongoing violation' in the first place." Pet.31.

On that question, BOLE has strikingly little to say. *See* Pet.12-14. It never offers any principled defense of the Second Circuit's rule, under the guiding purposes of state sovereign immunity. *Cf.* BIO12 (focusing on cases involving requests for payment of past-due money benefits). And its efforts to distinguish this Court's cases is wholly unpersuasive. Take *Milliken v. Bradley*, where the Court explained that *Ex parte Young* relief is available to "help dissipate the continuing effects of past misconduct." 433 U.S. 267, 290 (1977). BOLE dismisses this reference to "past misconduct" as a product of "the case's procedural

posture." BIO13. But *Milliken* concerned whether courts could order schools that had *already been integrated* to implement remedial programs to combat the lasting effects of "past acts of *de jure* segregation." 433 U.S. at 269. Without "such prospective relief," victims of "the antecedent violation" "will continue to experience the effects of segregation." *Id.* at 290.

Similarly, *Papasan v. Allain* explained that remedying a "current" harm that "results directly from … actions in the past that are the subject of [plaintiffs'] claims" is "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." 478 U.S. 265, 282 (1986). BOLE attempts to distinguish *Papasan* by arguing that it found *Ex parte Young* available only to remedy a "'present disparity'"—not "past conduct." BIO14 (quoting 478 U.S. at 282). But that is precisely what T.W. requests: a prospective injunction requiring expungement of records resulting from BOLE's "past" violations (denying accommodations), which cause "present" harm (maintaining records of failure).

Finally, BOLE fails to show that T.W.'s requested relief would "threaten to evade sovereign immunity," *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 256 (2011), and never rebuts petitioner's showing (at 28-30) that the Second Circuit's rule is senseless and arbitrary. Nor could it. All that rule does is ensure that, even in cases of open and egregious misconduct, with undisputed harm that could be redressed with prospective relief, there will be *no* remedy. App.39a-40a. That rule will govern thousands of claims across the Second Circuit, leading to manifestly unjust outcomes for those who live there. Access to justice cannot depend on geography. This Court's intervention is needed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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