UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A & R Engineering and Testing, Incorporated,

Plaintiff-Appellee,

v.

Ken Paxton, Attorney General of Texas

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

Brief of *Amicus Curiae*, The Rutherford Institute, in Support of A&R Engineering and Testing, Inc., and Affirmance

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and 29(a)(4)(A), Amicus Curiae, The Rutherford Institute, a Virginia nonprofit corporation, makes these disclosures:

1) There are no parent corporations for The Rutherford Institute; and
2) No public corporation owns 10% or more stock in The Rutherford Institute.

Certificate of Interested Persons

Counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms.[1]

As part of its mission, The Rutherford Institute resists the erosion of fundamental civil liberties that results from overly narrow drawings of procedural doctrines like standing and sovereign immunity. *Ex parte Young* provides Americans the ability to efficiently challenge potentially unconstitutional laws in federal court. Over the years, *Ex parte Young* has endured criticism, with opponents alleging that it is constitutionally dubious, and not sufficiently grounded in our historical understanding of state sovereign immunity. That criticism has directly led to arguments

[1] Pursuant to Fed. R. App. P. 29(a), *amicus* represents that all parties have consented to the filing of this brief. The undersigned counsel further represent that no party or party's counsel have authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no party other than the *amicus curiae* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

seeking to keep narrowing its scope. The Rutherford Institute is interested here because Texas' Attorney General is advancing one of these overly narrow arguments.

These criticisms are ill-founded and seeking to narrow *Ex parte Young* is a mistake for many reasons. The Rutherford Institute's brief here will touch on both points.

Summary of Argument

This case arises from Texas' attempt to prevent individuals from exercising their First Amendment rights. Rasmy Hassouna, an American citizen from Gaza, owns A&R Engineering and Testing, Inc. ("A&R"). Hassouna believes in the "Boycott, Divestment, and Sanctions" movement – BDS for short – and wants to preserve his and A&R's right to boycott. Unsurprisingly, not all Americans agree with the BDS movement. That includes many elected officials. But rather than debating the merits, some states are using government power to punish BDS supporters

Texas passed an anti-BDS law that requires individuals seeking to provide services to the state to certify that the individual is not participating in any BDS movement, nor will they while providing services to

the state. Essentially, the state seeks a statement that the contractor will conduct themselves in accordance with the state's viewpoints. If the contractor does not agree to conduct themselves accordingly, their bid will not be considered. Seeking to vindicate his First Amendment rights, Hassouna filed this suit, and the lower court correctly found that Texas' law offends the First Amendment.

Among Texas' arguments is yet another chapter in an ongoing saga about the Eleventh Amendment: who can enforce rights enshrined the United States Constitution when states allegedly violate them – and how? In *Ex parte Young*, the Supreme Court struck a balance. 203 U.S. 123 (1908). Using a longstanding common law tradition, the Court held that injunctive suits against state officials in their individual capacities could be filed in federal court to prevent them from defying the Constitution. *Id.* This preserved both the traditional justifications for sovereign immunity, state control over its purse (absent other statutes or causes of action), and ensured that Americans could protect their rights.

In the years since, *Ex parte Young* has come under direct and indirect attacks. Some directly question its constitutional validity. James Leonard, Ubi Remedium Ibi Jus*, or, Where There's a Remedy, There's a*

Right: A Skeptic's Critique of Ex parte Young, 54 Syracuse L. Rev. 215 (2004). Others appear to at least facially accept it but seek to narrow its scope to limit suits brought against the states. That is Texas' argument in this case. Not a direct attack per se, but an indirect one that, if accepted, runs the risk of gutting Americans' ability to protect their rights.

Both attacks are misplaced. *Ex parte Young* is based in common law traditions that were strongly embraced by our founders. The equitable methods used have changed over hundreds of years, mostly to simplify the process, but they would be familiar to the founders regardless. Much of the current confusion, and dizzying case law, is more the result of misunderstanding what sovereign immunity provided at the time of the Eleventh Amendment and how that concept was understood. Our modern notion of sovereign immunity is, ironically, more sweeping and embracing than the Eleventh Amendment's drafters could have conceived of. Attempts to narrow *Ex parte Young* in the name of fulfilling the Eleventh Amendment's promise is unsound.

Also, attempting to narrow *Ex parte Young*'s application presents a grievous threat to our rights. By delegating and disavowing enforce-

ment, states then make arguments seeking to prevent citizens from vindicating their rights in court – the final backstop in preventing government abuse. Texas' argument here, if accepted, creates an open invitation for states across the country to pass similar laws threatening everything from freedom of speech to free exercise of religion to the right to bear arms.

ARGUMENT

A. *Ex parte Young* is Based on Centuries of Common Law Tradition.

Ex parte Young's critics fundamentally misunderstand a key concept that was wholly familiar to the founders: there is a meaningful difference between a legal action against a government and an equitable action against a government agent. It is not merely a change in the caption. There is a long, common-law tradition of controlling government agents, and agencies, through equity. Not only that, but the argument that the Eleventh Amendment should take precedence in any analysis of officer suits also fundamentally misunderstands both the nature of the Eleventh Amendment and how the founders understood sovereign immunity.

1. English Common Law Origins

Suits seeking to enjoin individual officers rose alongside the administrative state during the second half of the sixteenth century when an "unprecedented increase in legislation" began assigning governance to what amounted to forerunners to modern agencies. Edith G. Henderson, *Foundations of English Administrative Law: Certiorari And Mandamus In The Seventeenth Century* 9 (1963).[2] By the 1500s, England's parliament created statutory regulations on everything from alcohol to iron. Paul Craig, *Administrative Law History: Perception and Reality*, *in Judicial Review in the Common Law World: Origins and Adaptations* 40 (2021). But England had long been too large for centralized enforcement. Instead, administration and enforcement were spread out among a wide range of bodies, including "commissioners of sewers, excise, inclosure, tithes, improvement," and so forth. *Id.* There were also such bodies as "turnpike trustees, which undertook analogous functions in relation to roads; the guardians of the poor, who oversaw the poor law; and factor inspectors." *Id.*

[2] It is beyond the scope of this brief, but the notion that the administrative state is purely modern is mistaken. Henderson, Craig, and many others, discuss this in some detail.

Of course, this proliferation of legislation came with a concomitant proliferation of government abuse. The sudden, marked expansion government "posed new threats to the rights of individual subjects, who found themselves 'so at the mercy of administrative officers' that 'some protection' against the abuse of power became necessary." James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 Stan. L. Rev. 1269, 1294 (2020)(quotations original)(citations omitted). This gave rise to the use of writs to prevent government officials from abusing their power.

These writs were not aimed at the state for two reasons. First, no common law court had the power to command the crown to do anything because "the king can do no wrong…" 3 William Blackstone, Commentaries *254. But second, *because* the king could do no wrong, any government officer acting beyond the scope of their authority was necessarily no longer mirroring the king's wishes. That meant a court could issue a writ in the king's name directing the official to change course:

> Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, … yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute:

> and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved. 3 William Blackstone, *Commentaries* *254-55.

There is also a third, and more practical reason for this procedure that is still relevant today: efficiency. Attempts to obtain forms of legal relief were slow, expensive, and, in many cases, ultimately useless. Henderson, *supra*, at 47. Equitable writs, on the other hand, could be obtained far more quickly, and in a more direct fashion than legal relief.

Sir Edward Coke played a pivotal role in developing equitable writs designed to prevent government officials from abusing their power. For example, in *Hetley v. Boyer,* (1613) 79 Eng. Rep. 287, 287 (KB), Lord Coke issued a writ to prevent a town, Northampton, from assessing a tax imposed on the entire town on a single resident. In *Bagg's Case*, Lord Coke issued a writ of restitution after Plymouth's mayor threw James Bagg out of town for disrespecting the mayor "as well in gesture as in words." *Bagg's Case*, (1615) 77 Eng. Rep. 1271, 1271-72, 1274 (KB). Restoring Bagg, Coke wrote that equitable writs existed to correct "other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or . . . any manner of misgovernment; so that no

wrong or injury, either public or private, can be done but that it shall be (here) reformed . . . by due course of law." *Id.* at 1281.

English common law courts continued to develop more and more equitable writs to prevent different acts. Chief among them were writs of prohibition—the forerunner of the modern American injunction.

By the founding period, there were many equitable writs available, but they all shared one key feature: they were all "public proceedings brought in the King's name." Pfander & Wentzel, *supra*, at 1301 (citing Louis L. Jaffe, *Judicial Control of Administrative Action* 462 (1965)). That is important for our purposes for two primary reasons. First, these writs were "issued to correct the wrongs of public officers, not 'mere private wrongs' inflicted by ordinary citizens." *Id.* at 1302 (citing Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, as It Obtains Both in England, and in Ireland* 11 (1848)). And second, "the writs were generally "pursued as public actions, in which individuals sought the correction of public wrongs on behalf of the public at large." *Id.* (citing Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816, 825 (1969)).

One of the most striking features of the English common law tradition was that the king's sovereign immunity was almost entirely nominal. While the king might have theoretically been able to routinely claim to do no wrong, government officials could be hauled into court nearly ad nauseam. Edwin Borchard, *Government Liability in Tort Parts I and II*, 34 Yale L.J. 1 (1924); 36 Yale L.J. 1, 757 (1926); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963). John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1895-1896 (1983). By the eighteenth century, the petition of right directly against the king itself was employed routinely. In essence, it had stopped being discretionary.

2. America Adopts the Common Law Officer Suit

In *Marbury vs. Madison*, Chief Justice John Marshall strongly endorsed the continued use of administrative writs against government officers. 5 U.S. 137 (1803). In his majority opinion, Justice Marshall wrote that the Supreme Court did not have original jurisdiction over the matter but was careful to directly weave common law administrative oversight

into federal law. Quoting directly from English Lord Chief Justice Mansfield, Justice Marshall stated that "[w]henever . . . there is a right" of "public concern," and anyone is "dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice" and "public policy, to preserve peace, order and good government." *Marbury*, 5 U.S. at 169. Marshall's formative observations are nearly identical to Blackstone's:

> If one of the heads of departments commits any illegal act, under the color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?
> ....
> But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department. *Id.* at 170-171.

Refusing to deliver Marbury's commission was an "illegal act" and

presented "a plain case for a mandamus." *Id.* at 170, 173. Marbury just went to the wrong place to get it. But regardless of the outcome for Marbury personally, the Chief Justice issued a ringing endorsement for equitable suits against officers.

Of course, this was before the passage of the Eleventh Amendment. "The Eleventh Amendment was adopted in 1798 in direct response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), holding that the State of Georgia could properly be called to defend itself in federal court against a citizen's suit." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001). In that same case, this Court said that "[t]he alacrity with which Congress and the states approved the Eleventh Amendment to nullify Chisholm evinces the absolutely certain and fundamental respect the early fathers demanded the federal courts pay to the sovereignty of the several states." *Id.* at 411.

This is true enough, but it is an overstatement for two reasons. First, and beyond the scope of this brief, is that the amendment's passage was not motivated purely by a sort of amorphous respect for the states. Rather, public debts, waning support for Federalists, a burgeoning war

between France and Great Britain, and a rapid resurgence of state factionalism and talk of splitting the union played the primary role. James E. Pfander, *History and State Suability: An "Explanatory" Account of The Eleventh Amendment*, 83 Cornell L. Rev. 1269, 1281 (1998), The Eleventh Amendment was birthed of circumstance, not philosophy.

But second, and more importantly, there is no reason to think that the Eleventh Amendment, would function to alter the general availability of writs against state officials. For more than 200 years, sovereign immunity was legally irrelevant to officer suits. This understanding is borne out by early cases interpreting the Eleventh Amendment. In fact, most early cases read the Eleventh Amendment in a highly textual fashion, without attempting to graft policy and intent into the text.

Cohens v. Virginia, 19 U.S. 264 (1821) provides an excellent example. While often cited for the more transformative proposition that federal courts have appellate jurisdiction over state court decisions about the federal constitution, *Cohens* also concerned a case in which a Virginia citizen sued Virginia. Virginia claimed that the Eleventh Amendment barred his ability to appeal to a federal court. In his majority opinion, Justice Marshall disagreed on two bases. First, he felt that the appeal's

posture did not make it a suit "commenced or prosecuted" against the state for procedural reasons. *Id.* at 405-06. But he immediately noted that, even if it were, it fell outside the Eleventh Amendment for purely textual reasons:

> But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, in judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties. *Id.* at 412.

Cohens was from Virginia, putting it outside the plain language of the Eleventh Amendment entirely.[3]

The Court also recognized that the Eleventh Amendment was no bar to officer suits. *United States v. Peters*, 9 U.S. 115 (1809), heard a mere six years after the amendment's passage, concerned a federal judgment for a Connecticut citizen, awarding him proceeds of a sale. The

[3] Of course, this was overruled in *Hans v. Louisiana*, 134 U.S. 1 (1890). But *Hans*' reasoning is questionable at best. Instead of actually grappling with the amendment's text, the Court just said that this was dicta, and not binding. Instead, *Hans* ruled on what amounts to pure policy grounds, openly admitting the result took precedence over the text: "It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States…" *Id.* at 10.

Pennsylvania courts refused to recognize the judgment, and gave the money to Pennsylvania's treasurer, David Rittenhouse. *Id.* at 139.

The Pennsylvania legislature quickly passed a statute declaring the district court decree to be a nullity, requiring Rittenhouse to give Pennsylvania the money, and "directing the Governor to protect them from any process that might issue from the federal court, and providing for their indemnification should they turn over the fund as directed." Gibbons, *supra*, at 1942. The Supreme Court issued a writ directing District Judge Peters to execute judgment against the money in favor of the Connecticut citizen. Pennsylvania raised the Eleventh Amendment as a defense. Again, Justice Marshall disagreed, this time because the case was brought against an officer: "The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant." *Peters*, 9 U.S. at 140.

It would be easy, at this point, to continue a historical exegesis clear

up until *Ex parte Young* and through the present day.[4] But in any event, the point is made. The sort of grudging acceptance of *Ex parte Young* as a fictional contrivance ungrounded in our common law and constitutional history is baseless. It is just as untrue that the founders believed that state sovereignty was sacrosanct where government lawbreaking was concerned. As has been observed, "*Ex parte Young* poses no threat to the Eleventh Amendment or to the fundamental tenets of federalism. To the contrary, it is a powerful implementation of federalism necessary to the Supremacy Clause, a stellar companion to *Marbury* and *Martin v. Hunter's Lessee*." *Okpalobi*, 244 F.3d at 432. (J. Higginbotham, concurring). Any desire to narrow its availability for those reasons are ahistorical. Even more, narrowing its availability by allowing states to draft language to avoid it will open a pandora's box of mischief, headaches, and procedural fighting.

B. Allowing Texas to Avoid *Ex parte Young Invites* Substantive and Procedural Nightmares

Texas argues that Attorney General Ken Paxton lacks a sufficient connection to this law's enforcement to provide A&R an *Ex parte Young*

[4] There was a brief deviation from this understanding under the infamous Taney court. *See Decatur v. Paulding*, 39 U.S. 497 (1840). But the court quickly corrected course in *Union P. R. Co. v. Hall*, 91 U.S. 343 (1876).

claim. Lightly put, Texas' claim is questionable. But if plaintiff-appellant is barred from suing the Attorney General, whom can he sue? Apparently, Texas' answer is individual Texas state and municipal entities. If that is correct, and *Ex parte Young* does not apply in this situation, there would be disastrous consequences for civil liberties. Not only that, but such a finding could also lead to a tremendous amount of wasteful litigation.

Lawsuits would have to be filed, one by one, against municipalities. Municipalities generally do not have sovereign immunity, so that defense could not be raised. *N. Ins. Co. of N.Y.*, 547 U.S. 189 (2006). That said, municipalities would have a small army of other defenses to raise.

First, a municipality could attempt to short circuit the suit using standing. A municipality could claim that they have no intent to enforce the law – a sort of preemptive "zombie law" defense, declaring the law a dead letter within the bounds of this municipality. *See e.g., Pool v. City of Houston*, 978 F.3d 307, 313 (5th Cir. 2020). Another, and more common, government maneuver is to instead wait until suit is filed and then seek to moot the case. *See e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021). And while damages remedies can survive, if sustained, a move to

moot a case will often take injunctive relief off the table. This kind of procedural fencing is a massive drain on the courts even when successful because, ultimately, it does not get to the merits. And given that we are all bound by the law the situation complained of will almost always repeat itself quickly.

Government maneuvers like this have already happened in Texas and this Court. In *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019), a plaintiff sued challenging this specific law. The court granted the preliminary junction, finding that the anti-BDS law likely violated the plaintiff's First Amendment rights. Rather than proceeding on the merits, however, the Texas legislature then amended the law to exempt the *Amawi* plaintiffs. H.B. 793, 86th Leg., R.S. (Tex. 2019). A panel of this Court then dismissed the case as moot because a judgment could not provide the plaintiffs anything they, personally, did not already have. *Amawi v. Paxton*, 956 F.3d 816, 820 (5th Cir. 2020); *see Friends of Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167 (2000) (holding that a case can become moot in cases of voluntary cessation when a party can show that the act giving rise to suit will not recur with regards to the plaintiff). It is hardly surprising that, given that Texas did not

repeal the law wholesale, its constitutionality would come up once again.

Suing the government to protect constitutional liberties is already difficult enough even when the fight is against one entity. Allowing states to create statutory schemes to intentionally skirt around *Ex parte Young* multiplies the problems.

If a plaintiff sues a municipality, survives the procedural rigamarole, and succeeds on the merits, there is the still the problem of trying to enjoin the law's application to others. Not every past illegal act will provide for prospective relief. So as a threshold manner, a victorious plaintiff would need to show that *they specifically* may be harmed by the unconstitutional law or act again to enjoin the municipality. *See e.g.*, *L.A. v. Lyons*, 461 U.S. 95, 112 (1983).

But even if they make that showing it only applies to the parties before the court. Fed. R. Civ. P. 65(d)(2). The *Ex parte Young* doctrine considers government actors to be in privity such that a "judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co. v. Adkins*, 301

U.S. 381, 402-03 (1940). But if Texas is allowed to craft legislative work-arounds to *Ex parte Young*, plaintiffs seeking to recover for government violation of their constitutional rights would likely be unable to enjoin more than one municipality at a time. On a rolling case approach, in which individual municipalities are not in privity with each other, only the municipality before the court is bound and only as to the plaintiff before the court. Restatement (Second) of Judgements § 17(3) (Am. L. Inst. 1982).

The only possibility remaining to ensure meaningful enforcement would be to attempt to use class actions. But it would have to be a dual class action – one for both injunctive relief under Fed. R. Civ. P. 23(b)(2) and against a defendant class to obtain true finality for citizens and the government. This dual class is sometimes called a bilateral or "double-edged" class action. This is no mean feat and courts have routinely struggled with the practice.

All class actions must first satisfy Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements. *Wal-Mart Stores, Inc. V. Dukes*, 564 U.S. 338, 349 (2011). The classes would generally have to have around forty members each. See e.g., *Hayes v. Wal-Mart Stores, Inc.*,

725 F.3d 349, 357 (3d Cir. 2013).

On a statewide constitutional basis, that should not be terribly difficult to establish. But that is just the first step. Adequacy also provides avenues of attack. While adequacy's precise requirements can vary depending on the circumstances, the most basic requirements are that they "have common interests with unnamed members of the class" and they must "vigorously prosecute the interests of the class through qualified counsel." *In re American Medical Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996). This creates a simple move: moot the named plaintiff's case, as described above. If the named plaintiff's claim is moot, their adequacy is at stake. *See e.g.*, *Wilson v. Gordon*, 822 F.3d 934, 942 (6th Cir. 2016).

Commonality and typicality are also problematic, as each municipality could bring its own take to the situation. It has to be borne in mind that "[b]ecause a defendant class representative is frequently an unwilling captain of a defendant class, due process considerations of fairness for absent class members require special care to be exercised by the court in identifying issues that are common to the class that will be automatically defended by the named defendant in the process of defending its own conduct and then assuring the defendant class action aspects are

limited to those common questions." Robert E. Holo, Comment, *Defendant Class Actions: The Failure Of Rule 23 And A Proposed Solution*, 38 UCLA L. Rev. 223, 229 (1990). Heightened due process concerns make the commonality assessment more complicated than in a standard class, as we are normally only assessing the plaintiffs, who stand to gain something from the litigation. A defendant class stands to lose.

Typicality, too, poses unique problems. Typicality is similar to commonality, but it focuses more on the claims and defenses rather than the factual allegations. For example, in a bilateral class in the Second Circuit against various state entities relating to a statutory scheme, typicality was found lacking "because the scope of injunctive relief appropriate against State Class Defendants who have not enforced the statute, or who have done so only rarely, would likely be different from the scope of appropriate injunctive relief that could reasonably be imposed against the City Defendants." *Brown v. Kelly*, 609 F.3d 467, 481 (2d Cir. 2010).

Another major problem is this: few people even know how to pursue a defendant class, few know how to defend them, and courts have very little experience assessing them. Courts have called "the defendant class action" one of the "rarest types of complex litigation…" *Bell v. Brockett*,

922 F.3d 502, 504 (4th Cir. 2019). They have even been called "unicorns." *CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 853 (7th Cir. 2002).

The purpose here is not to claim that class actions have no role in vindicating constitutional rights. To the contrary, they play a critical role. But they are vulnerable to a number of collateral attacks and massive complications that a claim against a single office – such as an attorney general – is not.

C. This Court Should Reaffirm *Ex parte Young*'s Broad Availability to Protect American Liberties

"The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (J. Scalia). Arguments that it is merely a judicially convenient fig leaf to skip around the Eleventh Amendment are simply wrong.

Not only that, but *Ex parte Young*'s champions who advocate for its broad availability also have the better of the argument. The late Charles Alan Wright referred *to Ex parte Young* as "indispensable to the establishment of constitutional government and the rule of law" because it can

"bring within the scope of federal judicial review actions that otherwise might escape review, and to subject the states to the restrictions of the United States Constitution that they otherwise might be able to safely ignore." Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 48, at 314 (6th ed. 2002). In fact, Professor Wright put *Ex parte Young* on par with *Marbury* and *Martin's Lessee*. Michael E. Solimine, *Congress,* Ex parte Young*, and The Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 102 (2008).

During the founding period, this was not perhaps at the forefront of anyone's mind. But, as the republic grew, "and particularly after the Civil War, Congress undertook to make the federal courts the primary guardians of constitutional rights." *Perez v. Ledesma*, 401 U.S. 82, 106 (1971). And *Ex parte Young* "permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (J. Rehnquist).

But only a sharp sword can cut. Narrowing *Ex parte Young* by allowing states to cleverly draft around it dulls that sword.

CONCLUSION

This Court should rule for A&R and reaffirm *Ex parte Young*'s crucial role in enforcing the Constitution. Only its broad availability against government officers can ensure efficient vindication of our rights.[5]

Respectfully submitted

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[5] I would like to thank Ian Roberson, a law student at the University of Virginia, for his input and assistance on this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 5,239 words, as determined by Microsoft Word, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Century Schoolbook, a proportionally spaced serif typeface.

/s/ *John S. Friend*
John S. Friend