No. 22-1661

IN THE
United States Court of Appeals
for the Second Circuit

T.W.,

PLAINTIFF-APPELLANT,

—v.—

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

DEFENDANTS-APPELLEES,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
IN CASE NO. 16-CV-03029 (RJD),
U.S. DISTRICT JUDGE RAYMOND J. DEARIE

BRIEF OF AMICI CURIAE NATIONAL DISABILITY RIGHTS NETWORK, ET AL., IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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RULE 26.1(a) DISCLOSURE STATEMENT

All amici curiae, including lead amicus curiae, **National Disability Rights Network**, and the additional amici listed below, have no parent corporations and no publicly held company owns 10 percent or more of their stock:

American Diabetes Association

Association on Higher Education and Disability

Bazelon Center for Mental Health Law

CommunicationFIRST

Council of Parent Attorneys and Advocates, Inc.

Deaf Equality

Disability Rights Advocates

Disability Rights Bar Association

Disability Rights Connecticut

Disability Rights Education & Defense Fund

Disability Rights Legal Center

Disability Rights New York

Hearing Loss Legal Fund

National Association of the Deaf

National Disabled Legal Professionals Association

National Federation of the Blind

National Health Law Program

New York Civil Liberties Union

Washington Civil & Disability Advocate

RULE 29(a)(2) PERMISSION TO FILE AMICI BRIEF

Amici certify that all parties have consented to the filing of this amicus curiae brief.

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INTEREST OF AMICI CURIAE[1]

Amici are 20 organizations sharing a commitment to broad enforcement of hard-won civil rights laws in support of full participation by all in society. They advocate for and/or represent individuals, including people with disabilities, who will be impacted by the panel's decision.

Lead amicus curiae, the **National Disability Rights Network**, is the non-profit membership organization for the federally-mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&A's and CAP's in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally-based advocacy services to people with disabilities in the United States.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici certify that: (i) no counsel for a party authored this brief in whole or in part; (ii) no such counsel or party made a monetary contribution to fund the preparation or submission of this brief; and (iii) no person other than amici and their counsel made any such monetary contribution.

INTRODUCTION

Amici respectfully submit this brief in support of T.W.'s petition for rehearing or rehearing en banc. While T.W.'s petition provides three valid bases for granting rehearing, this brief focuses on the panel's improper narrowing of the *Ex parte Young* exception to sovereign immunity.[2] *See Ex parte Young*, 209 U.S. 123 (1908). The panel's opinion conflicts with controlling precedent; is unmoored from the *Ex parte Young* doctrine's underlying constitutional principles and interests; and would improperly deny important prospective injunctive relief to many plaintiffs who endure ongoing harm as a result of illegal disability discrimination.

According to the panel, "if T.W. had alleged that the Board's maintenance of records violated Title II, her claim may well have survived. But T.W. makes no allegation that the Board's maintenance of records constitutes an ongoing violation of her rights." Op. 63. But that is *not* the determinative question under *Ex parte Young*. In case after case, the question of whether the doctrine applies hinges on the nature and effect of the injunctive *relief* sought. As discussed below, in these cases the courts did *not* analyze whether doing or not doing what the proposed injunction sought to require or prevent was itself a discrete violation of federal law. Instead,

[2] Amici previously filed a brief addressing the abrogation issue discussed at section I.B. of T.W.'s petition. *See* Case No. 22-1661, D.E. 48 at 13-28.

cases analyze whether the injunctive relief sought is prospective and would ameliorate ongoing harms caused by violation of federal law.

ARGUMENT

I. The Panel's *Ex parte Young* Holding Conflicts with Supreme Court Precedents and a Precedential Decision of This Court

The panel's holding that the *Ex parte Young* doctrine is inapplicable for the prospective injunctive relief T.W. seeks – expungement of a portion of her bar records – is in direct conflict with *Quern v. Jordan*, 440 U.S. 332 (1979), *Milliken v. Bradley*, 433 U.S. 267 (1977) and *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985). These decisions teach that the Eleventh Amendment is no barrier to a plaintiff who seeks prospective injunctive relief against a state official in order to ameliorate ongoing harm that is the direct result of past violation of federal law. Failing to correct the harmful *result* of that unlawful conduct is itself a continuing violation of federal law, even where that unlawful conduct is not part of an ongoing policy or active course of conduct. According to these controlling authorities, and contrary to what the panel's decision asserts (*see* Op. 63-65), a violation of federal law is "ongoing" for purposes of the *Ex parte Young* doctrine when the violation's detrimental impact continues into the present.

Quern was a class action against the Director of the Illinois Department of Public Aid by persons wrongly denied benefits under the federal Aid to the Aged, Blind, or Disabled Program (AABDP). 440 U.S. 332, 335 n.4. Earlier in the

litigation, the Director conceded that under *Ex parte Young* he could be prospectively enjoined from failing to process benefit applications within the time limits established by applicable federal regulations. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). But the Director argued, and the Supreme Court agreed, that ordering him to make *retrospective* benefit payments to the class violated the Eleventh Amendment. *Id.* at 678.

On remand, an issue arose regarding what form of notice the district court could order the Director to send to class members regarding their entitlement to illegally-denied public assistance. *Quern*, 440 U.S. at 334-35. That issue made its way back to the Supreme Court, which ultimately concluded that the district court could order a modified notice to class members that there was "a state administrative procedure available if they desire[d] to have the state determine whether or not they [might] be eligible for past benefits. A simple returnable notice of appeal form could also be provided."[3] *Id.* at 335-36. "We think this relief falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman* side." *Id.* at 347.

Here, the panel's distinction between ongoing harm from a defendant's prior acts violating federal law, versus ongoing acts violating federal law (Op. 63-65), cannot be reconciled with *Quern*. Several years before the district court's order to give notice to the class in *Quern*, it had issued a permanent injunction requiring the

[3] Throughout this brief, internal quotation marks are omitted unless relevant.

Director to comply with the AABDP prospectively. *Edelman*, 415 U.S. at 656. In other words, at the time of the notice order, there was no longer any ongoing policy or activity of illegally denying benefits. Thus, the approved notice in *Quern* concerned only prior illegal policy or activity, and what class members could do prospectively to obtain benefits lost as a direct result of that illegal policy or activity. The notice injunction upheld in *Quern* was, like the injunction T.W. seeks, a remedy to ameliorate ongoing *harm* directly caused by the state's *prior* acts in violation of federal law, *i.e.*, "ongoing" violations for purposes of *Ex parte Young*.

Likewise, the panel's decision is inconsistent with *Milliken*, a school desegregation case. To remedy the ongoing detrimental effects of past *de jure* racial discrimination, the district court ordered the state of Michigan, through its officials, "to pay about $5,800,000 to the Detroit School Board [for] educational components included in the desegregation decree: remedial reading, in-service training of teachers, testing, and counseling." 433 U.S. at 293-94 (Powell, J. concurring). The majority rejected the state's argument that this order exceeded the district court's power under *Ex parte Young.* 433 U.S. at 289. "The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit." *Id.* at 290 (emphasis in original). The injunctive

relief was an appropriate forward-looking remedy to address "continuing conditions of inequality" caused by prior acts of *de jure* racial discrimination.

The *Milliken* court observed that the injunction under review "could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the injunction here looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past." *Id.* at 290, n.21. The same is true of the injunction T.W. seeks. Expungement of her bar records would do nothing to compensate her for past harm caused by the defendants' ADA violations. But it would give T.W. *prospective* relief, just like the injunctions upheld in *Milliken* and *Quern*.

Relying on both *Milliken* and *Quern*, this Court in *Dwyer* reversed in part dismissal of a state employee's complaint under 42 U.S.C. § 1983 for wrongful termination. The plaintiff's complaint alleged that:

> (1) under New York law, he had a right not to be removed from his position unless he was guilty of incompetency or misconduct; (2) this right constituted a "property" interest within the meaning of the Due Process Clause of the Fourteenth Amendment; (3) the bad-faith reassignment and sham abolition of his position by Regan in order to remove Dwyer from that position and give it to another employee of the System constituted a deprivation of that property right; and (4) the failure to accord Dwyer an opportunity for a hearing prior to that deprivation violated his right to due process.

777 F.2d at 828. This Court ruled that these allegations were insufficient to head off an Eleventh Amendment challenge to the plaintiff's backpay claim

(retrospective relief), but "there would be no Eleventh Amendment impediment to his" reinstatement claim. *Id.* at 829.

In *Dwyer*, the plaintiff's requested prospective relief was sought to redress the ongoing harm he suffered as a direct result of *past* illegal acts surrounding his employment termination. Based on the complaint's allegations, this Court concluded that the *Ex parte Young* exception applied with respect to his reinstatement claim because "[r]einstatement is purely prospective injunctive relief that orders the state official to return the former employee to the state's payroll." *Id.* at 836.

Under *Quern*, *Milliken*, *and Dwyer*, T.W.'s claim for injunctive relief would survive a motion to dismiss, while under the panel's decision, dismissal is required. This is precisely the sort of disuniformity in controlling law that en banc rehearing is meant to rectify. *See* Fed. R. App. P. 35(b)(1)(A).

II. The Panel Opinion's Narrowing of the *Ex parte Young* Doctrine Does Not Further the Doctrine's Underlying Constitutional Principles and Interests

Sovereign immunity is a state's privilege "not to be sued without its consent." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). The *Ex parte Young* doctrine is an exception to sovereign immunity based on the Supremacy Clause; it seeks to "vindicate the federal interest in assuring the supremacy of [federal] law." *Id*. at 262 (Kennedy, J., concurring).

Via the doctrine, the Supreme Court has "redefined" sovereign immunity "as freedom from an" action when "the state, is the real, substantial party in interest' " – as is often the case where the action seeks to recover "money from the state" – but *not* "freedom from 'compliance in the future with a [federal court's] substantive federal-question determination.' " *Santiago v. New York State Dep't of Correctional Services*, 945 F.2d 25, 29 (2d Cir. 1991) (quoting *Edelman*, 415 U.S. at 663, 668). By precluding non-monetary, prospective injunctive relief that would remediate ongoing harm caused by violation of federal law, the panel's opinion fails to further the *Ex parte Young* doctrine's underlying Supremacy Clause and sovereign immunity principles and interests.

The doctrine's "distinction between prospective and retroactive *relief* fulfills its" Supremacy Clause purpose while "preserving to an important degree the constitutional immunity of the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (emphasis added). Consistent with this relief-based distinction, "the *effect* of the relief sought" determines whether the doctrine's application would run afoul of the Eleventh Amendment. *See Stewart*, 563 U.S. at 256 (emphasis in original). Applying this effect-of-the-relief-sought criterion, the Supreme Court has concluded that *Ex parte Young* does not apply to "an injunction requiring the payment of

funds from the State's treasury" (*id*. at 256-57) or where the plaintiff is *in effect* "conducting a raid on the state treasury for an accrued monetary liability" (*Milliken*, 433 U.S. at 290 n.22). Nor does the doctrine apply to "an order for specific performance of a State's contract," or to "the functional equivalent of a quiet title suit" against a state. *Stewart,* 563 U.S. at 257. Finally, the doctrine cannot be used to bypass "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe v. Fla*., 517 U.S. 44, 74-75 (1996); *cf*. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 289 (2d Cir. 2003) (In the ADA, Congress did not intend to create a "comprehensive enforcement scheme that would preclude prospective injunctive relief against a state official" via *Ex parte Young*).

Expungement relief does not fall under any of the aforementioned categories of relief implicating a state's sovereign interests. Such relief is entirely prospective, non-monetary, and furthers *Ex parte Young*'s Supremacy Clause purpose.[4] In contrast, the state has no legitimate interest in "maintaining and reporting records" that reflect "discriminatory conditions" (JA34).

[4] The same is true of similar relief, including reinstatement, discussed *infra*.

III. The Panel's Narrowing of *Ex parte Young* Will Improperly Preclude Relief for Many Persons with Disabilities Who Are Illegally Denied Needed Accommodations

The prospective injunctive relief available via *Ex parte Young* is an important and oft-used means to mitigate the harm of illegal disability discrimination. Discrimination against persons with disabilities frequently takes the form of what T.W. suffered: past wrongful denial of needed accommodations, resulting in continuing harm. This is especially common in public employment and education.[5]

Like expungement, reinstatement is an example of a remedy that is jeopardized by the panel's decision. In cases similar to *Dwyer* (discussed *supra*), ADA plaintiffs dismissed from state employment regularly seek reinstatement after wrongful termination. *See, e.g., Whitfield v. Tennessee*, 639 F.3d 253, 257 (6th Cir. 2011) (complaint validly alleged "*Ex parte Young* action for reinstatement pursuant to Title I of the ADA."); *Koslow v. Pennsylvania*, 302 F.3d 161, 179 (3d Cir. 2002) ("Koslow's claim for reinstatement, with accommodations for his disability, is the type of injunctive, 'forward-looking' relief cognizable under *Ex parte Young*."). Likewise, ADA plaintiffs expelled from public universities regularly seek

[5] In the public-employment context, the Supreme Court has made clear that the *only* available relief to a public employee suing a state under the ADA's Title I is *Ex parte Young* relief. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

reinstatement after wrongful denial of requested accommodations. *See, e.g., Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002) (rejecting argument that the ADA plaintiff merely sought "a retrospective reversal of a completed state decision to expel him" and holding that prospective relief for reinstatement was permissible under *Ex parte Young*).

In these cases, the original actions violating federal law happened at discrete times in the past (denial of accommodations plus termination or expulsion), but the harm flowing from those actions was ongoing, itself constituting illegal discrimination. Here, the panel, citing no authority, creates a distinction that will deny prospective injunctive relief in such cases: a distinction between actions that violate federal law, and injunctive relief that would prospectively ameliorate ongoing harm caused by the state actor's prior federal-law violations: "[E]ven if the *relief* is prospective, T.W.'s injunctive relief is unavailable under *Ex parte Young* because it is aimed exclusively at a *past violation*; it does not seek to remedy an alleged *ongoing violation* of federal law." Op. 65 (emphasis in original).

What the panel misapprehends is that the relief sought is what *determines* whether the *Ex parte Young* exception applies. *See Stewart*, 563 U.S. at 256. In *Quern*, *Milliken*, and all of the reinstatement cases discussed above, it sufficed under *Ex parte Young* for the plaintiff to request injunctive

relief designed to mitigate ongoing harms caused by prior acts in violation of federal law.

CONCLUSION

Amici respectfully submit that the Court should grant T.W.'s petition.

Date: August 22, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

This brief complies with: (1) the type-volume limitation of Fed. R. App. P. Rule 29(b)(4) and Local Rule 29.1(c) because it contains 2,587 words, excluding the parts exempted by rule; and (2) the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. Rule 32(a)(6) because the body of the brief has been prepared in 14-point Times New Roman font using Microsoft Word 2016.

Date: August 22, 2024 /s/ Bridget A. Clarke