No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's precedents, sovereign immunity does not bar suit against a state official when a plaintiff "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted); *see Ex parte Young*, 209 U.S. 123 (1908). In the decision below, a Second Circuit panel agreed that petitioner had plausibly alleged a violation of federal law—disability discrimination in connection with the administration of the New York bar exam. It also recognized that this violation continued to cause petitioner harm, and that the relief sought—expungement of petitioner's bar exam records that resulted from discrimination—was prospective. Yet the panel held that petitioner's suit was barred by sovereign immunity because, in its view, petitioner failed to allege any "ongoing violation" of federal law. In the panel's view, expungement was unavailable unless petitioner could establish that the maintenance of exam records independently violated federal law. The question presented is:

Whether a plaintiff who suffers ongoing harm caused by a state official's prior unlawful conduct is subject to an "ongoing violation" of federal law, and so able to seek an injunction under *Ex parte Young*—as multiple courts of appeals have held—or whether *Ex parte Young*'s "ongoing violation" requirement demands that a plaintiff show that the state official's continuing actions are independently unlawful, as the Second Circuit held below.

PARTIES TO THE PROCEEDING

Petitioner T.W. is the plaintiff in this case and was the appellant in the court of appeals.

Respondents New York State Board of Law Examiners, Diane Bosse, John J. McAlary, Bryan Williams, Robert McMillen, E. Leo Milonas, and Michael Colodner are the defendants in this case and were appellees in the court of appeals.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

T.W. v. New York State Board of Law Examiners, No. 16-cv-3029, U.S. District Court for the Eastern District of New York. Judgment entered July 19, 2022.

T.W. v. New York State Board of Law Examiners, No. 22-1661, U.S. Court of Appeals for the Second Circuit. Judgment entered July 19, 2024; rehearing denied October 2, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner T.W. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. 1a-41a) is reported at 110 F.4th 71 (2d Cir. 2024), and the court of appeals' denial of rehearing en banc (App. 62a-63a) is unreported. The decision of the district court (App. 42a-61a) is not reported but is available at No. 16-cv-3029, 2022 WL 2819092 (E.D.N.Y. July 19, 2022).

JURISDICTION

The court of appeals entered judgment on July 19, 2024. App. 1a. On October 2, 2024, the court of appeals denied petitioner's timely petition for rehearing or rehearing en banc. App. 62a-63a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

INTRODUCTION

This case presents a question of far-reaching importance over which the courts of appeals are divided. In the decision below, the Second Circuit held that injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), is unavailable even when the government has violated federal law and is engaging in ongoing conduct that perpetuates the harm caused by that violation. In the Second Circuit's view, a plaintiff must show not only that the government's ongoing conduct causes harm, but also that the conduct independently violates federal law. That holding erects an arbitrary barrier that lacks any grounding in this Court's precedents, and that will make *Ex parte Young* relief unavailable in many vitally important contexts—including, as here, the expungement of records tainted by government illegality. The decision below also breaks with decisions from at least three other circuits—all of which have found *Ex parte Young* relief available in the identical expungement context presented here. This case clearly meets the Court's criteria for certiorari, and the petition should be granted.

Petitioner T.W. suffered disability discrimination at the hands of respondents—state officials and members of the New York State Board of Law Examiners ("BOLE" or the "Board")—when they arbitrarily denied her requests for reasonable disability accommodations during the bar exam. As a result, T.W. failed the New York bar exam twice, and continues to suffer severe repercussions. Because respondents stand by—and continue to maintain records of—the discriminatory results, T.W. must disclose those exam failures to employers, resulting in permanent injury to her job prospects.

T.W. sued respondents, seeking injunctive and declaratory relief requiring respondents to expunge the records of her failure and affirmatively disavow the exam results obtained under discriminatory conditions. The Second Circuit agreed that T.W. plausibly alleged a violation of federal law *and* that a prospective order requiring expungement could remedy the ongoing harm caused by that violation. Those findings should have triggered the well-settled exception to sovereign immunity established by *Ex parte Young*, 209 U.S. at 159-60. As this Court has long held, *Ex parte Young* relief is available to "dissipate the continuing effects of past misconduct," so long as the relief "operates prospectively" in doing so. *Milliken v. Bradley*, 433 U.S. 267, 290 (1977); *see Papasan v. Allain*, 478 U.S. 265, 282 (1986) (allowing *Ex parte Young* relief where "current [harm] results directly from . . . [unlawful] actions in the past").

But the Second Circuit held that *Ex parte Young* relief was unavailable. As the panel saw it, alleging an "ongoing violation" not only required identifying a violation with "continuing effects" that could be redressed prospectively; T.W. *also* had to show that BOLE's continuing conduct—the maintenance of records and refusal to disavow the test results here—independently violated federal law. In the panel's view, governmental conduct that perpetuates "ongoing *harm*" caused by a past violation does not constitute an "ongoing '*violation[]* of federal law.'" App. 40a (citation omitted). As a result, the Second Circuit slammed the courthouse door on T.W., ensuring that no relief was available for an acknowledged violation of federal law with undisputed continuing harmful effects.

In so holding, the Second Circuit created a direct conflict with three other courts of appeals—which have all authorized expungement relief in circumstances indistinguishable from T.W.'s. Unlike the decision below, those circuits have concluded that there *is* an "ongoing violation" of law, making *Ex parte Young* relief available, whenever a plaintiff "posits that he is and will be *harmed* by the . . . continued maintenance of . . . records" that result from violations of federal law. *Morgan v. Bd. of Pro. Resp. of the Sup. Ct. of Tenn.*, 63 F.4th 510, 516 (6th Cir. 2023); *see also, e.g.*, *Doe v. Purdue Univ.*, 928 F.3d 652, 666 (7th Cir. 2019) (Barrett, J.); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007).

The Second Circuit's departure from the rule in other circuits will have far-reaching consequences. *Ex parte Young* has long served as a cornerstone of constitutional litigation and is a vital tool in vindicating federal rights. Expungement relief, in particular, is a critically important remedy in cases ranging from unconstitutional employment actions, to student discipline, to criminal arrests and convictions. *See, e.g.*, *Morgan*, 63 F.4th at 516 (employment); *Doe*, 928 F.3d at 666 (student discipline); *Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 & n.3 (D.C. Cir. 2004) (Roberts, J.) (arrest records). And the panel's rationale threatens other long-established remedies available under *Ex parte Young*, such as environmental remediation, reinstatement, and relief from unlawful licensing and permitting decisions.

The decision below is also deeply misguided on the merits. The panel misread this Court's case law describing *Ex parte Young* relief as being available "to stop [an] ongoing 'violation[] of federal law'" to require

assessing whether the ongoing conduct a defendant engaged in—here, the maintenance of records—was itself an independent violation of federal law. *E.g.*, App. 40a (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). But this Court's precedents have never required that. Instead, this Court has long recognized that a past violation of federal law, coupled with the perpetuation of ongoing harm by an official's failure to remedy the continuing effects of that initial violation, *is* an "ongoing violation" of federal law. Nothing in the letter or logic of this Court's sovereign immunity jurisprudence supports the elimination of equitable relief in a case like this. And the result of the Second Circuit's error is a stark difference in the availability of federal remedies in identical cases based purely on where the plaintiff files her claim. That divergence on an important federal question warrants this Court's review.

STATEMENT OF THE CASE

A. Factual Background

1. T.W. is an extraordinary woman who overcame significant challenges to begin a career in the law.

T.W. entered Harvard Law School in the fall of 2008. CA2 Joint Appendix ("CAJA") 19 (¶ 17) (Compl.). But in July 2009, she experienced a serious head injury when an all-terrain vehicle she was riding toppled off a cliff. *Id.* (¶ 20). She suffered resulting amnesia and was hospitalized, and also developed short-term memory problems and other cognitive deficits. *Id.* Between 2009 and 2010, T.W. suffered three more blows to the head—likely resulting from lingering effects on her balance from her initial head injury—and was then forced to take a leave of absence from law school. CAJA 20-21 (¶¶ 21-24).

While on leave, T.W. received medical evaluations diagnosing her with panic disorder, cognitive disorder, reading disorder, and amnesic disorder. CAJA 21-22 (¶¶ 25, 35). In practice, those meant that T.W. had serious difficulty concentrating for sustained periods and suffered debilitating panic attacks in stressful settings. CAJA 23 (¶ 37).

To facilitate T.W.'s continued ability to participate in her law school classes, medical experts recommended that T.W. receive three testing accommodations: (1) testing in a separate room; (2) 50% extra time on exams; and (3) stop-clock breaks during which exam time would not run. CAJA 22 (¶ 32). Testing in a separate room allowed T.W. to focus on her test, while stop-clock breaks gave T.W. the chance to use breathing exercises and other techniques to decrease stress during panic attacks. CAJA 23 (¶ 37).

Upon T.W.'s return to school, Harvard provided each of those recommended accommodations. CAJA 21 (¶ 27). With them in place, T.W. performed well, earning praise for her legal reasoning and analytical abilities, as well as for her interpersonal skills, diligence, and maturity. CAJA 22 (¶ 30). She spent a summer at a top national law firm, where she secured an offer to return. *Id.* (¶ 31).

2. After graduating in 2013, T.W. applied to take the New York bar exam with the accommodations that both her psychologists and Harvard had deemed necessary given her disabilities—submitting extensive documentation in support. *Id.* (¶ 32). BOLE routinely grants similar accommodations. *Id.* (¶ 33). But here, BOLE denied the request, doubting that T.W. had any disability at all. CAJA 23-24 (¶¶ 40-42). After an appeal, BOLE granted T.W. stop-clock

breaks but—with no explanation—refused her other requests. CAJA 25 (¶ 48). In July 2013, T.W. took the bar exam, but experienced several panic attacks and could not complete much of the exam. CAJA 25-26 (¶ 49). She failed that exam. CAJA 26 (¶ 50).

In 2014, T.W. signed up to take the bar exam again, and she again requested the accommodations that she, her doctors, and Harvard agreed were needed. *Id.* (¶ 52). This time, BOLE granted her 50% extra time, but inexplicably *removed* the stop-clock breaks it had previously allowed. *Id.* (¶ 53). BOLE again did not explain its decision. *Id.* T.W. experienced severe panic attacks during the exam, and failed again. CAJA 26-27 (¶¶ 54-55).

Although T.W.'s law firm had allowed her to continue her employment at the firm after her first bar exam, that firm—like many others—maintains a policy of terminating any associate who fails the bar exam twice. CAJA 27 (¶ 56). So in 2015, T.W.'s firm terminated her employment. *Id.*

In 2015, T.W. signed up to take the bar exam a third time. *Id.* (¶ 57). Although nothing had changed, this time BOLE granted 100% extra time—an alternative accommodation that T.W. had requested from the start. *Id.* (¶ 58). With that accommodation in place, T.W. passed the bar exam. *Id.* (¶ 60). BOLE never explained why its position on the appropriate accommodations shifted from exam to exam. CAJA 25-27 (¶¶ 48, 53, 58).

3. Since 2015, T.W. has diligently pursued employment comparable to the position she held at her law firm, but has been unable to secure such a position. CAJA 28 (¶ 61). Because respondents continue to stand behind—and maintain records of—

their determination that T.W. twice failed the bar exam, she is compelled to disclose that information to employers. CAJA 29 (¶¶ 72-73). And because top law firms "do not wish to employ someone who failed the bar examination twice," T.W. struggled for years to find "anything resembling" the employment she previously had. CAJA 28 (¶¶ 63-64). T.W. also alleged other injuries, including "humiliation, embarrassment, frustration, and denial of equal treatment and access." *Id.* (¶ 65). As T.W. explained, these injuries stemmed not only from BOLE's initial unlawful disability discrimination, but also from its "maintain[enance of] records documenting that [T.W.] failed the bar examination" twice, and its refusal to "acknowledg[e] that the failures were the result of discriminatory test administration." CAJA 29 (¶ 72).

B. Procedural Background

1. In June 2016, T.W. sued BOLE and individual members of the Board (referred to collectively as "respondents," BOLE, or the "Board"). CAJA 16 (¶ 1). She alleged violations of the Rehabilitation Act and Title II of the Americans with Disabilities Act ("ADA"), and sought damages, an injunction requiring respondents to expunge and disavow her first two exam results, and declaratory relief. CAJA 30-34 (¶¶ 75-102, Prayer for Relief); *see* App. 4a.

As to expungement in particular, T.W. alleged that respondents "maintain records documenting that [she] failed the bar examination," without acknowledging that these failures resulted from "discriminatory test administration." CAJA 29 (¶ 72). "Absent expungement and[] official acknowledgment of discrimination, [T.W.] must disclose and struggle to explain failure on the bar examination in her job

search," which has "hinder[ed] [T.W.'s] ability to obtain employment insofar as it reflects poorly on her and has required her to disclose her disability to employers." *Id.* (¶ 73); *see* CAJA 33 (¶ 102) (alleging that respondents "maintain records of [T.W.'s] performance under discriminatory conditions and [that] such records hinder [T.W.'s] job search and career prospects"). T.W. requested that the court "enjoin [respondents] from maintaining and reporting records of [T.W.'s] examination results received under discriminatory conditions and require [respondents] to take affirmative steps to alleviate the ongoing repercussions of the discriminatory test administration that continue to hamper [T.W.'s] search for employment." CAJA 34 (Prayer for Relief (c)); *see* CAJA 29 (¶ 73) (requesting "official acknowledgement of discrimination").

2. Respondents moved to dismiss all of T.W.'s claims on sovereign immunity grounds. *See T.W. v. N.Y. State Bd. of L. Exam'rs*, 996 F.3d 87, 90-91 (2d Cir. 2021). The district court rejected that bid, holding that BOLE was amenable to suit under the Rehabilitation Act because it is federally funded. *Id.* at 91. The district court declined to address T.W.'s ADA claim. *Id.* In an interlocutory appeal, the Second Circuit reversed, holding that BOLE was not part of any relevant program or activity that had accepted any federal funds, and so could not be sued under the Rehabilitation Act. *Id.* at 102. It remanded to the district court to consider respondents' motion to dismiss T.W.'s ADA claim in the first instance. *Id.*

3. On remand, the district court granted respondents' motion to dismiss the ADA claim. *See* App. 42a-61a. The district court agreed with respondents that BOLE is an arm of the state entitled

to sovereign immunity. App. 43a-51a. While the panel recognized that "T.W. ha[d] plausibly alleged that the Board violated Title II," it concluded that the ADA's express abrogation of sovereign immunity exceeds Congress's powers under section 5 of the Fourteenth Amendment, and thus BOLE could not be sued for money damages. App. 53a-59a. As to injunctive relief under *Ex parte Young*, the court held that T.W. lacked standing because expungement would not "undo the fact that she did not successfully pass the bar until 2015." App. 59a-61a.

4. A two-judge panel of the Second Circuit affirmed,[1] holding that BOLE is an arm of the state, that Title II of the ADA does not validly abrogate BOLE's sovereign immunity in this context, and that declaratory and injunctive relief are likewise barred by the Eleventh Amendment. App. 7a-41a.

As for T.W.'s request for an order enjoining respondents from maintaining and reporting records of the discriminatory exams, the panel accepted that T.W. had plausibly alleged that respondents' failure to provide her with disability accommodations violated the ADA, and that T.W. had identified an "ongoing harm" resulting from the Board's failure to expunge her records. App. 40a (emphasis omitted). But the panel found that to be "unresponsive to the issue" here because, in its view, T.W. needed to demonstrate that the "maintenance of records" itself was unlawful to establish an "ongoing violation" of federal law. App. 39a-40a.

The panel first noted that *Ex parte Young* allows suits that "'seek[] only prospective injunctive relief *in*

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[1] Judge Rosemary S. Pooler was originally a member of the panel, but she passed away on August 10, 2023. App. 1a n.*.

order to "end a continuing violation of federal law,"'" or in order "'*to prevent* a continuing violation of federal law.'" App. 37a (alteration in original) (citation omitted). Here, the panel reasoned, T.W. did not seek equitable relief to "prevent the Board's alleged[ly]" unlawful testing "'policies and practices'"; instead, "she s[ought] an injunction against the Board 'maintaining and reporting records of [her] examination results.'" App. 39a (quoting CAJA 31, 34 (¶¶ 86, 88, Prayer for Relief (c))). And because T.W. did not allege "that the Board's maintenance of records of her failures" itself "violates federal law, . . . [t]he injunction she s[ought] [wa]s . . . unavailable." *Id.* In other words, even though T.W. alleged unlawful discrimination, which continues to *harm* her (and that such harm could be remedied by "relief [that] is prospective"), *Ex parte Young* relief was unavailable because the "*violation*" was in the "past." App. 40a.

In October 2024, the court of appeals denied T.W.'s rehearing petition. App. 62a-63a.

REASONS FOR GRANTING THE WRIT

The Court's review is needed to resolve an important and recurring question over which the courts of appeals are now divided. In materially indistinguishable circumstances, the Sixth, Seventh, and Ninth Circuits have held that *Ex parte Young* relief is available to order expungement of records tainted by government officials' illegal acts. The disagreement is undeniably important. *Ex parte Young* is central to vindicating the supremacy of federal law; without its crucial protections, plaintiffs like T.W. will be unable to remedy even blatant, acknowledged misconduct by government officials that continues to devastate their lives. And there is no

sensible reason for the arbitrary barrier the Second Circuit erected here, which lacks any foothold in this Court's precedents or in the purposes of the *Ex parte Young* doctrine.

A. The Courts Of Appeals Are Divided On The Question Presented

The decision below held that *Ex parte Young* relief is unavailable even when a plaintiff suffers ongoing harm caused by a defendant's failure to remediate a past violation of the law. Instead, the panel held, a plaintiff must show that the defendant's continuing conduct is *itself* independently unlawful. That requirement is in direct conflict with the decisions of three other courts of appeals in the exact context presented here: expungement of records tainted by government illegality. The supremacy of federal law should not depend on the happenstance of where a legal violation takes place. This Court's intervention is needed to secure nationwide uniformity in this critically important area of the law.

1. As the Second Circuit recognized, T.W. adequately alleged that respondents violated the ADA by denying her necessary accommodations for her disability. App. 38a. She also alleged an *ongoing harm* stemming from respondent's *ongoing conduct*: "maint[enance of] records documenting that [T.W.] failed the bar examination," and refusal to provide an "official acknowledgment of discrimination," which means T.W. must "disclose and struggle to explain failure on the bar examination," in perpetuity, to employers. CAJA 29 (¶¶ 72-73). Yet the Second Circuit held that injunctive relief was unavailable because the ongoing conduct (i.e., the maintenance of, and failure to disavow, records) was not *itself* illegal.

In the panel's words, T.W.'s complaint "does not allege that the Board's maintenance of records of her failures violates federal law." App. 39a. Thus, although she alleged an "ongoing *harm*" caused by a "*past violation*" of federal law, there was no "ongoing violation of her rights" and an *Ex parte Young* injunction was "unavailable." App. 39a-40a.

In the panel's view, the "claim" could only "have survived" if T.W. had managed to allege that the maintenance of records violated the ADA. App. 39a. But that, of course, was an impossible task. Petitioner is unaware of any courts holding that the mere maintenance of records can independently violate the ADA—except in the sense that (as here) such maintenance stems from an ongoing refusal to remediate an past, initial violation. After all, the maintenance of records does not *itself* "exclude[]" a person from "the services, programs, or activities of a public entity," or "subject[]" them "to discrimination." 42 U.S.C. § 12132. Nor does such maintenance *itself* constitute a failure to offer "accessible arrangements" for persons with disabilities in "applications, licensing, certification, or credentialing for . . . professional . . . purposes." *Id.* § 12189. Rather, the maintenance of records can be an "ongoing violation" of federal law only *because* it perpetuates harm from past violations of these provisions. Yet in the panel's view, because T.W. did not (and could not) establish that the maintenance of records independently violated federal law, she was not entitled to expungement relief or an order requiring disavowal of the test results at issue.

2. Three circuits have allowed exactly what the Second Circuit barred here: expungement of records tainted by a state official's violation of federal law.

a. Start with the Sixth Circuit. In *Morgan v. Board of Professional Responsibility of the Supreme Court of Tennessee*, a public entity terminated the plaintiff's employment, allegedly because of the plaintiff's anti-Muslim tweets. 63 F.4th 510, 513 (6th Cir. 2023). The plaintiff sought relief under *Ex parte Young*, arguing that the employer's conduct violated the First Amendment. *Id.* at 516. He alleged that "the [defendant] opened a disciplinary file related to him," then "continue[d] to maintain records related to the [unlawful] disciplinary proceeding," even after his termination. *Id.* And he accordingly sought injunctive relief requiring the defendant to "expunge all reference to any disciplinary file" and "remov[e] any indication that [he] was terminated for cause." *Id.* (citation omitted).

The district court held—like the Second Circuit here—that *Ex parte Young* relief was unavailable because the plaintiff "failed to 'allege any ongoing violation of federal law,'" given that his "allegations [we]re based entirely on his [past] termination." *Id.* (citing *Morgan v. Bd. of Pro. Resp. of the Sup. Ct. of Tenn.*, 588 F. Supp. 3d 818, 823 (M.D. Tenn. 2022)).

The Sixth Circuit disagreed. Even though the disciplinary proceeding against the plaintiff had been "dismissed," and the termination completed, the plaintiff alleged "that he is and will be *harmed* by the Board's continued maintenance of disciplinary records against him and other internal records that pertain to his alleged unconstitutional firing." *Id.* (emphasis added). As a result, the court concluded that "[t]he complaint . . . can be plausibly read to extend to post-termination conduct of the Board that he pleads as an ongoing constitutional violation." *Id.* (collecting cases). So long as a plaintiff "posits that he

is and will be harmed by the Board's continued maintenance of disciplinary records against him . . . that pertain to his alleged" unlawful treatment, "expungement of negative government records" is proper under *Ex parte Young*. *Id.* at 516-17. That is the exact opposite of what the Second Circuit held, in identical circumstances, here.

b. The Seventh Circuit's decision in *Malhotra v. University of Illinois at Urbana-Champaign*, 77 F.4th 532 (7th Cir. 2023), likewise conflicts with the decision below. There, a student sued officials at his university under *Ex parte Young*, alleging that his Fourteenth Amendment rights were violated after the school suspended him for hosting a party in violation of COVID-19 lockdown restrictions. *Id.* at 534-35. The student, who alleged that the process afforded during his disciplinary hearing was constitutionally inadequate, sought "an injunction . . . that would require [the defendants] to expunge the disciplinary charges from his record." *Id.* at 535.

The Seventh Circuit agreed with the student. His "official capacity claims fall within the situation contemplated by *Ex parte Young*" because "he seeks to compel state officials to expunge his suspension from his record," and the "continuing harm" inflicted by the "failure to do so continues to violate his due process rights." *Id.* at 536. Because a legal violation that continues to *harm* an individual constitutes an "ongoing violation" of the law, *Ex parte Young* relief was available without any separate showing that the "failure to [expunge]" was unlawful. *Id.*

Malhotra, in turn, relied on an earlier Seventh Circuit decision holding similarly. *Id.* (citing *Doe v. Purdue Univ.*, 928 F.3d 652, 666 (7th Cir. 2019) (Barrett, J.)). In *Doe*, the plaintiff was found guilty in

a university-run sexual-misconduct proceeding and suspended from his university for a year—which also caused his expulsion from the Navy ROTC program, terminated his ROTC scholarship, and foreclosed his plan to pursue a career in the Navy. 928 F.3d at 656. As in *Morgan*, after the plaintiff sued alleging due process deficiencies in the school's disciplinary proceedings, the district court dismissed his suit seeking expungement of records maintained by the university because, as the district court saw it, the plaintiff alleged only "a past violation of federal law," not "an 'ongoing' violation of federal law." *Doe v. Purdue Univ.*, 281 F. Supp. 3d 754, 767 (N.D. Ind. 2017). Writing for the court, then-Judge Barrett disagreed, holding that a "marred record is a continuing harm for which [the plaintiff] can seek redress." *Doe*, 928 F.3d at 666. As in *Morgan* and *Malhotra*, the court did not require the plaintiff to separately allege that the state actor's maintenance of a "marred record" independently violated the Fourteenth Amendment. *See id.* Rather, it was enough for the plaintiff to simply allege that he was "seek[ing] redress" for a "continuing harm" that stemmed from an unconstitutional action by a state actor. *Id.* That holding is in direct opposition to the Second Circuit's decision here.

c. The Ninth Circuit has taken the same approach as the Sixth and Seventh Circuits. In *Flint v. Dennison*, a student, who was disciplined for campaign-finance violations in connection with campus elections, sought an injunction requiring expungement of records that were created as a result of alleged First Amendment violations. 488 F.3d 816, 819 (9th Cir. 2007). There, the Ninth Circuit considered the argument, like the one presented

below, that such relief related exclusively to "past violations," and so did not qualify for *Ex parte Young* relief. *Id*. at 825.

Like the Sixth and Seventh Circuits, the Ninth Circuit rejected that argument. Yes, the requested injunctions "relate[d] to past violations," but they were "not limited merely to past violations" because they also "serve[d] the purpose of preventing present and future *harm* to [the plaintiff]." *Id*. (emphasis added). "Thus, the injunctions sought [we]re not . . . barred by the Eleventh Amendment." *Id*.

Though the Second Circuit claimed that *Flint* is "distinguishable," it offered no relevant legal or factual difference between the cases. App. 40a. The *Flint* court granted the exact injunctive relief that T.W. sought—expungement of records tainted by prior illegality—*without* requiring the plaintiff to plead that the maintenance of those records independently violated the First Amendment. Rather, the *Flint* court granted the injunction to prevent "present and future harm" to the plaintiff that stemmed from a "past violation[]"—just like T.W. requested here. *Flint*, 488 F.3d at 825.

The panel's effort to skirt this core holding does not remotely hold up. The panel characterized *Flint* as holding only that expungement is "prospective" in nature, and somehow not "address[ing]" whether expungement would be "unavailable under *Ex parte Young* [if] aimed exclusively at a *past violation*." App. 40a. But the *Flint* court ordered the exact same expungement relief that the Second Circuit denied here, precisely because it understood that relief as "*not* limited merely to past *violations*." 488 F.3d at 825 (emphasis added). As the court put it, although the relief "*related* to past violations," the fact

that it "serve[d] to expunge from University records [material that] may cause Flint harm" meant that it was not "limited merely to [those] past violations," and thus was "not barred by the Eleventh Amendment." *Id.* (emphasis added). There is simply no way of reconciling either the reasoning or the result in *Flint* with the decision below.

d. In addition to this clear 3-1 circuit conflict, district courts are also deeply divided. District courts in the Fifth and Eighth Circuits hold, like the Second Circuit here, that *Ex parte Young* relief is unavailable absent an independently unlawful ongoing violation. *See, e.g.*, *Duhon v. Healthcare Pros.' Found. of La.*, No. 20-cv-2022, 2022 WL 317302, at *3-4 (E.D. La. Feb. 2, 2022) (even though plaintiff "s[ought] prospective relief" of expungement, there was "no allegation of an *ongoing* violation of federal law"); *Thompson v. Epps*, No. 12-cv-369, 2014 WL 2932284, at *4 (S.D. Miss. June 30, 2014) (expunging prison record is "primarily retroactive injunctive relief" that does not qualify for *Ex parte Young* exception); *McGee v. Feneis*, No. 07-cv-4868, 2009 WL 2928245, at *5 (D. Minn. Sept. 8, 2009) ("An expungement is retroactive relief because it does not prevent a continuing or ongoing violation of federal law—it simply changes the effect of an event that happened in the past."). In the Tenth Circuit, meanwhile, district courts take the opposite approach. *See, e.g.*, *Garcia v. Metro. State Univ. of Denver*, No. 19-cv-2261, 2020 WL 886219, at *8 (D. Colo. Feb. 24, 2020) (Plaintiff's "request for expungement of her records is prospective and therefore falls within the *Ex Parte Young* exception.");

Johnson v. W. State Colo. Univ., 71 F. Supp. 3d 1217, 1230 (D. Colo. 2014) (same).[2]

The upshot is that a plaintiff's ability to obtain expungement relief in a range of important and life-altering circumstances turns purely on which judicial circuit in which they happen to live. That alone is reason enough for this Court to grant certiorari.

3. Moreover, this issue runs deeper than the expungement relief at issue here. For example, the Sixth Circuit has firmly rejected the Second Circuit's rationale in the context of prospective environmental remediation. *See, e.g.*, *Waid v. Earley (In re Flint Water Cases)*, 960 F.3d 303, 334 & n.10 (6th Cir. 2020) (distinguishing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Even though "'[d]amage to the water pipes ha[d] been done' . . . solely in the past," that damage "'ha[d] ongoing effects,'" like water "contaminat[ion]" and "prolonged and extreme exposure to lead—particularly in children and mothers"—that could be redressed only with prospective *Ex parte Young* relief. *Id.* at 334 (quoting *Boler v. Earley*, 865 F.3d 391, 413 (6th Cir. 2017)). Thus, the "ongoing effects" of the damage were "sufficient to show an ongoing violation of the Plaintiffs' [federal] rights"—even when there was no present, independently unlawful conduct by the defendant. *Boler*, 865 F.3d at 413.

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[2] The Fourth Circuit has also generally held *Ex parte Young* relief available to secure expungement of records. *See Constantine v. Rectors & Visitors of George Wash. Univ.*, 411 F.3d 474, 496 & n.15 (4th Cir. 2005). In unpublished decisions, it appears to have weighed in on both sides of the split on the "ongoing violation" requirement. *Compare Shepard v. Irving*, 77 F. App'x 615, 620 (4th Cir. 2003) (agreeing with majority rule), *with Jemsek v. Rhyne*, 662 F. App'x 206, 211 (4th Cir. 2016) (appearing to agree with the Second Circuit's decision here).

The decision below is also incompatible with the "overwhelming[]" majority of courts of appeals holding that "reinstatement constitutes prospective injunctive relief" available under *Ex parte Young*. *E.g.*, *Doe v. Lawrence Livermore Nat'l Laboratory*, 131 F.3d 836, 841 (9th Cir. 1997). As the Fifth Circuit has explained, it is true that "termination has long been considered a discrete act for employment discrimination purposes." *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 323 (5th Cir. 2008). But even so, a request for reinstatement to remedy a past unlawful termination "satisfies the continuing violation requirement." *Id.*; *see id.* at 322 ("[A]lmost every circuit court has reached the same result.").

The Second Circuit's reasoning also poses serious problems for plaintiffs seeking relief from all manner of other one-off violations, like licensing or permitting decisions. Take the Fifth Circuit's decision in *Green Valley Special Utility District v. City of Schertz*, where a municipal utility district challenged a state agency's decertification of certain territory to which it claimed it had provided sewer services. 969 F.3d 460, 471-73 (5th Cir. 2020) (en banc). The state agency argued that *Ex parte Young* did not apply because the "decertification was a discrete event," "there [wa]s no ongoing violation of which to speak," and the case "merely [involved] collateral effects of a past act, not a continuing violation of federal law." *Id.* at 472. The en banc Fifth Circuit unanimously disagreed: "Though the ongoing harms that [the district] alleges it suffer[ed] can be traced to the [decertification order], that does not mean that" *Ex parte Young* relief is unavailable. *Id.* An *Ex parte Young* injunction preventing decertification "would redress an ongoing violation of [federal law]—curtailment of territory

where [the district] maintains it provided service or made it available—without requiring any money to be taken from the state's coffers." *Id.* at 473. Diametrically opposed to the Second Circuit's decision below, the Fifth Circuit held that "[a]s long as the claim seeks prospective relief for ongoing harm, the fact that a violation can be traced to a past action does not bar relief under . . . [*Ex parte*] *Young*." *Id.* at 471-72 (final alteration added) (citation omitted).

Other courts of appeals have held similarly. The Seventh Circuit has authorized *Ex parte Young* relief to vacate the grant of a permit issued without due process, finding such relief appropriate to "undo[] or expunge[] a past state action" because that action involved an "ongoing violation of federal law" despite challenging conduct "by a state actor at a discrete point in" the past. *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 514-15, 522 (7th Cir. 2021). The Tenth Circuit has likewise approved "claims for future injunctive relief to remedy past harms" and "'right a previous wrong,'" regardless of whether any ongoing conduct independently violated federal law. *E.g.*, *Columbian Fin. Corp. v. Stork*, 702 F. App'x 717, 721 (10th Cir. 2017) (citation omitted); *see id.* at 721-22 (collecting cases).

In sum, the circuit conflict created by the decision below is undeniable. The Second Circuit's decision breaks with three circuits in indistinguishable circumstances, denying expungement relief that T.W. would have been able to obtain had she resided within any of those circuits. And it relies on reasoning that cannot be reconciled with precedent across the country in a host of other important areas. The result is that access to a vital federal remedy depends on where a plaintiff lives.

B. The Question Presented Is Exceptionally Important

The question presented is also of obvious importance. For over a century, *Ex parte Young* has been "indispensable to the establishment of constitutional government and the rule of law." Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 48 (8th ed. 2017). Indeed, a leading treatise heralds it as "one of the three most important decisions the Supreme Court has ever handed down." 17A Charles Alan Wright & Alan R. Miller, *Federal Practice and Procedure* § 4231 (2024 3d ed., Westlaw) (also citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816)). "The decision in *Ex parte Young*" has played "a foundational role in American constitutionalism," *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 174 (1996) (Souter, J., dissenting), supporting many landmark injunctions, including those that desegregated public universities, *see, e.g.*, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Milliken v. Bradley*, 433 U.S. 267 (1977), and required reapportioning state legislatures, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *see also* David. A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 Sup. Ct. Rev. 81, 101 & nn.83-86 (offering examples of lawsuits that would have been barred "were it not for *Ex parte Young*").

In fact, *Ex parte Young* has been so "taken for granted" in litigation like this that "most of the time, in cases seeking injunctive relief against state officials, no one even had to mention *Ex parte Young*." Strauss, *supra*, at 102. "If the plaintiffs [seek] an injunction against unconstitutional state conduct," it

often goes "without saying that sovereign immunity [is] not an obstacle." *Id.*

In particular, *Ex parte Young* "has long fulfilled the function of assuring that, for violations of rights, there is some remedy available, even if not a perfect remedy or a remedy that is in fact available to all who are injured." Vicki C. Jackson, Seminole Tribe*, The Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. Rev. 495, 511 (1997); *see, e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (emphasizing that the Court's holding that "Congress did not validly abrogate the States' sovereign immunity" under Title I did "not mean that persons with disabilities have no federal recourse against discrimination" because "private individuals" can still bring "actions for injunctive relief under *Ex parte Young*"). By denying *Ex parte Young* relief to individuals who are experiencing ongoing harms that are caused by violations of federal law, the decision below needlessly limits access to vital remedies and undermines core federal interests in ensuring the supremacy of federal law.

The Second Circuit's rule will have particularly devastating consequences for plaintiffs suffering disability discrimination. Such discrimination very often looks like what T.W. experienced: the unlawful denial of a needed accommodation, resulting in continuing harm like the creation of negative, embarrassing, or otherwise harmful records of failure or poor performance. *See, e.g.*, *Garrett*, 531 U.S. at 362; *Shepard*, 77 F. App'x at 620-21 (expungement of university grades resulting from disability discrimination); *Carten v. Kent State Univ.*, 282 F.3d 391, 395-96 (6th Cir. 2002) (expulsion from university that resulted from disability discrimination).

Yet in the public-employment and educational contexts, the *only* relief available to individuals like T.W. will often be the prospective, injunctive relief afforded by *Ex parte Young*. *See Garrett*, 531 U.S. at 360 (holding suits for money damages against public employers under Title I of the ADA barred by sovereign immunity); App. 41a (Title II of the ADA also does not validly abrogate state sovereign immunity). If allowed to stand, the decision below will eliminate even that key remedy in one of the nation's largest judicial circuits—leaving individuals suffering continued harms from ongoing unlawful state conduct with *no* avenue for relief whatsoever.

But of course, the decision below is not limited to disability rights. As the cases described above show, the cross-cutting nature of *Ex parte Young* relief means that the Second Circuit's rule will curtail the enforceability of federal rights across various areas of the law where expungement is an important form of relief. Public-sector employees' free speech rights are at stake. *See, e.g.*, *Morgan*, 63 F.4th at 516 (allowing *Ex parte Young* relief to expunge references to state employee's termination for exercising his First Amendment speech rights); *Thomson v. Harmony*, 65 F.3d 1314, 1317 n.1, 1320-21 (6th Cir. 1995) (similar). As are the due process rights of students subject to university disciplinary processes. *See, e.g.*, *Malhotra*, 77 F.4th at 536 (*Ex parte Young* relief to expunge public-university student's disciplinary record); *Doe*, 928 F.3d at 656 (same). So too, the rights of those subject to unlawful arrests and prosecution. *See, e.g.*, *Hedgepeth*, 386 F.3d at 1152 & n.3 (noting that the D.C. Circuit has long "approved" the remedy of expungement of criminal records, and noting "[s]uch an order would relieve [a plaintiff] of the burden of

having to respond affirmatively to the familiar question, 'Ever been arrested?' on application, employment, and security forms"). In each of these areas, expungement is necessary to fully redress the continuing effects of unlawful state conduct.

Nor is expungement the only remedy at risk in the Second Circuit. As noted above, other forms of prospective relief, like reinstatement, are also vital to the enforcement of federal rights—yet threatened by the decision below. *See, e.g.*, *Koslow v. Pennsylvania*, 302 F.3d 161, 179 (3d Cir. 2002) (describing "reinstatement" as "the type of injunctive, 'forward-looking' relief cognizable under *Ex parte Young*"); *Whitfield v. Tennessee*, 639 F.3d 253, 257 (6th Cir. 2011) (similar); *Carten*, 282 F.3d at 395-96 (similar in case involving expulsion from public university). The Second Circuit's opinion thus has undeniably far-reaching consequences that go significantly beyond the disability discrimination that took place here.

This case provides an ideal vehicle for considering the question presented. The question was raised, fully briefed, and squarely addressed in the Second Circuit. The panel neatly isolated the question for further review by making clear that T.W. had plausibly alleged disability discrimination and properly sought prospective injunctive relief. App. 38a, 40a. The sole reason T.W.'s request for *Ex parte Young* relief failed was the circuit's holding on the "ongoing violation" issue raised by this petition. *Id.* And the decision below all but acknowledged the circuit conflict when it addressed the Ninth Circuit's decision in *Flint*, *see* App. 40a (noting that the panel "would not be bound by [*Flint's*] holding"), while the full scope of that conflict was made clear to the court of appeals at the rehearing stage, *see* CA2 Pet. for

Rehr'g 5-9, ECF No. 112. Yet the Second Circuit showed no interest in resolving the conflict itself. *See* App. 62a-63a (denying rehearing). The conflict will not dissipate without this Court's intervention.

C. The Second Circuit's Decision Is Wrong

The decision below is also indefensible on the merits. The Second Circuit's approach lacks any grounding in this Court's precedents, finds no home in the purposes of sovereign immunity, and defies common sense. The result is to erect an arbitrary barrier that will severely limit the remedies available to individuals suffering harm caused by governmental misconduct.

1. *Ex parte Young* establishes an "important limit" on sovereign immunity, *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011), necessary "to promote the supremacy of federal law" and "the vindication of federal rights," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (collecting cases). Under *Ex parte Young*, individuals may sue state officials who violate federal law while acting in their official capacity for prospective injunctive relief. *See, e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276-77 ("[W]here prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar.").

As this Court has explained, when a state official "comes into conflict with the superior authority of [the] Constitution," he is "stripped of his official or representative character," and "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United

States." *Stewart*, 563 U.S. at 254 (quoting *Ex parte Young*, 209 U.S. at 159-60).

2. To determine whether *Ex parte Young* relief is available in a given case, this Court has long required "only . . . a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 255 (second alteration in original) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). As this Court's precedents have repeatedly made clear, this "straightforward inquiry" is satisfied when a state actor (1) has violated federal law and (2) engages in conduct perpetuating ongoing harm from that violation. In those circumstances, there is an "ongoing violation" of federal law that can be redressed prospectively, because the state actor's conduct in perpetuating the harm inflicted by a past violation is *itself* an act in defiance of federal law.

Start with this Court's decision in *Milliken*. There, the Court held that a court order requiring state defendants to fund remedial education programs to "dissipate the continuing effects of *past misconduct*"—there, a segregated school system—"fit[] squarely within the prospective-compliance exception" to the Eleventh Amendment, "which had its genesis in *Ex parte Young*." 433 U.S. at 289-90 (emphasis added). In this Court's view, this order "did no more" than "enjoin state officials to conform their conduct to requirements of federal law" because "by the nature of the *antecedent violation* . . . the victims of [a] de jure segregated system will continue to experience the *effects* of segregation until such future time" as the inequalities arising from segregation (i.e., its harms) were ameliorated. *Id.* (emphasis added).

Or look to *Papasan v. Allain*, 478 U.S. 265, 282 (1986). There, the Court held that an equal protection claim was not barred by the Eleventh Amendment where the plaintiff alleged present, continuing harm—a "disparity in the distribution of the benefits of state-held assets"—that "result[ed] directly from . . . actions in the past." *Id.* at 274-75, 282. So long as the claim sought "'compliance *in the future* with a substantive federal-question determination' rather than . . . an award for accrued monetary liability," *Ex parte Young* relief was available. *Id.* at 282 (quoting *Milliken*, 433 U.S. at 289). As the Sixth Circuit cogently explained, *Milliken* and *Papasan* together establish that claims "seek[ing] prospective injunctive relief to remediate . . . ongoing harms . . . [are] proper under *Ex parte Young*, . . . *even if the conduct at issue occurred solely in the past*." *Flint Water Cases*, 960 F.3d at 334 (emphasis added).

3. The Second Circuit's rule, on the other hand—requiring plaintiffs to show that the state officials' continuing harmful conduct *independently* violates federal law—has no basis in this Court's precedent. Instead, it constitutes the type of "empty formalism" that this Court has repeatedly cautioned against in the *Ex parte Young* context. *E.g.*, *Stewart*, 563 U.S. at 256 (citation omitted).

To begin with, the Second Circuit's decision draws completely arbitrary distinctions that bear no relation to the principles underlying state sovereign immunity or the *Ex parte Young* exception. The decision below *agreed* that T.W. (1) was subject to a violation of federal law, (2) is still harmed by BOLE's failure to remediate that violation, and (3) could receive effective relief in the form of a prospective injunction requiring expungement. Yet it required that T.W.

also show that the maintenance of the records at issue was itself unlawful. App. 39a. That added requirement makes no sense. There is no principled difference between remedying "ongoing illegality" and the "ongoing harm" perpetuated as a direct result of past illegality. In both cases, the defendant has violated federal law, the plaintiff is harmed by that violation, and the "effect of the relief sought" is the same: to restrain a state actor from engaging in conduct that perpetuates a violation of federal law. *Stewart*, 563 U.S. at 256-57 (emphasis and citation omitted). This Court has instructed that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Coeur d'Alene*, 521 U.S. at 270.

Nor would T.W.'s requested expungement relief "threaten to evade sovereign immunity" in any of the ways this Court's precedents have previously recognized. *Stewart*, 563 U.S. at 256. Granting such relief would not require the payment of funds from a state's treasury, *see id.* at 256-57, order specific performance of a state's contract, *see id.* at 257, or implicate any "special sovereignty interests," such as a state's control over its lands and waters, *see id.* at 257-58 (quoting *Coeur d'Alene*, 521 U.S. at 281). Nor does it interfere "where Congress has [already] prescribed a detailed remedial scheme for the enforcement against a State" of the claimed federal right. *E.g.*, *Seminole Tribe*, 517 U.S. at 74. The expungement relief T.W. seeks thus lies within the heartland of the *Ex parte Young* exception to state sovereign immunity. Indeed, the decision below did not suggest otherwise—or anchor its decision in any principle of sovereign immunity at all. Rather, it formalistically looked to the words "ongoing violation"

in this Court's precedents, and misinterpreted them to require that the ongoing official conduct independently violate federal law. But that is not what this Court's cases say. Even cursory examination of those cases shows that, in this context, the term "ongoing violation" *includes* conduct perpetuating "the continuing effects of past misconduct." *Milliken*, 433 U.S. at 290.

4. In reaching a contrary conclusion, the decision below mostly relied on this Court's decisions in *Coeur d'Alene*, 521 U.S. at 281, and *Green*, 474 U.S. at 68. *See* App 37a-39a. Neither supports the panel's novel, arbitrary rule.

Coeur d'Alene addressed a wholly different *Ex parte Young* question. The Court there found that the plaintiff *did* allege an "ongoing violation" that could be cured by "prospective injunctive relief." 521 U.S. at 281. But even so, the Court held that the relief sought—which would "extinguish[] the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory" and amount to a "quiet title" action against the state—implicated "special sovereignty interests" that made the case highly "unusual," and that made *Ex parte Young* "inapplicable." *Id.* at 281-82, 287. Neither BOLE nor any court has ever identified such "special" sovereignty interests present here.

Green is also afield. There, the plaintiffs challenged a state agency's methodology for calculating certain welfare benefits under federal law. 474 U.S. at 65. While the challenge was pending, the agency "conformed [its calculations] to federal law," *id.*, and so, as the plaintiffs "concede[d]," "any claim they might have had for the specific type of injunctive relief approved in *Ex parte Young* was rendered moot," *id.*

at 68-69. The question was whether, even though there was no ongoing conduct by the defendant at all, a *court* could still issue "notice relief"; that is, "notice to the plaintiff class informing individual class members that they [had been] wrongfully denied benefits in a particular amount." *Id.* at 69-70.

The Court held that the answer was "no" because the notice, unlike an *Ex parte Young* injunction, did not "bind state officials in any way," stop a violation of federal law, or otherwise "lead to any particular action." *Id.* at 70-71. Rather, the contemplated notice was a "case-management device" that "'simply infor[med] class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing administrative procedures which they may wish to pursue.'" *Id.* (citation omitted). As such, it was more like a declaratory judgment, addressing state officials' actions in the past, than a prospective injunction, aimed at future official conduct. *Id.* at 71, 74.

Here, the question is not whether ancillary "notice relief" is available in the conceded absence of any ongoing legal violation. The question is instead what constitutes an "ongoing violation" in the first place. As cases like *Milliken* and *Papasan* make clear, there is an "ongoing violation" whenever there are "continuing effects of past [government] misconduct" that can be redressed through a prospective injunction. *Milliken*, 433 U.S. at 290; *see also, e.g.*, *Flint Water Cases*, 960 F.3d at 334 n.10 (explaining that "*Green* did not confront . . . whether remedial measures to combat the effects of past [federal] violations are available as a form of prospective injunctive relief under *Ex parte Young*").

In short, neither decision that the Second Circuit relied on remotely supports the new rule it fashioned; that rule is legally indefensible; and the result will be to curtail vitally needed remedies in one of the nation's largest judicial circuits.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 31, 2024

APPENDIX

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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.

No. 22-1661

August Term, 2022

Argued: June 5, 2023

Decided: July 19, 2024

[110 F.4th 71]

Before: Livingston, Chief Judge, and Nardini, Circuit Judge.*

OPINION

William J. Nardini, Circuit Judge:

Plaintiff-Appellant T.W. sued Defendants-Appellees the New York State Board of Law Examiners ("Board") and its members alleging that the Board violated Titles II and III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C.

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* Judge Rosemary S. Pooler, originally a member of this panel, passed away on August 10, 2023. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); 2d Cir. IOP E(b); *United States v. Desimone*, 140 F.3d 457, 458–59 (2d Cir. 1998).

§ 794 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code tit. 8, by denying her requests for certain accommodations on the New York State bar examination in 2013 and 2014. T.W. subsequently withdrew her claims under Title III of the ADA and the NYCHRL, as well as her claims against the Board members in their individual capacities.

The Board moved to dismiss T.W.'s complaint, asserting that the United States District Court for the Eastern District of New York (Raymond J. Dearie, *District Judge*) lacked subject matter jurisdiction because New York's sovereign immunity barred T.W.'s ADA and Rehabilitation Act claims under the Eleventh Amendment. The district court denied the Board's motion to dismiss, holding that the Board is a program or activity of a department or agency that receives federal funds, and accordingly that its sovereign immunity had been waived under the Rehabilitation Act. This Court reversed, holding that the Board was not a program or activity of a department or agency that receives federal funds and was therefore immune from suit under Section 504 of the Rehabilitation Act. We remanded the case for consideration of the Board's motion to dismiss as to T.W.'s Title II claim under the ADA, which the district court had not addressed in the first instance because it concluded that "the same legal standards and remedies apply to claims under Title II of the ADA and the Rehabilitation Act," such that T.W. needed to prevail on only one of the claims to survive the Board's motion to dismiss. *T.W. v. N.Y. State Bd. of L. Exam'rs*, No. 16-cv-3029, 2019 WL 4468081, at *2 (E.D.N.Y. Sept. 18, 2019). On remand, the district court granted the Board's motion to dismiss the Title

II claim, holding that the Board is entitled to immunity as an "arm of the state," that Title II does not abrogate the Board's sovereign immunity for money damages as applied to T.W.'s claim, and that T.W. could not maintain her requests for declaratory and injunctive relief under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

On appeal, T.W. argues that the Board is not an arm of the state, and even if it were an arm of the state, that Title II has abrogated Eleventh Amendment immunity in the context of T.W.'s claim. In addition, T.W. argues that even if the Board enjoys sovereign immunity as to her damages claim, she may seek her requested declaratory and injunctive relief under *Ex parte Young*. We disagree and therefore AFFIRM the July 21, 2022, judgment of the district court.

I. Background

A. Factual background[1]

T.W. is a Harvard Law School graduate who suffers from a variety of complications resulting from a severe head injury. While at Harvard, she received testing accommodations for her disabilities, including 50 percent extra time on exams, stop-clock breaks, and separate testing facilities. When she signed up for the July 2013 New York bar examination, she requested these same testing accommodations, citing her diagnosed impairments.

The Board initially denied her request for any accommodations. But after she appealed the decision,

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[1] We recounted this factual background in additional detail in our prior opinion, *T.W. v. New York State Board of Law Examiners* (*T.W. I*), 996 F.3d 87 (2d Cir. 2021).

the Board granted her request in part, providing off-the-clock breaks and seating her in a smaller room, although that room included others receiving similar accommodations. T.W. did not pass the July 2013 bar exam. At the time T.W. received her results, she had started as a law clerk at a law firm, and she alleges that failing the bar hurt her standing at the firm and required her to set aside time to study for the exam again.

T.W. signed up for the July 2014 exam and again requested the accommodations that she had received at law school. This time, the Board granted her 50 percent extra time, seating in a room with others receiving similar accommodations, but no off-the-clock breaks. She again did not pass, and her law firm fired her.

In February 2015, T.W. passed the bar examination on her third attempt. This time, the Board granted her double time on the exam, an accommodation that she had requested to the extent that her initial request for off-the-clock breaks and 50 percent extra time was not granted. T.W. alleges that the Board's failure to provide her with the accommodations that she initially requested caused her to fail the bar exam twice and resulted in her inability to find employment comparable to the position she had held at her law firm. T.W. sued the Board, its chair, and members of the Board, alleging violations of the ADA, Section 504 of the Rehabilitation Act, and the NYCHRL, seeking declaratory, compensatory, and injunctive relief.

B. Procedural background

In November 2016, the Board moved to dismiss T.W.'s complaint under Federal Rules of Civil

Procedure 12(b)(1) and 12(b)(6), asserting, *inter alia*, that the district court lacked subject matter jurisdiction because Eleventh Amendment immunity barred T.W.'s ADA and Rehabilitation Act claims. Shortly thereafter, T.W. withdrew her claims under Title III of the ADA and the NYCHRL, as well as her claims against the chair and members of the Board in their individual capacities. Her only remaining claims were those under Title II of the ADA and Section 504 of the Rehabilitation Act.

Following limited discovery on whether the Board had accepted federal funds during the relevant time period, the district court denied the Board's motion to dismiss. The district court found that although the Board had not directly received federal funds during the relevant time period, the Board had nonetheless waived its immunity as a " 'program or activity' of a department or agency that itself accepts federal funds—in this case, New York's Unified Court system." *T.W.*, 2019 WL 4468081, at *4. The district court declined to reach the Board's dismissal argument as to T.W.'s Title II ADA claim, because "the same legal standards and remedies apply to claims under Title II of the ADA and the Rehabilitation Act." *Id.* at *2.

The Board took an interlocutory appeal, and we reversed, holding that the Board was immune from suit under Section 504 of the Rehabilitation Act. *See T.W. I*, 996 F.3d at 93, 102. We agreed with the district court that the Board did not receive any federal funds and likewise rejected T.W.'s argument that merely being an "*intended* beneficiary" of federal funds was sufficient to find immunity waived under Section 504 of the Rehabilitation Act. *Id.* at 93–94. But we disagreed with the district court as to the

second of T.W.'s waiver arguments, namely whether the Board was a "program or activity" of a department or agency receiving federal funds. *Id.* at 94–102. The crux of our reasoning was that the district court had described the recipient of federal funds too broadly: it was not New York's Unified Court System that received federal funds during the relevant period, but rather only certain specialty courts within the Courts of Original Jurisdiction. *Id.* Because the Courts of Original Jurisdiction constituted the relevant funds-receiving "unit" for purposes of Section 504's immunity waiver, and because the Board is not a part of the Courts of Original Jurisdiction, we held that the Board had not waived its immunity under Section 504. *Id.* at 97–102. Accordingly, we reversed the district court's denial of the motion to dismiss the Section 504 claim and remanded the case for consideration of the Board's motion to dismiss as to T.W.'s Title II claim under the ADA. *See id.* at 102.

On remand, the district court held that the Board was immune from suit under Title II of the ADA. In a memorandum and order entered on July 19, 2022, the district court held that the Board was an arm of the state, that Title II of the ADA did not abrogate sovereign immunity in the context of professional licensing exams, that the declaratory relief T.W. seeks is not a valid application of the doctrine first articulated in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and that T.W. lacked standing to pursue her requested injunctive relief. *T.W. v. N.Y. State Bd. of L. Exam'rs*, No. 16-cv-3029, 2022 WL 2819092, at *1–9 (E.D.N.Y. July 19, 2022). Accordingly, the district court granted the Board's motion to dismiss T.W.'s Title II claim. T.W. now appeals.

II. Discussion

On appeal, T.W. contends that the district court erred in dismissing her Title II claim. She first argues that the Board is not an arm of the state, and therefore cannot claim sovereign immunity under the Eleventh Amendment. In the alternative, she argues that her claim for money damages can nonetheless proceed against the Board because Title II of the ADA abrogated sovereign immunity in the context of the Board's operations. Finally, she contends that her complaint states a valid claim for declaratory and injunctive relief pursuant to the *Ex parte Young* doctrine.

We "review[ ] the district court's factual findings for clear error and its legal conclusions *de novo*." *T.W. I*, 996 F.3d at 93 (internal quotation marks omitted). "The Board, as the party asserting immunity, bears the burden of demonstrating entitlement." *Id.* (internal quotation marks and alteration omitted). For the reasons that follow, we affirm in all respects.

A. Arm of the state

T.W. first contends that the district court erred in concluding that the Board is an arm of the state, and therefore is entitled to sovereign immunity.

The Eleventh Amendment to the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "Although the text of the amendment speaks only of suits against a state by persons who are not citizens of that state, the Supreme Court has interpreted the Eleventh

Amendment to extend to suits by all persons against a state in federal court." *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 10–11, 10 S.Ct. 504, 33 L.Ed. 842 (1890)). Further, the Eleventh Amendment bars suits against states even where the state "is not named a party to the action." *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945). Accordingly, the Eleventh Amendment applies to a suit for damages brought against an entity that is fairly considered to be an "arm of the state." *See Mancuso*, 86 F.3d at 292; *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

We outlined a multi-factor inquiry to assess whether an entity is an "arm of the state" for Eleventh Amendment purposes in *Mancuso v. New York State Thruway Authority*. *See* 86 F.3d at 293. These factors include:

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the

> entity's obligations are binding upon the state.

Id. Where those factors "point in different directions," a court asks "(a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk?" *Id.* In cases that remain close, the most important factor is whether the suit exposes the state treasury to a risk of liability. *See id.*

The district court conducted a thorough analysis of the *Mancuso* factors, concluding that the Board was an arm of the state, and therefore entitled to Eleventh Amendment immunity. *T.W.*, 2022 WL 2819092, at *1–5. We affirm, though on procedural grounds rather than our own assessment of the merits. *See Jusino v. Fed'n of Cath. Tchrs., Inc.*, 54 F.4th 95, 100 (2d Cir. 2022) ("We may affirm on any ground with support in the record." (internal quotation marks omitted)).

We begin by noting that this question—whether the Board is an arm of the state—is hardly an unfamiliar one. In *T.W. I*, our Court wrote, point-blank: "The Board of Law Examiners, as an arm of the State of New York, shares in [Eleventh Amendment] immunity." 996 F.3d at 92 (cleaned up). It therefore appears that we expressly decided this issue in *T.W. I*.

But even if we had not been so explicit, resolution of the sovereign immunity question was necessarily implicit in our holding that dismissal of the Rehabilitation Act claim was required; therefore, the law of the case doctrine settles the issue. "[A] decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was

not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision, for it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (internal quotation marks omitted); *see also United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002) ("[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine bars the district court on remand and an appellate court in a subsequent appeal from reopening such issues unless the mandate can reasonably be understood as permitting it to do so." (internal quotation marks omitted)); *Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp.*, 671 F.3d 261, 271 (2d Cir. 2012) (arguments not raised in prior appeal "were impliedly decided to have been waived in the first instance" (internal quotation marks omitted)). "[T]he law-of-the-case doctrine applies to everything decided by necessary implication in the first appeal." *County of Suffolk*, 106 F.3d at 1117 (cleaned up).

Applying these principles, we find that the Board's status as an arm of the state has become the law of the case. In *T.W. I*, we held that the Board had not waived its sovereign immunity, and that the district court was therefore obliged to dismiss the Rehabilitation Act claims for lack of subject matter jurisdiction. By deciding that dismissal was required, we necessarily decided that the Board *had* sovereign immunity—a decision that had to be logically premised on a conclusion that the Board was an arm of the state. The Board's eligibility for sovereign

immunity (that is, its status as an arm of the state) was "decided by necessary implication," *see id.*, even without regard to our explicit language on this issue, *see T.W. I*, 996 F.3d at 92 ("The Board of Law Examiners, as an arm of the State of New York, shares in [Eleventh Amendment] immunity."). But T.W. failed to raise in *T.W. I* the arm-of-the-state issue that she now seeks to litigate. *See* Brief of Appellee T.W., *T.W. v. N.Y. State Bd. of L. Exam'rs*, 996 F.3d 87 (2d Cir. 2021) (No. 19-4136), ECF No. 67 (raising no argument that the Eleventh Amendment did not apply to the Board). In fact, T.W.'s argument now essentially seeks vacatur of our prior decision, the holding of which is necessarily premised on the Board's Eleventh Amendment immunity. Under these circumstances, we conclude that the law of the case settles this issue.[2]

B. Abrogation of sovereign immunity

T.W. next contends that even if the Board is an arm of the state for Eleventh Amendment purposes, Title II of the ADA validly abrogated its sovereign immunity in the context of her claim.

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[2] T.W.'s waiver of this issue is even more apparent than it appears on the face of her appellate briefs. Not only did she fail to litigate this issue before the district court when the Board first filed its motion to dismiss, *see* E.D.N.Y. Dkt. No. 16-cv-3029, ECF No. 11 (T.W responding to the Board's motion to dismiss in an opening letter brief, which does *not* argue that the Board lacked sovereign immunity), but she essentially conceded the Board's status in her complaint. She alleges that "[t]he Board *is a public entity and state instrumentality* subject to the nondiscrimination requirements of Title II of the Americans with Disabilities Act." J. App'x 30, ¶ 78 (emphasis added). It was not until October 15, 2021, after five years of litigation on the very issue of the Board's immunity to suit, that T.W. first challenged the Board's arm-of-the-state status.

Section 5 of the Fourteenth Amendment grants Congress authority to abrogate state sovereign immunity. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). But Section 5 only "grants Congress the authority to abrogate states' immunity as to conduct that actually violates the Fourteenth Amendment, as well as a somewhat broader swath of conduct that is constitutional but which Congress may prohibit in order to remedy or deter actual violations." *Bolmer v. Oliveira*, 594 F.3d 134, 146 (2d Cir. 2010) (internal quotation marks omitted). When an exercise of Section 5 enforcement power is directed in a "prophylactic" way, *id.*, there must be "congruence and proportionality between the [violation] to be prevented or remedied and the means adopted to that end," *City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

"Congress has unambiguously purported to abrogate states' immunity from Title II claims." *Bolmer*, 594 F.3d at 146; *see also* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment . . . for a violation of this chapter."). Title II, however, sweeps more broadly than the Fourteenth Amendment. *See Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 109–12 (2d Cir. 2001) (comparing Title II's breadth to the Fourteenth Amendment, the latter of which, "[w]here disability discrimination is at issue," "only proscribes government conduct for which there is no rational relationship between the disparity of treatment and some legitimate governmental purpose"). Thus, to determine whether a Title II abrogation is valid, courts proceed on "on a claim-by-claim basis," considering "(1) which aspects of the State's alleged

conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *United States v. Georgia*, 546 U.S. 151, 158–59, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006). We proceed accordingly.

1. Step one: Title II violation

The first step of the *Georgia* framework requires us to identify "which aspects of the State's alleged conduct violated Title II." *Id.* In this case, the inquiry need not detain us. The district court found that T.W. "plausibly alleged that the Board violated Title II by failing to reasonably accommodate her disability." *T.W.*, 2022 WL 2819092, at *6. The Board does not contest this reading of T.W.'s complaint on appeal, waiving any argument to the contrary. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Accordingly, for the purposes of our sovereign immunity assessment, we conclude that T.W. has sufficiently alleged that the Board's conduct violated Title II of the ADA.

2. Step two: Fourteenth Amendment violation

The second step of the *Georgia* framework requires us to identify "to what extent such misconduct also violated the Fourteenth Amendment." 546 U.S. at 158–59, 126 S.Ct. 877. Again, this inquiry is an easy one here: T.W. has likewise declined to contest the district court's finding that the Board's alleged failure to provide sufficient accommodations did not violate

the Fourteenth Amendment, thereby conceding that issue.

In sum, the parties have agreed that T.W.'s complaint alleges a Title II violation, but not a Fourteenth Amendment violation.

3. Step three: Abrogation analysis

Our analysis thus turns on the third prong of the *Georgia* framework—whether Congress's purported abrogation of sovereign immunity is valid as to T.W.'s claim. In conducting this inquiry, we must: (a) identify the scope of the constitutional right at issue; (b) examine whether, in enacting Title II, Congress identified a history and pattern of unconstitutional discrimination by states in the relevant context; and (c) determine whether the right and remedies created by the statute are congruent and proportional both to the constitutional rights it purports to enforce and to the record of violations adduced by Congress. *City of Boerne*, 521 U.S. at 529–36, 117 S.Ct. 2157; *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–74, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (applying the *City of Boerne* factors to conclude that abrogation of Eleventh Amendment sovereign immunity was invalid as to Title I of the ADA).

We note at the outset some disagreement among our sister Circuits as to the application of this framework to Title II claims. In *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), the Supreme Court held that Title II of the ADA validly abrogated sovereign immunity in the context of a claim against the state of Tennessee for failure to make its courts accessible to disabled individuals. *Id.* at 514, 533–34, 124 S.Ct. 1978. Circuits disagree,

however, on how broadly *Lane* should be read. On the one hand, the Fourth, Fifth, Eighth, and Eleventh Circuits have read *Lane* to conclusively resolve the first two prongs of the *City of Boerne* inquiry as to Title II on the whole. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005); *McCarthy ex rel. Travis. v. Hawkins*, 381 F.3d 407, 423 (5th Cir. 2004) (Garza, *J.*, concurring in part and dissenting in part); *Klingler v. Dir., Dep't of Revenue, State of Mo.*, 455 F.3d 888, 896 (8th Cir. 2006); *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 957-58 (11th Cir. 2005). Were we to follow this approach, we would essentially skip to the third step of the *City of Boerne* test—congruence and proportionality. On the other hand, the First and Tenth Circuits have both held that *Lane* resolved these issues as to the "particular right and class of state action at issue." *Guttman v. Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012); *see Toledo v. Sanchez*, 454 F.3d 24, 35 (1st Cir. 2006). Under this approach, *Lane* did not resolve the first two steps of the *City of Boerne* inquiry as to all Title II claims, but spoke only to Title II claims regarding "accessibility of judicial services." *Toledo*, 454 F.3d at 36 (quoting *Lane*, 541 U.S. at 531, 124 S.Ct. 1978).

We agree with the First and Tenth Circuits that *Lane* did not resolve the first two prongs of the *City of Boerne* framework for all of Title II's myriad applications. "Title II—unlike . . . the other statutes we have reviewed for validity under § 5 [of the Fourteenth Amendment]—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees." *Lane*, 541 U.S. at 530, 124 S.Ct. 1978. Accordingly, "nothing in [Supreme Court] case law requires us to consider Title

II, with its wide variety of applications, as an undifferentiated whole." *Id.* Thus, as both the First and Tenth Circuits observed, the Supreme Court undertook its analysis of each of the *City of Boerne* prongs with respect to the specific fundamental right and state services at issue in *Lane*. *Id.* at 522–23, 527, 530–34, 124 S.Ct. 1978; *see Guttman*, 669 F.3d at 1117–18 (observing same); *Toledo*, 454 F.3d at 35.[3] Furthermore, reading *Lane* broadly would imply that abrogation analyses should be conducted, at least to some extent, on a statute-by-statute basis, an approach that runs afoul of the Supreme Court's prescription that this analysis occur on a "claim-by-claim basis." *Georgia*, 546 U.S. at 159, 126 S.Ct. 877. We therefore "find that *Lane* does not conclusively settle the first two prongs of the *City of Boerne* test for all classes of services." *Guttman*, 669 F.3d at 1118. Accordingly, we proceed through the three-part *City of Boerne* analysis *seriatim*.

a. Scope of the constitutional right

The first prong of the *City of Boerne* analysis requires us to determine the scope of the constitutional right at issue. T.W. contends that the

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[3] To be sure, passages in *Lane*, if read in isolation, could support a more expansive reading. *See, e.g., Lane*, 541 U.S. at 513, 124 S.Ct. 1978 ("The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment."); *id.* at 524, 124 S.Ct. 1978 (noting, with regards to the second *City of Boerne* prong, that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights"). But notwithstanding excerpts suggesting otherwise, *Lane* conducted its inquiry in the specific context of the right at issue in that case. *See, e.g.*, *id.* at 522–23, 527, 530–34, 124 S.Ct. 1978.

constitutional right here is the right to education (and educational testing) and, as a "plus factor," the right of access to courts. The Board contends that the right at issue is that of occupational choice.

We agree with the Board that the right involved in T.W.'s case is a disabled person's right of occupational choice, and more specifically that of licensure to practice in a highly regulated profession. Both the Supreme Court and this Court have referred to the bar exam as a professional licensure test. *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59, 68, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988) (referencing the bar exam as being a hurdle to "professional licensure"); *United States v. Novak*, 903 F.2d 883, 888 (2d Cir. 1990) (describing passing the bar as "meet[ing] the threshold criteria of competence in the law"). Common sense supports this conclusion: the bar exam is a test that individuals typically become eligible to take following *completion* of their legal education; it is not a "part" of one's legal education in any practical sense. *See* Bar Exam Eligibility, N.Y. State Bd. of L. Exam'rs, https://www.nybarexam.org/Eligible/Eligibility.htm [https://perma.cc/6P6V-4WCY].

Additionally, concerns created by T.W.'s claims are very different from those that arise in the education context. Caselaw addressing the right of access to education has emphasized the *sui generis* nature of education, including its unique importance in civil society. "Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. . . . [E]ducation has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786

(1982) (internal citations omitted); *see also Toledo*, 454 F.3d at 36–37 ("The Supreme Court has recognized the vital importance of all levels of public education in preparing students for work and citizenship as well as the unique harm that occurs when some students are denied that opportunity." (citing, *inter alia*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954))); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 555–56 (3d Cir. 2007); *Ass'n for Disabled Ams.*, 405 F.3d at 959 ("Discrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services."). None of this reasoning applies to taking the bar exam, which is surely not a prerequisite to participation in civil society. On this score, we note that T.W.'s alleged damages all concern her professional well-being, and she does not allege any inability to participate in society more broadly because of her difficulties passing the bar exam on her first two attempts. *See* J. App'x 27–28 (describing T.W.'s termination from her prior law firm and her difficulty finding comparable employment).

T.W.'s assertion that there is an access-to-courts angle to her claim (which she says is a "plus factor") fares no better. *Lane* addressed the "right of access to the courts," a fundamental civil right enshrined and expanded by other constitutional amendments. 541 U.S. at 523, 124 S.Ct. 1978. These include the Confrontation Clause of the Sixth Amendment, the Due Process Clause, which "requires the States to afford certain civil litigants a meaningful opportunity to be heard by removing obstacles to their full

participation in judicial proceedings," the Sixth Amendment right to trial "by a jury composed of a fair cross section of the community," and the First Amendment "right of access to criminal proceedings." *Id.* (internal quotation marks omitted). But the right of access to courts in *Lane* did not involve the right of individuals to earn a living in courts *as a licensed lawyer* (and for that matter, bar admission is required for *all* practicing lawyers, even those whose work involves only transactional or advisory work, and who never appear in court). The Supreme Court's failure to mention that species of supposed "access" in *Lane* comes as no surprise, because nothing in the Constitution guarantees an individual a right to work as a lawyer, nor does T.W. identify any authority otherwise. Accordingly, we conclude that T.W.'s complaint invokes only the right of occupational choice, and more specifically that of professional licensing.

We next consider the scope of that right. "[T]he liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment," but this right is "subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 291–92, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999); *see also Hu v. City of New York*, 927 F.3d 81, 102 (2d Cir. 2019) ("[T]he right of occupational choice is afforded Due Process protection only when a plaintiff is completely prohibited from engaging in his or her chosen profession." (cleaned up)). Although T.W. does not press an Equal Protection Clause claim on appeal, even if she did, the Board's conduct "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and

some legitimate governmental purpose." *Garrett*, 531 U.S. at 366–67, 121 S.Ct. 955 (internal quotation marks omitted). In sum, the right at issue here—a disabled person's right to practice her chosen profession—is not afforded heightened scrutiny.

b. History and pattern of unconstitutional discrimination

Under the second prong of the *City of Boerne* framework, we consider to what extent Title II was "responsive to, or designed to prevent, unconstitutional behavior," 521 U.S. at 532, 117 S.Ct. 2157, "[w]ith respect to the particular services at issue in this case," *Lane*, 541 U.S. at 527, 124 S.Ct. 1978.

We find, as did the Tenth Circuit, that Congress has not identified "a longstanding pattern of disability discrimination in [the context of] professional licensing." *Guttman*, 669 F.3d at 1119. Our review of the legislative history uncovered no legislative findings documenting a pattern of unconstitutional discrimination in the administration of professional licensure examinations by states, in the granting of professional licenses, or regarding occupational choice more generally. *See* 42 U.S.C. § 12101; S. Rep. No. 101–116 (1989); H.R. Rep. No. 101–485, pts. 1–4 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267; H.R. Rep. No. 101–558 (1990) (Conf. Rep.); H.R. Rep. No. 101–596 (1990) (Conf. Rep.), *as reprinted in* 1990 U.S.C.C.A.N. 565.[4]

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[4] As an appendix to his dissent in *Garrett*, Justice Breyer listed "Submissions made by individuals to the Task Force on Rights and Empowerment of Americans with Disabilities." *See Garrett*, 531 U.S. at 391, 121 S.Ct. 955, App. C (Breyer, *J.*, dissenting). That Appendix included five line-items that may

T.W. identifies one isolated example from the congressional record that may support her position. Namely, in a written statement before Congress, a disabled private attorney indicated that she had heard "scores of horror stories on an annual basis arising from the experiences of persons with disabilities who attempt to take bar examinations." J. App'x 64 n.3 (quoting *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 101st Cong. 162 (1989) (statement of Laura D. Cooper, Attorney, Pettit & Martin)). This isolated testimony, however, does not appear to have been adopted by Congress as any sort of finding. *See, e.g.,* 42 U.S.C. § 12101; S. Rep. No. 101–116 (1989); H.R. Rep. No. 101–485, pts. 1–4 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267; H.R. Rep. No. 101–558 (1990) (Conf. Rep.); H.R. Rep. No. 101–596 (1990) (Conf. Rep.), *as reprinted in* 1990 U.S.C.C.A.N. 565. Nor does this testimony necessarily flag unconstitutional conduct; it merely alleges without

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indicate instances of disability discrimination in the professional licensing context. *See id.* (California 00261 (teachers), Texas 01503 (same), Texas 01549 (same); Texas 01542 (cosmetologists); Texas 01543 (chiropractors)). However, there is insufficient context to suggest that any of these examples constituted unconstitutional discrimination, particularly because government regulations affecting disabled individuals do not receive elevated scrutiny and survive constitutional review if they are rationally related to a legitimate government purpose. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *see also Garrett*, 531 U.S. at 370, 121 S.Ct. 955 ("Whether [the isolated examples of state employment discrimination against the disabled] were irrational under our decision in *Cleburne* is more debatable, particularly when the incident is described out of context.").

any context or description that the witness heard "scores of horror stories" regarding the bar examination. But because laws infringing on occupational choice are subject only to rational basis review, and because laws distinguishing individuals on the basis of disability are reviewed likewise, we are left with no basis to conclude that these unspecified "horror stories" describe events that were unconstitutional as opposed to simply unfortunate. *See Garrett*, 531 U.S. at 370, 121 S.Ct. 955 ("Whether [the isolated examples of state employment discrimination against the disabled] were irrational under our decision in *Cleburne* is more debatable, particularly when . . . described out of context.").

T.W. also points to a House committee report that discusses private testing discrimination under Title III of the ADA. That report contains language implying that Title II requires states' "licensing[,] certification[,] and other testing authorities" to be accessible to those with disabilities, "which includes physical access as well as accommodations in the way the test is administered." H.R. Rep. No. 101-485, pt. 3, at 68. But this example is of little help to T.W.'s position, because it is not a finding of unconstitutional discrimination. Rather, this statement merely explains the purpose of a section in Title III with reference to Title II. It is not evidence that Title II was "responsive to, or designed to prevent, unconstitutional behavior" in the context of professional licensing. *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157. Accordingly, it provides no support to

Congress's exercise of Section 5 power in this context.[5]

But even if we assumed that the testimony of this single attorney constituted a congressional finding (which it was not) and that her testimony described unconstitutional conduct (which it does not), the record of unconstitutional discrimination in this context would still be insufficient to justify abrogation of state sovereign immunity. "In *Lane*, the Court found that Congress 'enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs,' and that it specifically considered evidence of discrimination in areas such as education, access to the courts, transportation, communications, health care, and other public services. The Court noted the 'sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services,' and concluded that it is 'clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.'" *Guttman*, 669 F.3d at 1118 (internal citation omitted) (quoting *Lane*, 541 U.S. at 528, 529, 124 S.Ct. 1978). In contrast, the Supreme Court in *Garrett* found that six examples from the congressional record of state employment discrimination against disabled

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[5] T.W. points to additional legislative history of discrimination from the education and educational testing realms. However, even if that evidence were sufficient to establish a history of unconstitutional state conduct in education or educational testing, it is not relevant to our inquiry here, which is into whether Title II was passed in response to a history of unconstitutional conduct in *professional licensing*.

individuals "f[ell] far short of even suggesting the pattern of unconstitutional behavior on which § 5 legislation must be based." 531 U.S. at 370, 121 S.Ct. 955.

The congressional record of unconstitutional conduct in the professional licensing context is even sparser than the record was in *Garrett*, 531 U.S. at 370, 121 S.Ct. 955, and looks nothing like the record at issue in *Lane*, 541 U.S. at 528, 124 S.Ct. 1978. T.W. points to *no* congressional findings of unconstitutional state behavior in the sphere of occupational choice and professional licensing. And even reading the record in her favor—and including both the testimony of attorney Cooper and those examples from Justice Breyer's dissent in *Garrett*, 531 U.S. at 391, 121 S.Ct. 955; *see supra* note 3—she would have at most six examples, all lacking sufficient context for us to determine whether the conduct at issue was even unconstitutional.

Although determining what quantity of legislative history of unconstitutional discrimination is necessary to validate a particular exercise of Section 5 power may be a fraught exercise in some contexts, we have no such trouble here. The congressional record of unconstitutional state conduct in the occupational choice and professional licensing context is perilously slim.

c. Congruence and proportionality

Finally, we consider whether the rights and remedies created by Title II are congruent and proportional to the specific violations at issue given the nature of the constitutional right and the history of unconstitutional violations. Considering the low level of scrutiny applied to the relevant right and the

scant, nearly non-existent record of constitutional violations, we find that abrogation of state sovereign immunity would not be congruent and proportional in this case.

We begin with a brief survey of Supreme Court jurisprudence on this issue. The Supreme Court has found "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" lacking where the injury to be prevented or remedied significantly exceeds the rights granted under the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157. For example, in *City of Boerne*, the Court held that the Religious Freedom Restoration Act was not a congruent and proportional exercise of Section 5 power because the law protected free exercise of religion *beyond* the protections granted by the Free Exercise Clause of the Constitution as interpreted by the Supreme Court. *Id.* at 535–36, 117 S.Ct. 2157. Congress, the Court wrote, "does not enforce a constitutional right by changing what the right is." *Id.* at 519, 117 S.Ct. 2157; *see also United States v. Morrison*, 529 U.S. 598, 626, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) ("Section 13981 [of the Violence Against Women Act] is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe" and "is, therefore, unlike any of the § 5 remedies that we have previously upheld."). In other words, the Court has found congruence and proportionality lacking where a statute's protections so significantly exceed the bounds of the Fourteenth Amendment right at issue that they effectively expand that right as it is defined in the Constitution.

Even where a law conceivably prevents or remedies an actual violation of the Fourteenth Amendment, the Supreme Court has found congressional action to exceed the scope of Section 5 power where Congress did not exercise that power on a sufficient record of constitutional violations. For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that the Patent and Plant Variety Protection Remedy Clarification Act did not validly abrogate state sovereign immunity because there was "scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions," and "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations." 527 U.S. 627, 646, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). Similar reasoning guided the Court in *Kimel v. Florida Board of Regents*, which held that the Age Discrimination in Employment Act, as applied to states, exceeded Congress' authority under Section 5 because Congress failed to identify "any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." 528 U.S. at 89, 120 S.Ct. 631; *see also Garrett*, 531 U.S. at 369–70, 121 S.Ct. 955 (abrogation of state sovereign immunity under Title I of the ADA exceeded congressional authority under Section 5 because only "half a dozen examples" of state employment discrimination on the basis of disability fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 35, 39, 132 S.Ct. 1327, 182

L.Ed.2d 296 (2012) (self-care provision of Family and Medical Leave Act of 1993 was not congruent and proportional because it "was not directed at an identified pattern of gender-based discrimination and was not congruent and proportional to any pattern of sex-based discrimination on the part of States"); *Allen v. Cooper*, 589 U.S. 248, 260–66, 140 S.Ct. 994, 206 L.Ed.2d 291 (2020) (abrogation of state sovereign immunity under the Copyright Remedy Clarification Act of 1990 was invalid because the Fourteenth Amendment intersects with copyright infringement only to the extent that a state infringed recklessly or intentionally, and, as in *Florida Prepaid*, 527 U.S. at 640, 119 S.Ct. 2199, the congressional record contained almost no evidence of unconstitutional copyright infringement by states). In sum, the Supreme Court has found congressional exercises of Section 5 power to lack congruence and proportionality where the right being protected exceeds the protections of the Fourteenth Amendment without a sufficient congressional record of unconstitutional violations that the challenged law would remedy or deter.

On the other side of the ledger, the Supreme Court has upheld exercises of Section 5 power where the remedy is closely tailored to the Fourteenth Amendment right in need of protection, and where the congressional record contains ample evidence that the right requires prophylactic protection. In *Nevada Department of Human Resources v. Hibbs*, the Court upheld the abrogation of sovereign immunity within the Family and Medical Leave Act for violations of the family-care provision of that act. 538 U.S. 721, 725, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). The Court reached this holding by observing that "statutory

classifications that distinguish between males and females are subject to heightened scrutiny," *id.* at 728, 123 S.Ct. 1972 (citation omitted), and that the FMLA's "legislative record reflects . . . [that] stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread," *id.* at 730, 123 S.Ct. 1972 (citations omitted). Similar reasoning appears in *Lane*. In that case, the right at issue was access to the courts, a right that calls "for a standard of judicial review at least as searching . . . [as] the standard that applies to sex-based classifications." *Lane*, 541 U.S. at 529, 124 S.Ct. 1978. Further, "the record of constitutional violations in [*Lane*]—including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services—far exceeds the record in *Hibbs*." *Id.* In both *Lane* and *Hibbs*, then, the Supreme Court found exercises of Section 5 power to be valid—including abrogations of sovereign immunity—where the right (or class) being protected was subject to heightened judicial scrutiny, and where the record of unconstitutional state action was extensive.

Applying these principles to the present case, we conclude that Title II's abrogation of state sovereign immunity is not congruent and proportional as applied to professional licensing of disabled individuals. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Lane*, 541 U.S. at 524, 124 S.Ct. 1978 (internal quotation marks and alteration omitted), and so in enacting "prophylactic remedial

legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent," *id*. at 523, 124 S.Ct. 1978. In fact, several courts and commentators have questioned whether, following *Lane*, a Title II claim for money damages can be maintained against a state absent a fundamental right (subject to heightened scrutiny) being at issue. *See Guttman*, 669 F.3d at 1122–23 (discussing courts and academics addressing this question) (citing *Buchanan v. Maine*, 377 F. Supp. 2d 276, 283 (D. Me. 2005); *Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 793 (9th Cir. 2004) (O'Scannlain, *J.*, concurring); *Press v. State Univ. of N.Y. at Stony Brook*, 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005); *Roe v. Johnson*, 334 F. Supp. 2d 415, 421 n.9 (S.D.N.Y. 2004); *Johnson v. S. Conn. State Univ.*, 2004 WL 2377225, at *4 (D. Conn. Sept. 30, 2004); Erwin Chemerinsky, Federal Jurisdiction 477 (5th ed. 2007)).

Here, the right at issue is that of occupational choice, applied to the area of professional licensing. Professional licensing rules are subject only to rational basis review. *Gabbert*, 526 U.S. at 291–92, 119 S.Ct. 1292 (observing that there is no right to practice one's profession free of restraints, and that there is no Due Process Clause violation absent a "complete prohibition of the right to engage in a calling"). This case is therefore distinguishable from *Lane*, which addressed the "class of cases implicating the fundamental right of access to the courts," 541 U.S. at 533–34, 124 S.Ct. 1978, a right that warrants

highly "searching" judicial review, *id.* at 529, 124 S.Ct. 1978.[6]

Further, the congressional record of unconstitutional conduct by states in professional licensing is slim to non-existent. T.W., as noted above, points to a single individual's testimony before Congress, which identified "scores of horror stories" regarding disabled individuals taking the bar exam. J. App'x 64 n.3 (quoting *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 101st Cong. 162 (1989) (statement of Laura D. Cooper, Attorney, Pettit & Martin)). In addition, we take notice of the isolated examples of licensing discrimination flagged in Justice Breyer's *Garrett* dissent. *See* 531 U.S. at 391, 121 S.Ct. 955, App. C (Breyer, *J.*, dissenting). But this record is insufficient for two reasons. First, these isolated examples do not establish a record of *unconstitutional* state behavior. These examples lack sufficient context to understand whether each describes actual unconstitutional state conduct, or whether each references events that, while perhaps unjust, were

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[6] T.W. again contends that the right at issue here is that of education and educational testing. For the reasons stated above, *see supra* Section II.B.3.a, we are unpersuaded. We do note, however, that access to education does appear to be a unique class of cases where courts have found exercises of prophylactic Section 5 power to be valid, notwithstanding that education has not been identified as a fundamental right. *See Toledo,* 454 F.3d at 39–40; *Bowers*, 475 F.3d at 555–56*; Constantine,* 411 F.3d at 490; *Ass'n for Disabled Ams.*, 405 F.3d at 959. These cases have relied on the distinct importance of education in society and the unique and extensive history of discriminatory conduct in schools. *See, e.g., Toledo*, 454 F.3d at 36–39.

constitutional. The latter outcome is particularly likely where, as here, restrictions related to professional licensing are subject only to rational basis review, as are classifications on the basis of disability. *See Gabbert*, 526 U.S. at 292, 119 S.Ct. 1292 (the right to choose one's field of private employment is a right "subject to reasonable government regulation"); *Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249 (regulations affecting the disabled violate the Constitution only if not "rationally related to a legitimate governmental purpose"); *see also Lane*, 541 U.S. at 529, 124 S.Ct. 1978 (in *Hibbs*, "it was easier for Congress to show a pattern of state constitutional violations than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review." (internal quotation marks omitted)).

Second, even if these examples demonstrated unconstitutional conduct, the record would still be too sparse to support the abrogation. In *Garrett*, the Court held abrogation was invalid as to Title I of the ADA because "[e]ven if it were to be determined that the half a dozen relevant examples from the record showed unconstitutional action on the part of States, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett*, 531 U.S. at 357, 121 S.Ct. 955. All the more so here, where the legislative record does not contain even six examples of unconstitutional conduct in the professional licensing context.

Finally, "the Title II remedy, as applied to professional licensing, 'far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses [to discrimination] that

would be reasonable[.]'" *Guttman*, 669 F.3d at 1124 (quoting *Garrett*, 531 U.S. at 372, 121 S.Ct. 955); *see also id.* ("The abrogation of sovereign immunity here would require states to justify a significant range of rational, everyday licensing decisions that would otherwise be constitutional."); *Garcia*, 280 F.3d at 109–10 ("[W]hereas under the Fourteenth Amendment the absence of an accommodation would be presumptively permissible with the burden of challenging it squarely on the plaintiff, Title II shifts the burden of proof onto the state to defend the absence. Indeed, this burden shift is consistent with the elevated scrutiny generally applied to suspect classifications such as race and nationality, suggesting that Title II is working a substantive elevation in the status of the disabled in equal protection jurisprudence.").

In sum, Title II of the ADA does not validly abrogate sovereign immunity in the context of professional licensing. This case exhibits three factors that the Supreme Court has found fatal to exercises of Section 5 power: the right at issue gets no heightened scrutiny, the congressional record of unconstitutional conduct is slim, and the statute cuts far wider than the Fourteenth Amendment. We therefore conclude that sovereign immunity bars T.W.'s claim for damages under Title II.

C. Relief under *Ex Parte Young*

Apart from her claim for damages, T.W. contends that she can pursue declaratory and injunctive relief under Title II against Board officials in their official capacities pursuant to the doctrine first articulated in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

"Absent proper Congressional abrogation or State waiver, the Eleventh Amendment bars a federal court from hearing suits at law or in equity against a State brought by citizens of that State or another." *Vega v. Semple*, 963 F.3d 259, 281 (2d Cir. 2020). However, "[t]here is a well-known exception to this rule—established by the Supreme Court in *Ex parte Young* and its progeny—by which suits for prospective relief against an individual acting in his official capacity may be brought to end an ongoing violation of a federal law. In determining whether a litigant's claim falls under the *Ex parte Young* exception, we ask two questions: whether the complaint (1) alleges an ongoing violation of federal law; and (2) seeks relief properly characterized as prospective." *Id.* (footnotes omitted).

For the reasons that follow, we conclude that that T.W.'s claims for declaratory and injunctive relief cannot go forward. The declaratory relief sought by T.W. is retrospective, rather than prospective, in nature, and the injunctive relief she seeks is not sufficiently tied to an allegation of ongoing violations of federal law.

1. Declaratory relief

T.W. seeks "declaratory relief, finding that Defendants' actions violated Title II . . . of the Americans with Disabilities Act[.]" J. App'x 34. The district court found this relief "plainly foreclosed by the *Ex parte Young* doctrine [because a] declaration that a violation of federal law occurred in the past is entirely retroactive. It does not mandate compliance with federal law *in the future* as required by *Ex parte Young*." *T.W.*, 2022 WL 2819092, at *8.

"[T]he Supreme Court has declined to extend the reasoning of *Ex [p]arte Young* to claims for retrospective relief." *Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000). "The line between prospective and retrospective relief is drawn because remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law, whereas compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Id*. (cleaned up).

We agree with the district court's conclusion that the declaratory relief sought is wholly retrospective, and therefore barred. T.W. seeks only a declaration—in the past tense—that the Board "*violated* Title II." J. App'x 34 (emphasis added). This relief is facially retrospective, as she seeks only a declaration regarding the Board's previous actions, not its future conduct.

This case is distinguishable from those in which declaratory relief for past violations have been allowed. For example, in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 640, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), the plaintiff sought a declaration that a state regulation violated the 1996 Telecommunications Act, and an injunction against future enforcement of that state order. The Court held that the declaratory relief sought did not run afoul of *Ex parte Young* because even though the declaration was "of the past, as well as the future," "[i]nsofar as the exposure of the State is concerned, the prayer for declaratory relief adds nothing to the prayer for injunction." 535 U.S. at 646, 122 S.Ct. 1753 (emphasis omitted); *see also id.* ("[T]he past financial liability of private parties may be

affected. But no past liability of the State, or of any of its commissioners, is at issue."). In contrast, the declaratory relief sought by T.W. does not overlap with her injunctive relief, because the injunctive relief she seeks relates to the Board's continued maintenance of records of her failures on the bar exam. *See* J. App'x 34 ("[E]njoin Defendants from maintaining and reporting records of Plaintiff's examination results received under discriminatory conditions and require Defendants to take affirmative steps to alleviate the ongoing repercussions of the discriminatory test administration that continue to hamper Plaintiff's search for employment[.]").

Furthermore, the Supreme Court has relied, at least in part, on considerations of whether declaratory relief will lead to monetary exposure for a state in determining whether relief is prospective or retrospective. In *Green v. Mansour*, the Supreme Court found declaratory relief retrospective in part on concerns that, if issued against the government, the declaratory judgment would have a *res judicata* effect as to liability for damages in a future state court action, thus serving as an end run around the Eleventh Amendment. 474 U.S. 64, 73, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) ("We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed."); *see also Ward*, 207 F.3d at 119 ("At the risk of being obvious, a party armed with such relief from the federal court and the doctrine of *res judicata* would have little left to do but

appear in state court, and employ the state court as a form of accounting proceeding for a retrospective (federal) award of damages against the state." (internal quotation marks omitted)). On the other side of that issue, the Supreme Court permitted the declaratory relief in *Verizon Maryland* in part because "no past liability of the State, or of any of its commissioners, is at issue. It does not impose upon the State 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.' " 535 U.S. at 646, 122 S.Ct. 1753 (emphasis omitted) (quoting *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)).

T.W.'s requested declaratory relief looks more like that in *Green* and *Ward* than that in *Verizon Maryland*. Although we decline to speculate as to when or how T.W. or another litigant could use the declaratory judgment here, we nonetheless note that a potential use, and in fact, perhaps the only potential use, would be to seek damages against the Board in state court. But "declaratory judgment is not available when the result would be a partial 'end run' around the Eleventh Amendment's bar on retrospective awards of monetary relief." *Ward*, 207 F.3d at 120 (cleaned up).

In sum, the declaratory relief T.W. seeks is retrospective in nature, and is therefore barred by the Eleventh Amendment.

2. Injunctive relief

Finally, T.W. seeks an order to "enjoin Defendants from maintaining and reporting records of Plaintiff's examination results received under discriminatory conditions and [to] require Defendants to take affirmative steps to alleviate the ongoing

repercussions of the discriminatory test administration that continue to hammer Plaintiff's search for employment." J. App'x 34. The district court held that T.W. lacked standing to pursue this relief, because it would not redress any of her alleged injuries. Specifically, it held that expungement of her failures would not redress her claimed injuries—including, for example, "that she did not have the opportunity to gain the experience they seek from a 2013 graduate due to the disruptions caused by her bar examination failure," J. App'x 28, ¶ 62—because "expungement will neither alter T.W.'s level of experience nor undo the fact that she did not successfully pass the bar until 2015," *T.W.*, 2022 WL 2819092, at *8. "Moreover," the district court wrote, "the injunctive relief T.W. requests would suppress a record that, according to the Board, it is prohibited from disclosing to employers under Section 90(10) of the Judiciary Law." *Id.* We agree with the district court's dismissal of T.W.'s claim for injunctive relief, but reach that conclusion on different grounds. *See Jusino*, 54 F.4th at 100 ("We may affirm on any ground with support in the record, including grounds upon which the district court did not rely." (internal citations and quotation marks omitted)).

"*Ex parte Young* gives life to the Supremacy Clause[ ] [because] remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68, 106 S.Ct. 423. Accordingly, *Ex parte Young* permits suits against state officials that "seek[ ] only prospective injunctive relief *in order to* 'end a continuing violation of federal law.' " *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)

(emphasis added) (quoting *Green*, 474 U.S. at 68, 106 S.Ct. 423); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 287 (2d Cir. 2003) ("The Eleventh Amendment, however, does not preclude suits against state officers in their official capacity for prospective injunctive relief *to prevent* a continuing violation of federal law." (emphasis added) (citing *Ex parte Young*, 209 U.S. at 155–56, 28 S.Ct. 441)). In other words, the doctrine of *Ex parte Young* permits federal courts to grant injunctions against state officials, but it only permits injunctions to prevent future violations of federal law.

Turning to T.W.'s complaint, we conclude that the injunctive relief she seeks is unavailable under *Ex parte Young* because it would not prevent an alleged continuing violation of federal law. To be sure, T.W.'s complaint alleges ongoing violations of federal law by the Board and, by extension, by the individual defendants named in their official capacities. For example, she alleges that the Board's "acts, policies, and practices discriminate against individuals with disabilities, including those who have mental and/or cognitive disabilities and require additional time, stop-clock breaks, and/or separate, quiet testing areas." J. App'x 31, ¶ 86. And she further alleges that the Board has "failed to make reasonable modifications to its policies and practices to ensure that Plaintiff and others with disabilities do not face [ ] discrimination because of their disabilities." *Id.* 31, ¶ 89. In the context of her Title II claim, these allegations amount to allegations that the Board continues to violate federal law.

But what is missing from T.W.'s complaint—and why her claim for injunctive relief cannot go forward—is the necessary nexus between the

injunctive relief she seeks and the continuing violations she alleges. T.W.'s requested injunctive relief does not seek to prevent the Board's alleged "fail first policies and practices" that she alleges "discriminate against individuals with disabilities." *Id.* 31, ¶¶ 86, 88. Rather, she seeks an injunction against the Board "maintaining and reporting records of Plaintiff's examination results" and a requirement that the Board "take affirmative steps to alleviate the ongoing repercussions of the discriminatory test administration that continue to hamper Plaintiff's search for employment." *Id.* 34. This relief does not align with the alleged continuing violations of federal law, because even if a court granted T.W. the full suite of injunctive relief she seeks, the alleged federal law violations could continue.

T.W.'s complaint, we note, does not allege that the Board's maintenance of records of her failures violates federal law. "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Therefore, 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. The injunction she seeks is accordingly unavailable.

T.W. contends that expungement is available under *Ex parte Young* for either of two reasons. First, she argues that she "allege[s] ongoing harm as a result of [the Board's] maintenance of bar examination records and refusal to expunge." Reply Br. 25. This argument, however, is unresponsive to

the issue here. Even if she alleges ongoing *harm*, injunctive relief under *Ex parte Young* must seek to stop ongoing "*violation[s]* of federal law." *Green*, 474 U.S. at 68, 106 S.Ct. 423 (emphasis added).

Second, T.W. points to the Ninth Circuit's decision in *Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2007), which she contends "noted that *Ex parte Young* was available to expunge negative information in a college student's file that might jeopardize that student's future employment." Reply Br. 26. That case, to be sure, did hold that expungement of negative information from university records may be available under *Ex parte Young*, because "they serve the purpose of preventing present and future harm to [the plaintiff]." *Flint*, 488 F.3d at 825. We find this case distinguishable from the issue here. The quoted language from *Flint* came in the course of the court's determination that the injunctive relief sought by the plaintiff, including expungement of records, "cannot be characterized solely as retroactive." *Id.* And we do not disagree with that conclusion as it applies here—T.W.'s requested expungement relief may well be prospective in nature. But even 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. We do not read *Flint*, 488 F.3d at 825, as having addressed this question and, in any event, we would not be bound by its holding even if it had.

III. Conclusion

In sum, we hold as follows:

1. The New York State Board of Law Examiners is an arm of the state of New York for Eleventh

Amendment purposes in this case because the law of the case doctrine settles that issue for this litigation.

2. Title II of the Americans with Disabilities Act does not validly abrogate sovereign immunity as applied to T.W.'s claim, and in the context of occupational choice and professional licensing more broadly.
3. The declaratory relief sought by T.W. is unavailable under the doctrine of *Ex parte Young* because it is purely retrospective, rather than prospective, in nature.
4. The injunctive relief sought by T.W. is unavailable under the doctrine of *Ex parte Young* because it does not seek to remedy an alleged ongoing violation of federal law.

We therefore AFFIRM the district court's dismissal of T.W.'s Title II claim for compensatory, declaratory, and injunctive relief.

[2022 WL 2819092]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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T.W.,

Plaintiff,

against

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

Defendants.

MEMORANDUM & ORDER

16-cv-3029 (RJD) (MMH)

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DEARIE, District Judge

Plaintiff T.W. alleges that the New York State Board of Law Examiners ("the Board") discriminated against her in violation of Title II of the Americans with Disabilities Act ("ADA") when it denied her requests for certain accommodations on the New York State bar examination in 2013 and 2014. The Board moves to dismiss T.W.'s Complaint, arguing that the Board is immune from the suit under the Eleventh Amendment. We conclude (i) that the Board is entitled to immunity as an "arm of the

state"; (ii) that Congress' attempt to abrogate state immunity from Title II suits for money damages was not constitutionally valid as applied to T.W.'s claim; and (iii) that T.W. cannot maintain her requests for injunctive and declaratory relief under Ex parte Young, 209 U.S. 123 (1908). Defendants' Motion to Dismiss is granted in its entirety.

PROCEDURAL BACKGROUND

T.W. originally brought claims against the Board and its members for disability discrimination under Titles II and III of the ADA, Section 504 of the Rehabilitation Act, and the New York City Human Rights Law. See Compl., ECF No. 1, ¶ 3. She also sought injunctive and declaratory relief against the individual members of the Board. Id. In 2017 we dismissed T.W.'s Title III and New York City Human Rights Law claims, as well as her damages claims against the individual members of the Board. See ECF No. 32 at 1. Her declaratory and injunctive relief claims against the individual members of the Board remained. See id. at 7 n.1. The Second Circuit subsequently dismissed T.W.'s Rehabilitation Act claim and remanded for proceedings on T.W.'s Title II claims, on which we had deferred ruling. See T.W. v. New York State Bd. of L. Exam'rs, 996 F.3d 87 (2d Cir. 2021). The parties then briefed Defendants' Motion to Dismiss the Title II claim, which the Court now addresses.

DISCUSSION

I. Arm of the State

The Eleventh Amendment bars private suits against states and state agencies unless Congress validly abrogates that immunity or the state waives

it. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Kelly v. N.Y. State Unified Ct. Sys., No. 21-1633, 2022 WL 1210665, at *2 (2d Cir. Apr. 25, 2022). Although the Board is not a state agency, it nevertheless qualifies for Eleventh Amendment immunity if it can demonstrate that it is an "arm of the state" rather than an entity independent of the state like a political subdivision or other municipal corporation. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). The Second Circuit established a six-part "arm of the state" test in Mancuso v. New York State Thruway Authority, 86 F.3d 289 (1994), which asks:

(1) how the entity is referred to in the documents that created it;
(2) how the governing members of the entity are appointed;
(3) how the entity is funded;
(4) whether the entity's function is traditionally one of local or state government;
(5) whether the state has a veto power over the entity's actions; and
(6) whether the entity's obligations are binding upon the state.

Id. at 293. If the six factors point in different directions, courts look to two tiebreaking factors: whether allowing the entity to be sued in federal court would "expose the state treasury to risk" or "threaten the integrity of the [s]tate." Id. Between the two tiebreakers, the impact on the state treasury is the factor entitled to dispositive weight. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48–49 (1994). The Board bears the burden of demonstrating that it qualifies as an arm of the state. Woods v. Rondout

Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 237 (2d Cir. 2006).

While we have located no previous Mancuso analysis with respect to the Board, we note that a plethora of legal authorities, including this Court, have suggested or assumed that the Board's relationship to New York's judicial branch (also known as the Unified Court System or "UCS")[1] renders the Board an arm of the state or otherwise immune from suit. In Bartlett v. N.Y. State Board of Law Examiners, 970 F. Supp. 1094 (S.D.N.Y. 1997) then-Judge Sotomayor recognized, "[t]here is no dispute that the Board is a creature of the State." Id. at 1118. In its earlier decision in this case, the Second Circuit characterized the Board as an "arm of the State of New York" which "shares in [New York's sovereign] immunity," without further analysis. T.W., 996 F.3d at 92 (cleaned up). And at an earlier oral argument in this case, I observed that the "Board of Law Examiners is a creature of the Court of Appeals via the Judiciary Act." March 20, 2019 Hearing Transcript at 8:23-4. While these statements strongly suggest that the Board is an arm of the state, for the avoidance of doubt, we analyze the Mancuso factors.

The first Mancuso factor, which asks how the Board is referred to in the documents that created it, weighs in favor of immunity. While nothing in the

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[1] The UCS itself is an arm of the state entitled to Eleventh Amendment immunity. Sutter v. Dibello, No. 18-cv-817, 2019 WL 4195303, at *6 (E.D.N.Y. Aug. 12, 2019) ("[T]here is no dispute that UCS is an administrative arm of the State of New York."), report and recommendation adopted, 2019 WL 4193431 (E.D.N.Y. Sept. 4, 2019).

Judiciary Law, which established the Board, explicitly refers to the Board either as an arm of the state or an independent entity, the organization of the Board as contemplated by the Judiciary Law suggests that it was envisioned as a subunit of the Court of Appeals, itself entitled to immunity as a state agency. See Richards v. State of N.Y., 597 F. Supp. 692, 693 (E.D.N.Y. 1984). The Judiciary Law authorizes the Court of Appeals to "appoint five members of the bar to constitute the state board of law examiners," N.Y. Jud. L. § 56, and to "prescribe rules providing for a uniform system of examination of candidates to practice as attorneys and counsellors, which shall govern the state board of law examiners in the performance of its duties," N.Y. Jud. L. § 53; see also Matter of Brennan, 243 N.Y.S. 705, 711–12 (N.Y. App. Div. 1930) (noting same). As we concluded in 2019 based on our review of the Judiciary Law and the structure of the Board, the "legislature clearly intended that the Board would function under the supervision of the Chief Judge and the Court of Appeals. . . . Such strong administrative ties usually indicate that an entity is not independent [of a department or agency.]" ECF No. 86 at 10.

Against a similar factual backdrop, the District of Rhode Island concluded that the Rhode Island Board of Law Examiners was an arm of the state by virtue of its connection to the state supreme court. Sinapi v. R.I. Bd. of Bar Exam'rs, No. 15-cv-311, 2016 WL 1562909 (D.R.I. Apr. 15, 2016), aff'd, 910 F.3d 544 (1st Cir. 2018). The court found that the Board's immunity followed from the fact that "the Rhode Island Supreme Court is an arm of the State of Rhode Island and the Board is an administrative arm of the Rhode Island Supreme Court." Id. at *2. The same is

true under New York law. The legislature established the Board to serve as a delegated operation of the Court of Appeals, not as an independent entity. We agree with the Board that its legislative mandate and organizational structure indicate that it is an arm of the state.

The second Mancuso factor, the appointment of the Board's members, weighs in favor of immunity because members are appointed by the Court of Appeals, rather than by a source independent of the state. See N.Y. Jud. L. § 56; see also Woods v. Rondout Valley Cent. Sch. Dist. Bd of Educ., 466 F.3d 232, 244 (2d Cir. 2006) (noting that appointment by state officials weighs in favor of immunity).

The third Mancuso factor, funding, also weighs in favor of immunity. T.W. contends that the Board's use of funds from attorney registration fees renders it a self-sufficient entity. T.W. Br. at 20-21. But this assertion belies the nature of the Board's funding. The Board does not collect or control attorney registration fees. These fees are housed within the state treasury as part of the Attorney Licensing Fund ("ALF"), which supports various UCS operations including the Board. T.W. Br. at 20; McAlary Dep., ECF No. 83-9, at 67:22-68:7 ("[A]ll of the [ALF] funds actually lie . . . with the state treasury."). The legislature, not the Board, sets the attorney registration fees that support the ALF and designates the programs supported by the ALF. N.Y. Jud. L. § 468-a(4).[2] The Board, therefore, does not resemble

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[2] See also Sponsor Memorandum to SB6500, available at: https://www.nysenate.gov/legislation/bills/2021/s6500 (noting that the legislature has raised the bar examination fee twice and has used the increased revenue for programs of its choice).

self-funded entities like the Port Authority in Hess or the Thruway Authority in Mancuso, which fund themselves by issuing bonds, tolls, or obtaining private financing. See Hess, 513 U.S. at 36 ("the Port Authority was conceived as a financially independent entity, with funds primarily derived from private investors. Tolls, fees, and investment income account for the Authority's secure financial position") (cleaned up). Unlike those entities, the Board is incapable of "paying its own way." Id. at 49.

The Board is also reliant on the three branches of state government for budgetary appropriations. The Board submits budget requests to the Court of Appeals for inclusion in the overall UCS budget, which is subject to UCS revision. T.W. 2018 Br., ECF No. 83, at 10-11. The UCS budget is then presented to the legislature and governor for approval. See McAlary Dep. at 40:20-42:10; Witting Dep., ECF No. 83-1, at 40:5-43:10; 60:21-61:9. As we concluded in 2019, "[u]nder state law, the Board is both administered and funded as part of New York's judicial branch." ECF No. 86 at 12. These facts do not support T.W.'s depiction of the Board as an independent, self-sufficient entity.[3] Indeed, T.W. noted in an earlier filing that the Board "is not self-funding, [the Board]'s funding is completely

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[3] T.W. also notes that the Board does not rely on taxpayer dollars. T.W. Br. at 20-21. But the fact that the Board does not currently use taxpayer dollars does not preclude it from doing so in the future. A state senate bill forecasting an ALF insolvency, for example, states: "Should the [ALF] actually become insolvent, and unable fully to cover [admission and licensing] costs, the Judiciary will have no option but to use General Fund moneys i.e., state taxpayer dollars - to make up the difference." See Sponsor Memorandum to SB6500.

dependent on UCS's budget allocations to [the Board]." T.W. 2018 Br. at 9.

The fourth Mancuso factor, whether the Board's function is traditionally one of state government, weighs in favor of immunity because the Board is tasked with statewide regulation of attorney admission. We disagree with T.W.'s contention that the Board "does not perform a central governmental function because it is not a licensing authority" and is essentially a private entity that simply administers a test. T.W. Br. at 21. Even as one of several steps in the attorney licensing process, the administration of the bar examination plays a critical gatekeeping role in the regulation of attorneys within the state. As the Court of Appeals has noted, "no application [for admission to practice law in New York] may be entertained . . . unless the Board of Law Examiners . . . has certified that the applicant has successfully completed the examination process." Matter of Anonymous, 78 N.Y.2d 227, 230 (1991).

The fifth factor, state veto power over the Board, is the only Mancuso factor weighing against immunity. The Board does not dispute that the state lacks veto power over it. In fact, the Board notes that while the Court of Appeals sets overall objectives for the Board, it "does not review the Board's reasonable accommodation decisions or individual grading decisions." Def. Rep., ECF No. 111, at 11. And as we previously concluded, "[t]he Board ultimately manages its operations without any daily control or guidance from the Court of Appeals." ECF No. 86 at 9.

Finally, the sixth factor, the state's responsibility for a judgment against the Board, as well as the dispositive, tie-breaking consideration of impact on

the state treasury, both weigh in favor of immunity. The parties agree that the Board would satisfy a monetary judgment against it using ALF funds. See T.W. Br. at 24-26; Def. Rep. at 17. As recited above, the ALF is a state fund housed within the state treasury; the legislature sets registration fees and designates the allocation of ALF proceeds. It therefore stands to reason, as the Board submits, that any judgment against the Board will impact the state treasury.

Moreover, unlike Mancuso and other cases finding against immunity, no statutory provision insulates the state from the Board's debts. Cf. 86 F.3d at 296 (noting New York law "expressly provides that the state shall not be liable for the obligations of public corporations, such as the Thruway Authority"); see also Aguilar v. N.Y. Convention Ctr. Operating Corp., 174 F. Supp. 2d 49, 53 (S.D.N.Y. 2001) (noting that statute governing defendant entity, which "expressly provides that '[t]he obligations of the corporation shall not be debts of the state,'" weighed heavily against immunity). This point represents a critical factor distinguishing the Board from the State Bar of Oregon, which the Ninth Circuit recently concluded was not an arm of the state: a state statute exempts Oregon from any indebtedness incurred by its state bar. See Crowe v. Oregon State Bar, 989 F.3d 714, 731-33 (9th Cir. 2021). No such provision of New York law exists with respect to the Board.[4] Moreover,

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[4] T.W. equates Section 41 of the New York State Finance Law to these provisions. That law, titled, "Indebtedness not to be contracted without appropriation," provides in relevant part that no state board shall "contract indebtedness on behalf of the state, nor assume to bind the state, in an amount in excess of money appropriated or otherwise lawfully available." N.Y. State

unlike the Board here, the Oregon State Bar received no appropriations from the legislature and was entirely self-funded through membership dues. Id. at 731. This is a logical distinction given that the Board, unlike the Thruway Authority or the Oregon State Bar, is incapable of independently raising funds to satisfy a debt.

In sum, five of the six Mancuso factors, along with the tiebreaking conclusion that the state is liable for the Board's debts, counsel in favor of immunity. We conclude on this record that T.W.'s suit, "in effect, is against the state and must be so treated." State Highway Comm'n of Wyo. v. Utah Const. Co., 278 U.S. 194, 199 (1929). The Board is entitled to immunity from T.W.'s suit under the Eleventh Amendment.

II. Abrogation of Immunity

T.W. contends that even as an arm of the state, the Board should be subject to her suit because Title II abrogates state sovereign immunity. See 42 U.S.C. § 12202 ("A State shall not be immune under the Eleventh Amendment . . . for a violation of this chapter."). Congress may lawfully abrogate immunity in certain contexts pursuant to its authority under Section 5 of the Fourteenth

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Finance L. § 41. Our reading of this statute, and the limited number of cases citing it, leads us to the conclusion that it precludes state boards from *entering into contracts* in excess of appropriated funds but would not make it unlawful for the Board to go into debt. T.W. provides no support for her assertion that this law means that the state would have no obligation to cover the Board's debts and no explanation for how, if it did, the Board would satisfy a debt against it given that the Board has no source of independent funding.

Amendment to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."

The authority of Congress to enact so-called "prophylactic" measures through Section 5, however, is not absolute. It is generally limited to remedying actual Fourteenth Amendment violations and a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000), but that is necessary to "remedy or deter actual violations," Bolmer v. Oliveira, 594 F.3d 134, 146 (2d Cir. 2010). To determine whether Congress has acted within the scope of its Section 5 authority in abrogating immunity, courts require that Congress' abrogation be supported by a history of constitutional violations and a remedy that is congruent and proportional to the documented violations. Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 43 (2012).

The Supreme Court in United States v. Georgia, 546 U.S. 151 (2006) established a three-step process to guide the assessment of whether abrogation under Title II is appropriately tailored to a constitutional violation. Id. at 159. On a claim-by-claim basis, a court must determine: (1) which aspects of the state's alleged misconduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment, if at all; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress' purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. Id. We thus analyze whether Title II's abrogation of immunity is a constitutional exercise of Section 5 authority as applied to bar examination

accommodations. While this appears to be a question of first impression within the Second Circuit, a number of district courts elsewhere have analyzed the issue and determined that Title II abrogation in this context exceeds the scope of Congress' prophylactic authority under Section 5.[5] We now join them.

1. Whether the Board's alleged conduct violated Title II

At the first Georgia step we ask whether any aspect of the Board's alleged misconduct constitutes a violation of Title II. See Mary Jo C. v. N.Y. State & Loc. Ret. Sys., 707 F.3d 144, 152 (2d Cir. 2013) (noting at the first Georgia step that "if a plaintiff cannot state a Title II claim, the court's sovereign immunity inquiry is at an end."); Goonewardena v. New York, 475 F. Supp. 2d 310, 324 (S.D.N.Y. 2007).

To state a claim for Title II discrimination, T.W. must establish (1) that she is a "qualified individual" with a disability; (2) that the Board is subject to the ADA; and (3) that she was denied the opportunity to participate in or benefit from the Board's services, programs, or activities, or was otherwise discriminated against by the Board by reason of her disability. Lipton v. N.Y.U. Coll. of Dentistry, 507 F. App'x 10, 10-11 (2d Cir. 2013). T.W. satisfies this

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[5] See Kohn v. State Bar of Calif., 497 F. Supp. 3d 526, 538 (N.D. Cal. 2020); Block v. Tex. Bd. of L. Examiners, No. 18-cv-386, 2019 WL 433734, at *3 (W.D. Tex. Feb. 1, 2019); Oliver v. Va. Bd. of Bar Exam'rs, 312 F. Supp. 3d 515 (E.D. Va. 2018); Glueck v. Nat'l Conf. of Bar Exam'rs, No. 17-cv-451, 2017 WL 5147619, at *5 (W.D. Tex. Nov. 3, 2017); Brewer v. Wis. Bd. of Bar Exam'rs, No. 04-c-0694, 2005 WL 8164755, at *6 (E.D. Wis. Oct. 24, 2005); Simmang v. Tex. Bd. of L. Exam'rs, 346 F. Supp. 2d 874, 883 (W.D. Tex. 2004).

burden. She alleges that she is a qualified individual with a disability, Compl. ¶¶ 6, 76-77, that the Board is subject to the ADA, id. ¶ 78, and the Board discriminated against her on the basis of her disability by denying her the full set of reasonable accommodations she requested on the bar examination, id. ¶¶ 87-89. While the Board may be able to demonstrate that the accommodations it provided to T.W. were reasonable, accepting T.W.'s allegations as true at the motion to dismiss stage, T.W. has plausibly alleged that the Board violated Title II by failing to reasonably accommodate her disability.

2. Whether the Board's alleged Title II violation also violated the Fourteenth Amendment

Applying rational basis review because disability is not a suspect classification, we find no basis to conclude that the Board's alleged failure to provide certain accommodations to T.W. violated the Fourteenth Amendment. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). T.W. concedes as much in her opposition brief. See T.W. Br. at 31.

3. Whether Congress' abrogation was nevertheless valid

Having found that the Board's alleged conduct violated Title II but not the Fourteenth Amendment, we move to the third step of the Georgia framework to determine whether abrogation in this case can nevertheless be considered a valid exercise of Congress' Section 5 power. This challenge requires us to perform the three-step "congruence and proportionality" inquiry based on City of Boerne v. Flores, 521 U.S. 507 (1997): *first*, we identify the

scope of the constitutional right at issue, if any; *second*, we examine whether in enacting Title II Congress identified a history and pattern of unconstitutional discrimination by the states in the relevant context; and *third*, we determine whether the rights and remedies created by Title II are congruent and proportional both to the constitutional rights it purports to enforce, if any, and the record of constitutional violations adduced by Congress, if any. Garrett, 531 U.S. at 365, 368, 372-73.

First, whether framed as the right to bar examination accommodations, or the right to practice law, T.W.'s complaint implicates no constitutional right nor any fundamental right subject to heightened judicial scrutiny. See Block, 2019 WL 433734, at *3 ("This Court's research indicates that every court that has addressed the issue has concluded that the practice of law is not a fundamental right."); Jones v. Bd. of Comm'rs of Ala. State Bar, 737 F.2d 996, 1000 (11th Cir. 1984) (finding no fundamental right to take the bar examination and noting that the Supreme Court "has never held that the right to pursue a particular occupation is a fundamental right"); Smith v. Walsh, 519 F. Supp. 853, 858 (D. Conn. 1981) ("Nor is there any fundamental right to obtain a license to practice a certain profession.").

Cognizant of this caselaw, T.W. attempts instead to analogize her case to Tennessee v. Lane, 541 U.S. 509 (2004), which held that Congress validly abrogated Title II as applied to the right of access to the courts. See T.W. Br. at 37. The other case T.W. relies on, Mosier v. Kentucky, 675 F. Supp. 2d 693 (E.D. Ky. 2009), like Lane, found that state sovereign immunity did not block the suit of a deaf attorney whose fundamental right to court access was

infringed when the state denied her a courtroom interpreter, effectively excluding her from judicial proceedings. Id. at 699. But T.W. is situated differently than the petitioners in Lane and Mosier. Those decisions held that abrogation was proper because the use of Section 5 authority was sufficiently tailored to deterring violations of the fundamental right to court access. See Lane 541 U.S. at 522-23 (Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review . . . these rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment."). As a bar examination candidate, on the other hand, T.W. was several steps removed from any judicial process and cannot conceivably argue that her failure to receive bar examination accommodations denied her due process. Cf. id. at 514 (noting Plaintiff's allegation that defendants violated her "opportunity to participate in the judicial process."). T.W.'s theory confuses the right to participate in the judicial process with the privilege of practicing law. See Turner v. Nat'l Council of State Bds. of Nursing, Inc., 561 F. App'x 661, 666 (10th Cir. 2014) (finding "no authority to suggest that the alleged right of access to a licensing examination, or to a license itself, is either akin to or a part of the fundamental right of access to the courts."). Simply put, the constitution does not enshrine a right to participate in judicial proceedings as an attorney. Nothing in Lane or Mosier instructs otherwise.[6]

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[6] T.W.'s submission also alludes to the connection between the bar examination and education, but, as she recognizes, there

Moving to the second Boerne question, the lack of a fundamental right is not necessarily fatal to T.W.'s claim if Congress, in enacting Title II, identified a history and pattern of unconstitutional discrimination in the context of professional licensing examinations like the bar examination. In Lane, for example, the Court observed that Congress passed Title II in light of a legislative finding that "many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities." 541 U.S. at 527.

By contrast, in Oliver v. Virginia Board of Bar Examiners, our sister district court found the legislative record of Title II to be devoid of any finding of a widespread pattern of unconstitutional discrimination in professional licensing generally or the bar exam specifically. 312 F. Supp. 3d 515, 530-531 (E.D. Va. 2018). We agree. In Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), the Court explained that a plaintiff must put forth "legislative findings," more than simply "unexamined, anecdotal accounts," to amount to a history of unconstitutional discrimination. Id. at 370. Yet anecdotes are all T.W. provides. She cites the prepared statement of an attorney with a disability from the ADA congressional record, but the crux of that testimony concerns difficulties in obtaining employment, not in taking the bar examination or in

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is no fundamental constitutional right to education. See T.W. Br. at 36; see also Goonewardena, 475 F. Supp. 2d at 325–26 (S.D.N.Y. 2007) ("[T]he right to public education is not a fundamental right.") (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

testing generally; reference to the bar examination appears only in a footnote. See T.W. Br. Ex. A, ECF No. 110-1, at 10 n.3. T.W. also cites a newspaper article and several examples of testimony heard by the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities describing individuals "who were not allowed to demonstrate their knowledge on professional examinations." T.W. Br. at 40. Lacking from this record is any *finding* by Congress relating to a history and pattern of discrimination against bar examination takers with disabilities. Cf. Lane, 541 U.S. at 529 (observing that "the conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself" which prohibits discrimination against individuals in "public services").

Moving to the third and final Boerne step, I must conclude that Title II does not represent a congruent and proportional response to any constitutional violation adduced by Congress. The bar examination is not open to the public; it is not a public service or program like the right to access court proceedings or voting; it does not affect an individual's "ability to live within the structure of our civil institutions" like education. Plyler v. Doe, 457 U.S. 202, 223 (1982). The Supreme Court has observed that the states' interest in regulating the legal profession within their borders is "particularly strong," and that they "bear[ ] a special responsibility for maintaining standards among members of the licensed professions." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978). Against this backdrop, and in concert with the lack of a fundamental right or history of discrimination, we cannot conclude that Title II is a valid exercise of

Congress' prophylactic authority as applied here. That power is limited to instances in which Congress enforces the substantive guarantees of the Fourteenth Amendment. Lane, 541 U.S. at 518. Unless and until a higher authority extends the scope of the services and programs entitled to heightened constitutional scrutiny to include licensing examinations like the bar examination, T.W.'s Title II claim is too far attenuated from any Fourteenth Amendment violation to warrant a congressional exercise of prophylactic legislation.

As a result of the Board's Eleventh Amendment immunity, T.W.'s Title II claim for monetary damages is dismissed for lack of subject matter jurisdiction.

III. Injunctive and Declaratory Relief

Finally, T.W. seeks declaratory and injunctive relief pursuant to Ex parte Young, 209 U.S. 123 (1908), which provides a limited exception to Eleventh Amendment immunity for petitioners seeking prospective injunctive or declaratory relief against state officials in their individual capacities. Id. at 157; see also In re Dairy Mart Convenience Stores, Inc., 411 F.3d 367, 371 (2d Cir. 2005). The declaratory relief T.W. seeks—a declaration that the individual Board member defendants violated Title II—is plainly foreclosed by the Ex parte Young doctrine. A declaration that a violation of federal law occurred in the past is entirely retroactive. It does not mandate compliance with federal law *in the future* as required by Ex parte Young. See Papasan v. Allain, 478 U.S. 265, 277–78 (1986) (Ex parte Young requires "a violation of federal law by a state official [that] is ongoing as opposed to cases in which federal law has been violated at one time" in the past). T.W. cannot

maintain her action for declaratory relief under Ex parte Young.

T.W.'s desired injunctive relief that would prevent the Board from maintaining or reporting records of her examination results[7] must also be denied. Even if we characterize such relief as prospective under Ex parte Young, the Board's expungement of T.W.'s bar examination failures would not redress any of the harm she alleges. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (constitutional minimum of standing to sue requires that injury be redressable by a favorable decision). T.W. submits that she faces continuing injury because the record of her bar examination failures has hindered her job search and career prospects. Compl. ¶ 74. But T.W. never alleges that a prospective employer has inquired about her bar examination record much less made a hiring decision based on that record. Instead, she alleges that law firms have learned "that she did not have the opportunity to gain the experience they seek from a 2013 graduate due to the disruptions caused by her bar examination failure." Compl. ¶ 62. The Court cannot rewrite history; expungement will neither alter T.W.'s level of experience nor undo the fact that she did not successfully pass the bar until 2015. Moreover, the injunctive relief T.W. requests would suppress a record that, according to the Board,

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[7] T.W. also seeks an injunction requiring the Board to take "affirmative steps to alleviate the ongoing repercussions of the discriminatory test administration that continue to hamper Plaintiff's search for employment." Compl. ¶ 108. It is not clear from the Complaint what affirmative steps T.W. proposes that Defendants take beyond the expungement of her bar examination failures, so we will consider only the expressly requested remedy.

it is prohibited from disclosing to employers under Section 90(10) of the Judiciary Law. See ECF No. 40 at 26. As a result of this lack of redressability, T.W. lacks standing to pursue her claim for injunctive relief against the individual Board members.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted in its entirety and Plaintiff's Complaint is dismissed with prejudice.

SO ORDERED.

Dated: Brooklyn, New York
July 19, 2022

/s/Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of October, two thousand twenty-four.

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.

ORDER

Docket No: 22-1661

Appellant, T.W., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

s/ Catherine O'Hagan Wolfe
[seal omitted]