CASE NO. 24-1035

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TEVA PHARMACEUTICALS USA, INC.,

Plaintiff-Appellee,

v.

PHILIP J. WEISER, in his official capacity as, Attorney General of the State of Colorado, and PATRICIA A. EVACKO, ERIN FRAZER, RYAN LEYLAND, JAYANT PATEL, AVANI SONI, KRISTEN WOLF, and ALEXANDRA ZUCCARELLI, in their official capacity as members of the Colorado State Board of Pharmacy,

Defendants-Appellants.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Daniel D. Domenico
District Court Case No. 23-cv-02584-DDD-JPO

PETITION FOR REHEARING AND REHEARING EN BANC

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Appellants ("State Officials") respectfully petition for rehearing and rehearing en banc of the panel opinion filed on September 5, 2025 (attached at Addendum A). Fed. R. App. P. 40.

STATEMENT PURSUANT TO FED. R. APP. P. 40(b)(2)

A. The panel decision conflicts with the following decisions of other United States courts of appeals: *Laborers' International Union v. Neff*, 29 F.4th 325 (6th Cir. 2022); and *EEE Mins., LLC v. North Dakota*, 81 F.4th 809 (8th Cir. 2023). *See* Section I, *infra.*

B. The panel decision conflicts with the following decisions of the United States Supreme Court: *Edelman v. Jordan*, 415 U.S. 651 (1974); and *Green v. Mansour*, 474 U.S. 64 (1985). *See* Section II, *infra.*

C. The panel decision also conflicts with the following decisions of the United States Supreme Court: *Hurley v. Kincaid*, 285 U.S 95 (1932); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987); and *Knick v. Twp. of Scott*, 588 U.S. 180 (2019). *See* Section III, *infra.*

D. This appeal is of exceptional importance because the panel decision strips the State Officials of their constitutional shield from suit in federal court and forces them to fully litigate takings claims in this forum even though the injunctive relief requested by Plaintiff is not available under well-established, century-old law, and Plaintiff instead may pursue just compensation only. *See* Section III, *infra*.

INTRODUCTION

Plaintiff Teva Pharmaceuticals USA, Inc. seeks to sue Colorado State Officials in federal court in order to permanently enjoin a state pharmaceutical program that Teva alleges constitutes a Fifth Amendment taking. There is no dispute that state officials are generally entitled to sovereign immunity from suit in federal court under the Eleventh Amendment. Nevertheless, the panel relied on the exception to sovereign immunity articulated in *Ex parte Young*—namely, that plaintiffs may seek prospective injunctive relief in federal court—to hold that the case can proceed. But in so holding, the panel ignored binding Supreme Court precedent that firmly establishes that *there is no viable claim for prospective injunctive relief for a Takings Claim*. Rather, the only remedy for a Takings Claim is "just compensation." Because this

remedy is available to plaintiffs in state court, there is no reason to erode Colorado's Eleventh Amendment sovereign immunity. The en banc Court should grant rehearing and reverse.

BACKGROUND

Eleventh Amendment sovereign immunity is an integral, structural part of our federal system that bars suits against States in federal court. *See Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993). It "concerns the subject matter jurisdiction of the district court," *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002), and places a constitutional limitation on federal judicial power, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). It serves the important function of preserving the dignity of sovereign States by preventing private parties from involuntarily dragging them into federal court. *See Alden v. Maine*, 527 U.S. 706, 748-49 (1999); *P.R. Aqueduct*, 506 U.S. at 146.

Ex parte Young, 209 U.S. 123, 159-60 (1908), provides a "narrow exception" to Eleventh Amendment immunity. *P.R. Aqueduct*, 506 U.S.

at 146; *see also Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021). The exception applies only when "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). And while "a court need conduct only a straightforward inquiry into whether the complaint" does so, *id.*, that inquiry is substantive and not merely an "empty formalism." *See Va. Off.*, 563 U.S. at 256 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997)); *see also Edelman,* 415 U.S. at 666-68 (scrutinizing request for relief characterized as "equitable," but in fact was a money judgment, and concluding that plaintiffs could not avoid the bar of sovereign immunity by manipulating the *Ex parte Young* exception); *Green*, 474 U.S. at 73 (denying request for declaratory judgment that would result in an end-run around the Eleventh Amendment).

Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a complaint must contain sufficient factual matter to make a plaintiff's claims plausible, rather than merely possible, under F.R.C.P. 8(a)(2). This plausibility standard also applies to all jurisdictional allegations in a plaintiff's complaint. *See Brownback*

v. King, 592 U.S. 209, 217 (2021) ("a plaintiff must plausibly allege all jurisdictional elements"). Since *Ex parte Young* concerns the Eleventh Amendment's "jurisdictional bar," *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 73 (1996), a plaintiff's request for injunctive relief must be plausible for it to invoke the exception to sovereign immunity and establish subject matter jurisdiction.[1]

Here, Teva seeks to enjoin enforcement of a state statute that would give qualified individuals affordable access to life-saving epinephrine auto-injectors. This request for injunctive relief is highly *implausible* because it is firmly established that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use." *Ruckelshaus*, 467 U.S. at 1016. Indeed, the Supreme Court more recently reiterated that a takings claim cannot support a request for injunctive relief. *See Knick*, 588 U.S. at 201 ("As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking."). This is because the Takings Clause "is designed not to limit the governmental interference with

[1] *Verizon* was decided before the Supreme Court established this heightened pleading standard.

property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First Eng.*, 482 U.S. at 315 (emphasis in original). Indeed, the district court declined to preliminarily enjoin the statute at issue here, in part, because "not a *single* case cited by Teva granted preliminary relief to enjoin a taking." App. Vol. II at 353 (emphasis in original).[2] Nor did Teva cite any case in briefing before this Court in which a federal court granted permanent relief to enjoin a taking. This dearth of precedent is not surprising given that the plain text of the Fifth Amendment specifies "just compensation" as the only remedy when private property is taken. U.S. Const. Amend. V.

Absent a plausible request for injunctive relief, Teva's takings claims against the State Officials may seek just compensation only and thus are barred by Eleventh Amendment immunity under this Court's precedent. *See Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212-14 (10th Cir. 2019) (Eleventh Amendment extends to Fifth Amendment takings claims for just compensation brought against state officials in

[2] "App. Vol. II" refers to Volume 2 of the Appendix filed with the Court in this appeal.

their official capacities "as long as a remedy is available in state court"); *see also DeVillier v. Texas*, 601 U.S 285, 292-93 (2024) (refusing to decide "whether a plaintiff ha[d] a cause of action arising directly under the Takings Clause" because "Texas state law provides a cause of action by which property owners may seek just compensation against the State" and remanding for further proceedings in Texas state court).

Yet the panel's order concluded that a plaintiff merely needs to "seek" prospective injunctive relief to avail itself of the *Ex parte Young* exception, while also concluding in the same sentence that "a court may not *award* injunctive relief unless no adequate remedy at law exists." Doc. 44-1, at 7 (emphasis in original). By failing to assess the plausibility of Teva's requested relief as required by *Brownback*, 592 U.S. at 217, the panel's order requires the State Officials to fully litigate the merits of Teva's takings claims through summary judgment or trial, after which the District Court's final judgment may deny Teva's request for injunctive relief because an adequate state court remedy exists. The very real possibility of such an absurd result turns the Eleventh Amendment's jurisdictional bar on its head and allows the *Ex parte Young* exception to swallow the rule in Fifth Amendment takings claims against Colorado's

officials and those of other States. While the panel's order is not precedential, future plaintiffs likely will use it as a roadmap to avoid the Eleventh Amendment in Takings Clause cases. Further, district courts in this circuit will likely cite it as indicative of this Court's position on the question.

Given the legal principles and significant consequences at stake, the State Officials respectfully request that this Court grant this petition for rehearing and petition for rehearing en banc.

ARGUMENT IN SUPPORT OF REHEARING EN BANC

I. In the *Ex parte Young* analysis, courts should not ignore whether the relief requested is actually available to the plaintiff.

Relying principally on *Verizon*, 535 U.S. at 645, the panel concluded that the *Ex parte Young* exception applied because Teva requested an injunction to enjoin future enforcement of the statute against it. *See* Doc. 44-1 at 5-6. The Court reasoned that whether relief is properly characterized as prospective is a separate question from whether injunctive relief is warranted. *See id.* at 6.

But the panel's analysis threatens to turn *Ex parte Young* into an "empty formalism." *Va. Off.*, 563 U.S. at 256. As Chief Justice Roberts

and Justice Alito have explained, "not every plaintiff who complies with these prerequisites [in *Verizon*][3] will be able to bring suit under *Ex parte Young*." *Id.* at 268 (Roberts, C.J., dissenting). In the *Ex parte Young* analysis, "formal pleading titles do not necessarily control"; rather, courts must also look to the substance of the requested relief to see if *Ex parte Young* applies. *See Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007); *see also Edelman*, 415 U.S. at 666; *Green*, 474 U.S. at 73; *Coeur d'Alene*, 521 U.S. at 270. The "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Va. Off.*, 563 U.S. at 256 (emphasis in original).

In determining whether the narrow *Ex parte Young* exception applies in the first instance, courts should consider whether the suit plausibly alleges a claim for injunctive relief. Indeed, this is the approach that the Sixth Circuit took in a takings claim in *Laborers' International Union v. Neff*, 29 F.4th 325 (6th Cir. 2022). In *Neff*, the plaintiff requested injunctive relief related to a Takings Clause claim. *See id.* at 334. Applying *Ex parte Young*, *Neff* examined whether injunctive relief was

[3] "[W]hether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645.

available, and, concluding it was not, dismissed that plaintiff's claims. *Id.* at 334-35. This approach is consistent with the Eighth Circuit's in *EEE Mins., LLC v. State of N. Dakota*, 81 F.4th 809 (8th Cir. 2023), where it, too, rejected the plaintiff's request for prospective relief in a Takings Clause case because such relief would require payment of just compensation and equitable relief was unavailable. *Id.* at 816.

The Sixth and Eighth Circuit opinions are consistent with *Verizon*, which requires a "straightforward inquiry" that includes going beyond pleading labels and evaluating whether the complaint "seeks relief properly characterized as prospective." *Verizon,* 535 U.S. at 645. The Sixth and Eighth Circuit opinions did not consider the merits of the claims at issue. Instead, they each looked at the threshold issues of whether the relief sought was available and whether it was legitimate prospective relief. This is the approach the Court should adopt here.

As discussed in the State Officials' briefs to the panel, Colorado provides an adequate means for just compensation should the Act effect a taking of Teva's epinephrine auto-injectors.[4] Specifically, Colorado

[4] To prevail on the merits of its Takings Clause claim, Teva must prove that: (1) something was taken; (2) it was property; (3) it was Teva's

provides a cause of action in state court for just compensation under the Colorado Constitution. *See* Colo. Const. Art. II, § 15; *Colo. Dep't of Health v. The Mill*, 809 P.2d 434, 440-41 (Colo. 1991); *Callopy v. Wildlife Comm'n*, 625 P.2d 994, 1005-06 (Colo. 1981); *Game and Fish Comm'n v. Farmers Irr. Co.*, 426 P.2d 562 (Colo. 1967). Since Teva can obtain just compensation in state court, this case belongs in state court. *See Knick*, 588 U.S. at 201.

Forcing the State Officials to litigate this Takings Clause case in federal court simply because Teva included a request for prospective injunctive relief that *it cannot obtain in federal court* would render the Eleventh Amendment meaningless. *See P.R. Aqueduct*, 506 U.S. at 145 (value of Eleventh Amendment immunity "is for the most part lost as litigation proceeds past motion practice"). Given the purpose and importance of the Eleventh Amendment, the question of whether the State Officials are entitled to immunity is not a question that can, or should, be deferred to the *end* of the case. Rather, the purpose and benefit

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property; (4) and it was taken for public use without just compensation. *See Knellinger v. Young*, 134 F.4th 1034, 1043 (10th Cir. 2025). These merit determinations are distinct from the question of whether injunctive relief is available.

of the Eleventh Amendment is to resolve that threshold question at the *beginning*. Accordingly, the State Officials respectfully request that the Court grant this petition for rehearing and petition for rehearing en banc.

II. The panel's decision would allow Teva and other litigants to obtain federal court findings that would impose later monetary liability on the state, which creates an impermissible end run around the Eleventh Amendment

By affirming the district court's refusal to consider the availability of the requested relief as part of its *Ex parte Young* analysis, the panel's decision could have practical effects that would run afoul of well-established Eleventh Amendment principles. It is undisputed that *Ex parte Young* cannot be used to obtain an injunction requiring payment of funds from the state treasury. *Edelman*, 415 U.S. at 666. Similarly, declaratory judgments with the practical effect of ensuring an award of damages in a subsequent state court action may not be sought in federal court since that would allow an end run around *Edelman*. *See Green*, 474 U.S. at 73.

These principles were important considerations in *Verizon*. *See* 535 U.S. at 645-46. After mentioning *Ex parte Young*'s "straightforward inquiry," the Court in *Verizon Maryland* examined whether the requested relief would impose financial liability on the state. *Id.*

Although the Court noted that the plaintiff sought a declaration about past action, the Court concluded that the declaratory relief would put "no past liability of the State . . . at issue" and would 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." *Id.* at 646 (citing *Edelman*). Accordingly, it allowed the case to proceed under *Ex parte Young*.

By contrast, in this Takings Clause case, the panel's decision could allow for precisely the sort of end run around the Eleventh Amendment that *Edelman* and *Green* prohibit. By their very nature, Takings Claims are retrospective and implicate a state's past financial liability. *See, e.g.*, *Knick*, 588 U.S. at 193 ("[I]n the event of a taking, the compensation remedy is required by the Constitution."). But during the preliminary injunction and motion to dismiss phase, the district court concluded that the Affordability Program – which had not even started – effected a taking as a matter of law. App. Vol. II at 348. Therefore, before the Affordability Program went into effect and before any epinephrine auto-injector was ever taken from Teva, the district court essentially gave Teva the declaratory relief that it requested in its complaint. As a result, even if the district court ultimately determines that injunctive relief is

not available, Teva can simply take the district court's takings decision to state court where it would serve as res judicata on that issue. Further, other similarly situated companies could raise comparable claims and assert a right to similar relief. The state court action would be limited to performing an accounting on damages because liability was already decided by the federal court. This is exactly what *Edelman* and *Green* prohibit. *See Green*, 474 U.S. at 73; *see also Cotto v. Campbell*, 126 F.4th 761, 772 (1st Cir. 2025) (declaratory judgments are barred as impermissible "end run[s]" around *Ex parte Young*'s prospective relief requirement when their only use would consist of 'be[ing] offered in state-court proceedings as res judicata on the issue of liability.'").

By looking only at whether Teva sought prospective injunctive relief without considering the *effect* of the relief sought, see *Va. Off.*, 563 U.S. at 257, the panel's opinion subjects the state to financial liability in contravention of Eleventh Amendment principles. This is why Takings Clause claims against state officials belong in state court.

III. This appeal is of exceptional importance.

Finally, this Court should grant rehearing en banc because of the issue's exceptional importance to states. The panel's decision, even

unpublished, could be used to support attempts to require states to litigate Takings Clause claims in federal court even when the declaratory and injunctive relief requested is not available as a matter of law. If such attempts are successful, states across this Circuit will be forced to fully litigate Takings Clause claims in federal court, contrary to sovereign immunity principles.

A. It is well-settled that the remedy for a Takings Clause claim is compensation.

The Takings Clause was designed not "to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First Eng.*, 482 U.S. at 315 (emphasis in original). So, the Fifth Amendment takings "provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* at 314.

The rule that injunctive relief is *not* available as a remedy where just compensation *is* available was recently reaffirmed in *Knick*. 588 U.S. at 205. As the Supreme Court explained, injunctive relief was initially available for takings claims because plaintiffs had no means of redressing a violation of the Takings Clause. *Id.* at 199-200. But starting in the

1870s, state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause, and those courts "declined to grant injunctions because property owners had an adequate remedy at law." *Id.* at 200. "Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable." *Id.* at 201. That is, "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *Id.* Colorado, of course, has a state mechanism for providing just compensation. *See* Colo. Const. Art. II, § 15

As discussed above, the Supreme Court has made clear that (i) post-taking compensation is an adequate remedy and (ii) compensation need not precede the taking nor be contemporaneous with a taking. *See Ruckelshaus*, 467 U.S. at 1016; *see also Hurley*, 285 U.S. at 99-100, 103-04 (rejecting property owner's request to enjoin flood control project because just compensation under the Tucker Act provided the plaintiff with a plain, adequate, and complete remedy at law). All that is required is "reasonable, certain and adequate provision for obtaining

compensation after a taking." *Knick*, 588 U.S. at 198 (internal quotation marks and citation omitted); *accord Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 149-50 (1974) (reversing injunction because availability of just compensation under the federal Tucker Act guaranteed an adequate remedy at law for any taking that might occur). This law has been well-settled for nearly 130 years. *See Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 658-59 (1890); *Knick*, 588 U.S. at 199-201.

But here, the panel considered the plaintiff's complaint enough to satisfy *Ex parte Young* because Teva pleaded a request for prospective injunctive relief. Doc. 44-1 at 5-6. The panel understood Defendants' argument as "*Ex parte Young* cannot apply where a remedy exists in state court." *Id.* at 5 n.2. That reading, however, does not fully encompass Defendants' argument: *Ex parte Young* cannot apply where injunctive relief is unavailable as a remedy. Doc. 22-1 at 21-27.

B. Allowing a Takings Clause claim to proceed in federal court potentially opens the door for plaintiffs to pursue relief in federal court to which they are not entitled.

Teva did not dispute below that Colorado provides a means for it to obtain just compensation in state court. *See* Doc. 22-1 at 27.[5] Since just compensation is the remedy for Takings Clause violations, takings clause cases belong in state court where they can be properly and fully adjudicated. The panel's decision, although not precedential, will likely trigger additional litigation raising comparable issues, with plaintiffs sensing an opening to avoid Eleventh Amendment immunity with analogous cases.

Despite the well-established rule that injunctive relief is not a remedy for a taking, more and more plaintiffs are bringing Fifth Amendment Takings Clause claims in federal court as a way to enjoin state policies that may have negative economic effects on their business interests. To give some examples: *Albert v. Lierman*, 152 F.4th 554, 561-

[5] Teva argued that it would have to litigate numerous suits in state court, relying on the Eighth Circuit's decision in *Pharmaceutical Research and Manufacturers of America v. Williams*, 64 F.4th 932 (8th Cir. 2023) ("*PhRMA*"). But *PhRMA*'s logic has no basis in the Takings Clause, *see, e.g.*, Doc. 22-1 at 27-33, the panel did not adopt that reasoning, and the decision is not binding on this Court.

62 (4th Cir. 2025) (holding *Ex parte Young* did not allow for a claim for injunctive relief where plaintiff sought to have Maryland pay interest that accrued before the date of any judgment by the district court on unclaimed property while the state held that property); *Hucul v. United States*, No. 5:24-CV-01750-CV (SHKX), 2025 WL 2714107, at *7 (C.D. Cal. Sept. 10, 2025) (dismissing takings claim since "a party who suffers a taking is only entitled to damages, not equitable relief.").

As a result of the panel's decision, states in this Circuit may well have to litigate these claims in federal court even though injunctions for Fifth Amendment claims are not available. Any federal decisions in those cases would then bind state courts. But this is what the Eleventh Amendment was designed to prevent. *Edelman*, 415 U.S. at 666; *Green*, 474 U.S. at 73. Under the panel's decision, a plaintiff may access federal court simply by alleging a claim for prospective injunctive relief in a Takings Clause case, even though that relief is not available to it, *supra* Sections I-III.

When state compensation remedies are available and injunctive relief is not, plaintiffs should be required to bring their Takings Clause claims against states and state officials in state court. Given the panel's

decision eroding Eleventh Amendment immunity, as well the negative consequences that are likely to result, the State Officials respectfully request that the Court grant rehearing en banc.

IV. Panel rehearing is appropriate.

In the alternative, panel rehearing is proper under Fed. R. App. P. 40(a)(2). Should this Court decline en banc rehearing, panel rehearing is proper for the reasons stated above.

Respectfully submitted, October 29, 2025.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2025, I electronically filed the foregoing **PETITION FOR REHEARING AND REHEARING EN BANC** with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system and was served via the Tenth Circuit CM/ECF on all counsel of record for the parties in this case.

s/ Sarah Bomgardner
Paralegal

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TEVA PHARMACEUTICALS USA, INC.,

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PHILIP J. WEISER, in his official capacity as, Attorney General of the State of Colorado, and PATRICIA A. EVACKO, ERIN FRAZER, RYAN LEYLAND, JAYANT PATEL, AVANI SONI, KRISTEN WOLF, and ALEXANDRA ZUCCARELLI, in their official capacity as members of the Colorado State Board of Pharmacy,

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The Honorable Daniel D. Domenico
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ATTACHMENT 1 TO PETITION FOR REHEARING AND REHEARING EN BANC

FILED
United States Court of Appeals
Tenth Circuit

September 5, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TEVA PHARMACEUTICALS USA, INC.,

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PHILIP J. WEISER, in his official capacity as Attorney General of the State of Colorado; PATRICIA A. EVACKO; ERIC FRAZER; RYAN LEYLAND; AVANI SONI; JAYANT PATEL; KRISTEN WOLF; ANDREA ZUCCARELLI, in their official capacity as members of the Colorado State Board of Pharmacy,

Defendants - Appellants.

No. 24-1035
(D.C. No. 1:23-CV-02584-DDD-JPO)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BALDOCK**, and **CARSON**, Circuit Judges.

Epinephrine auto-injectors, commonly known as "EpiPens," are lifesaving medical devices that counter anaphylaxis, a potentially fatal allergic reaction. In 2023, Colorado passed "An Act Concerning the Affordability of Epinephrine Auto-Injectors." H.B. 23-1002, 74th Gen. Assemb., Reg. Sess. (Co. 2023). The Colorado

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Legislature declared, "approximately 565,824 individuals" in Colorado suffer from "life-threatening food allergies," but "[m]any individuals are unable to afford an epinephrine auto-injector because they cannot pay the copayment amount required under their insurance plan or, if they are uninsured, the cost of an epinephrine auto-injector." *Id.* § 1(d), (f). Consequently, the Legislature enacted the Colorado epinephrine auto-injector affordability program "to provide low-cost epinephrine auto-injectors to eligible individuals." Colo. Rev. Stat. Ann. § 12-280-142(2). The program, effective January 1, 2024, allegedly takes property from pharmaceutical manufacturers without advance or contemporaneous compensation.

Plaintiff, Teva Pharmaceuticals, is a manufacturer of generic epinephrine auto-injectors and is subject to Colorado's affordability program. Ordinarily, Plaintiff sells its auto-injectors to distributors and wholesalers for around $300 per two-pack. Distributors and wholesalers then sell the auto-injectors to pharmacies at a marked-up price, and consumers purchase the auto-injectors from these pharmacies. Colorado's affordability program modifies this commercial exchange by limiting how much a pharmacy may charge qualifying uninsured individuals for a two-pack of epinephrine auto-injectors to $60. *Id.* § 12-280-142(7). This means a pharmacy receives at most $60 for a product that cost it much more than that to supply. To offset the pharmacy's loss, the program shifts the financial burden to manufacturers like Plaintiff.

Under the program's "reimburse or resupply" provision, pharmacies may recoup their losses by submitting a claim for reimbursement of a dispensed auto-injector to the manufacturer. *Id.* § 12-280-142(8)(a). The manufacturer then has a choice to either:

"(I) Reimburse the pharmacy in an amount that the pharmacy paid for the number of epinephrine auto-injectors dispensed through the program; or (II) Send the pharmacy a replacement supply of epinephrine auto-injectors in an amount equal to the number of epinephrine auto-injectors dispensed through the program." *Id.* § 12-280-142(8)(c)(I–II). In other words, the manufacturer must reimburse the pharmacy for the cost of the dispensed auto-injectors or resupply them. Any manufacturer that fails to comply with the reimburse or resupply requirement engages in a deceptive trade practice and is subject to a fine. *Id.* § 12-280-142(11)(a).

Plaintiff brought suit against the Colorado Attorney General and individual members of the Colorado State Board of Pharmacy in their official capacities. Plaintiff alleges the Colorado affordability program's reimburse or resupply requirement violates the Fifth Amendment's Takings Clause and seeks declaratory relief and an injunction barring Defendants from enforcing the program's reimburse or resupply requirement. Defendants moved to dismiss the case, arguing, among other things, that the Eleventh Amendment entitled Defendants to immunity from suit. The district court held the *Ex parte Young* exception to Eleventh Amendment immunity applied and denied their motion.[1] *See Ex parte Young*, 209 U.S. 123, 159–60 (1908). The sole question on appeal is whether *Ex parte Young* provides an exception to Defendants' Eleventh Amendment immunity here. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of*

[1] Plaintiff moved for a preliminary injunction. The district court denied Plaintiff's motion but left open the possibility of awarding Plaintiff injunctive relief later should its remedy at law prove inadequate as the case develops.

Maryland directs our inquiry into whether suit lies under *Ex parte Young*. 535 U.S. 635, 645 (2002). As Plaintiff's complaint satisfies the *Ex parte Young* inquiry set forth in *Verizon*, we exercise jurisdiction under 28 U.S.C. § 1291 via the collateral order doctrine and affirm the district court's denial of Defendants' motion to dismiss based on Eleventh Amendment immunity.

We review the denial of a motion to dismiss based on Eleventh Amendment immunity de novo. *Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019). The Eleventh Amendment states, "[t]he 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. When applicable, the Eleventh Amendment bars the exercise of federal subject matter jurisdiction. *See Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212 (10th Cir. 2019). The Eleventh Amendment "extends to arms of the state and to state officials who are sued for damages in their official capacity." *Id.* It not only bars suits brought by "Citizens of another State" but also "suits in federal court against a nonconsenting state brought by the state's own citizens." *Id.* And as relevant here, Eleventh Amendment immunity generally extends to claims arising under the Fifth Amendment's Takings Clause "as long as a remedy is available in state court."[2] *Id.* at 1213.

[2] Defendants argue that in *Williams* we held *Ex parte Young* does not extend to claims under the Fifth Amendment's Takings Clause where a just compensation remedy exists in state court. 928 F.3d at 1212–14. But they misconstrue our precedent. In *Williams*, an inmate sued the Utah Department of Corrections (UDOC) and prison

That said, "Eleventh Amendment immunity 'is not absolute.'" *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 965 (10th Cir. 2021) (quoting *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990)). In *Ex parte Young*, the Supreme Court recognized a narrow exception to Eleventh Amendment immunity "grounded in traditional equity practice." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021) (citing *Ex parte Young*, 209 U.S. at 159–60). *Ex parte Young* "allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Id.* "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645 (internal citation omitted).

Here, Plaintiff's complaint easily satisfies the *Ex parte Young* exception to Eleventh Amendment immunity under *Verizon*. Plaintiff alleges an ongoing violation of federal law—that the affordability program's reimburse or resupply requirement

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officials claiming UDOC failed to pay prisoners interest earned on their prisoner funds in violation of the Takings Clause. *Id.* at 1211. We considered whether the Eleventh Amendment extended to takings claims and concluded it did "as long as a remedy is available in state court." *Id.* at 1213. Defendants take this to mean *Ex parte Young* cannot apply where a remedy exists in state court. But that is far from what *Williams* says. We held the Eleventh Amendment extends to takings claims as long as a remedy exists in state court, not that the traditional exceptions to Eleventh Amendment immunity do not apply. *Id.* at 1213–15. Indeed, we separately considered whether *Ex parte Young* applied as an exception to the inmate's suit and determined it did not under our "straightforward inquiry." *Id.* at 1214–15. That inquiry does not consider the availability of a state forum. *See Hill v. Kemp*, 478 F.3d 1236, 1256 (10th Cir. 2007).

violates the Fifth Amendment's Takings Clause. And Plaintiff seeks relief properly characterized as prospective—injunctive relief enjoining enforcement of the reimburse or resupply requirement against Plaintiff. *Ex parte Young* requires no more. *Id.*

Defendants argue injunctive relief is never available for a takings plaintiff as long as some remedy at law exists because compensation remedies are always adequate in takings cases. But our straightforward *Ex parte Young* inquiry under *Verizon* does not extend to an analysis of whether injunctive relief is available in a particular case. "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.* at 636–37. It is instead enough that Plaintiff "*seeks* relief properly characterized as prospective." *Id.* (emphasis added). *Id.* at 645. "The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry.'" *Id.*

Nor does our analysis of whether the requested relief is "properly characterized as prospective" invite inquiry into whether injunctive relief is ultimately available. *See id.* at 645–46. Relief is not properly characterized as prospective if, in substance, Plaintiff seeks retroactive relief, such as monetary damages resulting from a past liability of the state. *See Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007). Consequently, we must evaluate whether the relief Plaintiff seeks is prospective "not just in how it is captioned but also in its substance." *Id.* But whether relief is "properly characterized as prospective" is a separate question from whether injunctive relief is warranted in a given case, and here, no question exists that Plaintiff *seeks* injunctive

relief to prevent enforcement of an allegedly unconstitutional act. While a court may not *award* injunctive relief unless no adequate remedy at law exists, *Ex parte Young* allows Plaintiff to seek it.[3]

We AFFIRM the district court's denial of Defendants' motion to dismiss based on Eleventh Amendment immunity and REMAND this case to the district court for further proceedings consistent with this order and judgment.

Entered for the Court

Bobby R. Baldock
Circuit Judge

[3] Defendants argue the Sixth and Eighth Circuits consider the adequacy of legal remedies in their *Ex parte Young* analysis, pointing to *Laborers' Int'l Union of N. Am., Loc. 860 v. Neff,* 29 F. 4th 325 (6th Cir. 2022), *Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910 (8th Cir. 2001), and *EEE Mins., LLC v. State of N. Dakota*, 81 F.4th 809 (8th Cir. 2023). We are not convinced the Sixth Circuit conflated the adequacy of a legal remedy with its *Ex parte Young* analysis in *Laborers' Int'l*. 29 F.4th at 334–35. Rather, the court first explained *Ex parte Young* would allow the suit for injunctive relief to proceed before next addressing why injunctive relief was not available in that particular case. *Id.* To the extent the Eighth Circuit considers the availability of an adequate remedy at law within its *Ex parte Young* analysis, we depart from it in adherence to the Supreme Court's directed "straightforward inquiry." *Verizon*, 535 U.S. at 645. But we note the Eighth Circuit applied *Ex parte Young* after holding a state remedy at law inadequate in a takings case similar to this one. *See Pharm. Rsch. & Manufacturers of Am. v. Williams*, 64 F.4th 932, 950 (8th Cir. 2023).