No. 14-

IN THE

Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA DEPARTMENT OF REVENUE, and MARSHALL STRANBURG, as Interim Executive Director and Deputy Executive Director,
Respondents.

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

PETITION FOR CERTIORARI

GLEN A. STANKEE
AKERMAN LLP
Las Olas Centre II
350 East Las Olas Boulevard
Suite 1600
Fort Lauderdale, FL 33301

KATHERINE E. GIDDINGS
KRISTEN M. FIORE
AKERMAN LLP
106 East College Avenue
Suite 1200
Tallahassee, FL 32301

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
COLLEEN E. ROH
EUGENE A. SOKOLOFF*
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5528
neal.katyal@hoganlovells.com

*Admitted in New York only; supervised by firm attorneys.

Counsel for Petitioner

QUESTION PRESENTED

This Court established in *Ex parte Young*, 209 U.S. 123 (1908), that a plaintiff may sue state officials for prospective injunctive relief against the enforcement of an unconstitutional state law. In the intervening years, this Court and most courts of appeals have repeatedly held that *Ex parte Young* allows federal courts to enjoin the future enforcement of state tax schemes that violate federal law or the Constitution. This Court has also observed that an injunction requiring a state's future compliance with federal law does not violate state sovereign immunity, even if it has a "substantial ancillary effect on the state treasury." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

In this case, however, the Eleventh Circuit concluded otherwise. It departed from this Court's precedent, and "create[d] a circuit split," Pet. App. 24a (Jordan, J., concurring in part and dissenting in part), when it held that *Ex parte Young* does *not* permit the Seminole Tribe of Florida to seek injunctive or declaratory relief against the future unconstitutional enforcement of Florida's fuel tax scheme. The court's holding turned on the fact that Florida precollects this tax from a third party, which means that an order barring future enforcement against the tribes might require the state to issue tribal consumers refunds "from state coffers," supposedly in violation of the Eleventh Amendment. Pet. App. 12a.

The question presented is whether sovereign immunity bars an American Indian tribe from seeking *Ex parte Young* relief from the unconstitutional enforcement of a state tax scheme merely because that relief might require refunds for taxes unlawfully collected in the future.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Seminole Tribe of Florida, petitioner on review, was plaintiff-appellant below.

2. The State of Florida Department of Revenue and Marshall Stranburg, in his official capacity as the Interim Executive Director and Deputy Executive Director of the Florida Department of Revenue, respondents on review, were defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Seminole Tribe of Florida is a federally recognized American Indian tribe. It is not a corporation; it does not issue any stock; and it has no parent corporation.

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PETITION FOR CERTIORARI

Petitioner Seminole Tribe of Florida respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 750 F.3d 1238 and reproduced at Pet. App. 1a-32a. The decision of the United States District Court for the Southern District of Florida dismissing the complaint is reported at 917 F. Supp. 2d 1255 and reproduced at Pet. App. 33a-44a.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2014, and a timely petition for rehearing was denied on July 10, 2014. Pet. App. 45a-46a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States 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. Cont. amend. XI.]

INTRODUCTION

This case involves a question that frequently arises when an American Indian tribe challenges state taxes in federal court: how should the court balance the often competing legal principles implicated in these cases—the sovereignty and self-determination of American Indian tribes, the supremacy of federal law, and the sovereign immunity of the states? The balance is a delicate one, and courts have long struggled to reach the right result.

Given the importance of this balance, and the unique nature of the relationship between the federal government and American Indian tribes, this Court has often reviewed cases in which a tribe challenges an allegedly unlawful state tax (most often, a precollected fuel or cigarette excise tax). It has ruled that "when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal inci-

dence falls on a Tribe or its members for sales made within Indian country." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 (1995). Nor may a state impose "use fuel taxes" on a non-Indian business "for operations that are conducted solely on * * * tribal roads within the reservation." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 148 (1980). But a state *may* impose a "tax [on] a non-Indian distributor's *off-reservation* receipt of fuel," even if the fuel is subsequently sold on the reservation, where "the legal incidence of the tax is on the distributor." *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 101, 103 (2005) (emphasis removed). This case involves the set of facts that logically comes next: an excise tax on fuel purchased by a tribe off-reservation and used on the reservation in the performance of essential public services, where the tribe bears the legal incidence of the tax.

The Eleventh Circuit below, however, determined over a strong dissent that the propriety of this tax will never be decided in a federal lawsuit. It minted an unprecedented new rule: that the avenue through which tribes typically challenge state taxes in federal court—a claim for prospective declaratory or injunctive relief against state officials under *Ex parte Young*, 209 U.S. 123 (1908)—is unavailable where the challenged tax is "precollected" from a third party. And it applied this new rule below because Florida precollects fuel excise taxes from fuel suppliers and honors individual customer's exemptions only through after-the-fact refunds. In so holding, the majority created what the dissent aptly called a "'pre-collection exception' to *Ex parte Young*." Pet. App. 28a.

The majority reasoned as follows: (i) the only practical way to give effect to an exemption from the disputed tax is through the State's existing refund regime, *see* Pet. App. 13a-14a, (ii) relief under this regime would necessarily require "a recurring refund paid to the Tribe from the Department after it precollects the tax from the fuel suppliers," Pet. App. 14a, (iii) those refunds would be "the functional equivalent of ordering recurring payments of money damages," *id.*, and (iv) that type of remedy is categorically impermissible because it would "be financed by the Florida fisc," Pet. App. 12a.

This reasoning is fatally flawed. The majority's decision flatly contradicts the precedent of this Court and decisions of the other courts of appeals, which have repeatedly allowed tribes to sue state officials for prospective relief against allegedly unconstitutional taxes—and which have never allowed the state's particular method of administration to dictate the availability of relief. Pet. App. 23a-24a, 27a-28a. The majority's effort to differentiate those cases—based on Florida's precollection of the challenged tax—identifies only "a distinction without a difference." Pet. App. 24a. Therefore, as the dissenting judge rightly recognized, the decision "creates a circuit split." *Id.*

The majority's precollection exception to *Ex parte Young* also eliminates American Indian tribes' ability to challenge through a federal lawsuit *any* state excise taxes precollected from a third party, but borne by the tribe itself, no matter how seriously the tax burdens the tribe's on-reservation activities. It is based on an untenable rule that states may structure the administration of their laws to insulate those laws from federal review—a rule that turns the Su-

premacy Clause on its head and, unsurprisingly, conflicts with this Court's caselaw and the decisions of the majority of the other courts of appeals. And it is dangerous precedent to boot: the decision's flawed reasoning constricts the scope of *Ex parte Young* and grants states license to use imaginative ways to "legislate their way around" the doctrine. Pet. App. 28a.

Accordingly, this Court's review is not only appropriate; it is essential. The Court should grant the Petition and reverse the decision below.

STATEMENT

The Seminole Tribe of Florida is a federally recognized Tribe with reservations in the State of Florida. It provides essential government services on its reservations, including police and fire protection, emergency medical services, public schools, public transportation, and public roadway construction, repair, and maintenance. In carrying out these duties, the Tribe uses fuel, sometimes purchased from off-reservation gas stations. This case concerns the Tribe's ability to bring an *Ex parte Young* claim to challenge payment of Florida's excise tax on fuel purchased off the reservation and used in the performance of essential public services on the reservation.

A. The *Ex parte Young* Doctrine

From its inception, *Ex parte Young* has stood for the proposition that a party aggrieved by an unconstitutional state law may obtain prospective injunctive relief against a state official in federal court. While the outer boundaries of *Ex parte Young* are sometimes disputed, two features of the doctrine have never been in question. First, although *Ex*

parte Young may not be used to obtain damages for *past* violations of federal law, it may—and indeed should—be used to enjoin ongoing violations of that law, even where the injunction has a direct effect on the state treasury. Second, *Ex parte Young* removes any Eleventh Amendment obstacle to federal injunctions against the future enforcement of an unconstitutional state tax scheme.

1. In *Ex parte Young*, the Court was asked to determine whether state sovereign immunity, enshrined in the Eleventh Amendment, barred a federal suit against a state official to enjoin the enforcement of an allegedly unconstitutional state rate-setting scheme. 209 U.S. 123 (1908). The Court answered that question in the negative, formally recognizing the principle—implicit in prior caselaw—that state officials "who threaten and are about to commence proceedings * * * to enforce * * * an unconstitutional act * * * may be enjoined by a Federal court of equity from such action." *Id.* at 155-156. This doctrine rests on the "fiction" that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638 (2011) (quotation marks omitted). That fiction is "necessary to permit the federal courts to vindicate federal rights," *id.* (quotation marks omitted), thereby "giv[ing] life to the Supremacy Clause," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

To determine whether the *Ex parte Young* doctrine applies, courts must "look to the substance rather than to the form of the relief sought." *Papasan* v. *Allen*, 478 U.S. 265, 279 (1986). Plaintiffs may not invoke *Ex parte Young* to pursue relief that "is ex-

pressly denominated as damages," "in essence serves to compensate a party injured in the past" or "is tantamount to an award of damages for a past violation of federal law, even though styled as something else." *Id.* at 278. "On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Id.*

2. *Ex parte Young* has long been used as a vehicle to challenge unconstitutional state tax schemes.[1] As the Court recognized just a few years after the case was decided, *Ex parte Young* "set at rest" the argument that suits for injunctions against the enforcement of such schemes are "in effect suits against the State." *Greene* v. *Louisville & I.R. R.R.*, 244 U.S. 499, 506 (1917). Rather, a suit to enjoin the unconstitutional collection of state taxes "is not a suit against the State" because it is "a suit to restrain a state officer from executing an unconstitutional statute." *Id.*

The use of *Ex parte Young* to enjoin unconstitutional state taxes is of course not without limits. *First*, since the 1937 enactment of the Tax Injunction Act, federal courts generally may not hear such cases when the taxpayer is a private plaintiff with adequate recourse in the state court system. *See* 28

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[1] Indeed, even before *Ex parte Young*, this Court had recognized the federal judiciary's authority to enjoin the collection of state taxes assessed in violation of the Constitution. *See Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 40 (1907) (affirming a federal "judgment enjoining the collection of the balance of the tax levied against the" complaining parties).

U.S.C. § 1341; *see also Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (holding that Tax Injunction Act also bars federal declaratory judgments). The Act does not, however, apply to Indian tribes. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *see also* 28 U.S.C. § 1362; *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 785 & n.3 (1991).

Second, state sovereign immunity bars suits against state actors seeking damages for the state's *past* enforcement of an unconstitutional tax. *See Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 463-464 (1945). Injunctions against the *future* enforcement of a state tax scheme, however, remain fair game. *See Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 305 (1952). Consequently, this Court has repeatedly heard such suits when they have been brought by Indian tribes. *See, e.g.*, *Wagnon*, 546 U.S. at 100 (considering tribe's suit for "injunctive relief from the State's collection of motor fuel tax"); *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995) (considering suit to stop Oklahoma's enforcement of several taxes against a tribe); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991) (considering tribe's suit seeking to prevent collection of state cigarette tax).

The *Ex parte Young* claim in this case involves the same type of claim affirmed by this Court in *Wagnon*, *Chickasaw Nation*, and *Potawatomi Tribe*; namely, the Tribe seeks to enjoin the unlawful enforcement of Florida's excise tax on fuel used by the tribe on tribal lands.

B. Florida's Fuel Tax Precollection System

Florida imposes an excise tax on fuel used in the State. That tax is precollected, meaning that it is remitted at the time the fuel is removed from the loading rack by the supplier, before the tax is incurred. Fla. Stat. § 206.41(2). This precollection system exists for the State's "administrative convenience." *Id.* § 206.41(4)(a). The cost of the tax is passed on to customers who buy fuel at the pump. The statute specifies that "[t]he legal incidence of the tax shall be on the ultimate consumer." *Id.*

Certain entities and uses of fuel are exempt from Florida's fuel tax. *See id.* § 206.41(4). For example, "any system of mass public transportation authorized to operate within any city, town, municipality, county, or transit authority region in this state * * * is entitled to a refund of such taxes," *id.* § 206.41(4)(b), as is "[a]ny person who uses any motor fuel for agricultural, aquacultural, commercial fishing, or commercial aviation purposes," *id.* § 206.41(4)(c)(1), and any "municipality or county" that paid excise taxes on "fuel for use in a motor vehicle operated by it shall be returned to the governing body of such municipality or county for the construction, reconstruction, and maintenance of roads and streets within the municipality or county," *id.* § 206.41(4)(d).

The State honors these exemptions by refunding the fuel-tax payment after-the-fact. Exempt entities receive an annual permit from the State, which allows its holder to apply for refunds on a quarterly basis. *See id.* § 206.41(5)(a)(1), (c). So long as the amount due is at least $5, the State will pay the refund. *Id.* § 206.41(5)(c).

C. Proceedings Below

Florida's legislative scheme does not exempt the Tribe from fuel taxes. Accordingly, after Florida courts denied the Tribe's claim for a refund of fuel taxes paid between 2004 and 2006, *see Florida Dep't of Revenue* v. *Seminole Tribe of Fla.*, 65 So. 3d 1094 (Fla Ct. App. 2011), the Tribe brought this federal action for prospective relief in the Southern District of Florida. Pursuant to *Ex parte Young*, the Tribe seeks a declaratory judgment that the Tribe is exempt from the fuel tax under the Indian Commerce Clause, the Indian Sovereignty Doctrine, and Equal Protection, and an injunction against Department officials' continued refusal to refund unlawfully precollected taxes.

The district court dismissed the complaint under the *Rooker-Feldman* Doctrine and the Tax Injunction Act. Pet. App. 36a-44a. The Eleventh Circuit affirmed in a split decision—but on other grounds. The majority concluded that the suit was barred by Florida's sovereign immunity because the Tribe's claim was supposedly "equitable in name only" and was instead in effect "a suit for monetary relief to be financed by the Florida fisc." Pet. App. 12a. According to the majority, "[a] declaratory judgment exempting the tribe from the tax is the functional equivalent of ordering recurring payments of money damages" because "[t]he Tribe points to no other way around the alleged constitutional violation other than a recurring refund paid to the Tribe from the Department after it precollects the tax from the fuel suppliers." Pet. App. 14a. Likewise, the majority reasoned, "a judgment 'enjoining the Department and its Executive Director's continued and prospec-

tive refusal to refund the Fuel Tax,' * * * would amount to a money judgment against Florida." Pet. App. 12a (brackets omitted). The court concluded that "[e]ither form of relief is equivalent to a retroactive award," "is compensatory in nature," and demonstrates that "Florida is the real, substantial party in interest." Pet. App. 13a (quotation marks omitted). It therefore affirmed the dismissal. Pet. App. 20a.

Judge Jordan dissented. He refused to join the majority's creation of a " 'pre-collection exception' to *Ex parte Young*." Pet. App. 28a. He explained that the doctrine "generally allows suits for declaratory and prospective relief against state officials in charge of administering or enforcing unconstitutional laws," and "is necessary to ensure the supremacy of federal law." Pet. App. 21a-22a (quotation marks omitted). The majority's rule, by contrast, "allow[s] a state to shield the enforcement of any tax, no matter how constitutionally untenable, from challenge in federal court simply by enacting a precollection procedure." Pet. App. 28a. Judge Jordan rejected that reasoning because "there is no 'pre-collection exception' to *Ex parte Young*, and the supremacy of federal law does not rest on the type of tax scheme that Florida has designed." *Id.* He noted that no other court has recognized such an exception, and concluded that the majority's decision "creates a circuit split." Pet. App. 24a.[2]

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[2] Judge Jordan also pointed out that the district court's reasons for dismissal lacked merit: The Tax Injunction Act does not bar claims by Indian tribes pursuant to *Moe*, 425 U.S. 463, and *Rooker-Feldman* does not apply because the Tribe is not attacking a state-court judgment. Pet. App. 29a-31a.

The Tribe petitioned the Eleventh Circuit for rehearing en banc. It was denied. Pet. App. 45a-46a. This petition followed.

REASONS FOR GRANTING THE PETITION

The decision below has all of the hallmarks of a case warranting review by this Court. It creates a circuit split, acknowledged by the dissenting judge, Pet. App. 24a, on important questions concerning a state's ability to manipulate its method of administering state laws to insulate them from federal review. It conflicts with this Court's precedents, which have consistently interpreted *Ex parte Young* to allow tribes to pursue prospective injunctive and declaratory relief against unlawful state tax regimes, and which have never suggested that relief is barred merely because the injunction will affect the state treasury. And it unduly limits *Ex parte Young* by creating a giant loophole through which states may evade federal judicial review of unconstitutional and unlawful state schemes. This Court should grant the Petition, and reverse the decision below.

I. THE DECISION BELOW DIVIDES THE CIRCUITS.

This Court's review is needed because the Eleventh Circuit's newly minted "precollection exception" to *Ex parte Young* creates a circuit split, as the dissenting judge below acknowledged. Pet. App. 24a. Two aspects of the decision conflict with the views of other courts of appeals: (i) the Eleventh Circuit's holding that a state's method of administering taxes determines the viability of an *Ex parte Young* claim, and (ii) the court's ruling that state sovereign im-

munity bars any claim that might require a state to refund costs unlawfully imposed in the future.

In the past few Terms, this Court has not hesitated to grant review to correct an outlier court of appeals decision that departs from the decisions of the other circuits. *See, e.g.*, Cert. Pet., *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247), 2011 WL 3750709, at *9-*15; Cert. Pet., *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632 (2011) (No. 09-529), 2009 WL 3602072, at *16-*21; Cert. Pet., *Carcieri* v. *Salazar*, 555 U.S. 379 (2009) (No. 07-526), 2007 WL 3085107, at *26-*32. It should grant review here as well.

A. The Circuits Are Now Divided Over Whether The Particular Manner In Which A State Tax Is Collected Determines The Viability Of An *Ex parte Young* Claim.

Majority Approach. The other circuits that have considered whether a tribe may bring suit to enjoin the enforcement of an unconstitutional tax scheme have answered that question with a resounding yes, no matter how the tax was structured. As the Ninth Circuit has recognized, a tribe's challenge to such a tax scheme "fall[s] squarely within the [*Ex parte Young*] exception" to state sovereign immunity. *Agua Caliente Band of Cahuilla Indians* v. *Hardin*, 223 F.3d 1041, 1046 (9th Cir. 2000). Consequently, the Second, Sixth, Eighth, Ninth, and Tenth Circuits routinely hear tribal suits, brought under *Ex parte Young*, seeking prospective injunctions against the continued enforcement of unconstitutional state tax schemes. *See, e.g.*, *Oneida Nation of New York* v. *Cuomo*, 645 F.3d 154 (2d Cir. 2011); *Keweenaw Bay*

Indian Cmty. v. *Rising*, 477 F.3d 881 (6th Cir. 2007); *Fond du Lac Band of Lake Superior Chippewa* v. *Frans*, 649 F.3d 849 (8th Cir. 2011); *Yavapai-Prescott Indian Tribe* v. *Scott*, 117 F.3d 1107, 1108 (9th Cir. 1997); *Muscogee (Creek) Nation* v. *Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

In allowing tribes' *Ex parte Young* claims to proceed, these courts focus on whether the federal Constitution forbids the tax in question—not on how the state administers it. For example, in *Muscogee (Creek) Nation*, the Tenth Circuit decided the case based on the legality of the state's excise tax on tobacco products rather than the fact that the state required the tribal wholesaler to prepay estimated taxes and recover overpayments only after the fact. 669 F.3d at 1164, 1168, 1183. Likewise, in *Keweenaw Bay Indian Community*, the Sixth Circuit addressed the merits of the tribe's challenge to delays in refunds on prepaid cigarette taxes, not the fact that overpayments were corrected through refunds. 477 F.3d at 890-893. The logic of these cases is intuitive; as the Fourth Circuit has held in an analogous context: "It is of no import that the state officials have already decided how much money they want illegally to collect * * * nor that the state will have to expend its own funds to make up for the funds it was not allowed illegally to collect. The point is that the future collection is illegal." *CSX Transp., Inc.* v. *Board of Public Works of W.Va.*, 138 F.3d 537, 542-543 (4th Cir. 1998) (involving a challenge by railroads not subject to the Tax Injunction Act to a tax that had already been assessed and partially paid).

The Eleventh Circuit's Approach. The Eleventh Circuit, by contrast, breaks from these other Circuits and stands alone in its categorical rejection of a

tribe's *Ex parte Young* claim to enjoin the future unlawful enforcement of state taxes. The decision below rested on an analysis diametrically opposed to the other courts of appeals'; namely, how the state administers the tax in question—not whether the federal Constitution forbids the tax itself. The majority reasoned that because Florida honors exemptions through refunds, *any* relief granting the Tribe an exemption from the tax would be an unauthorized claim against the State. Pet. App. 13a-14a, 16a-17a. Thus, the majority concluded, "Florida is the real, substantial party in interest to this suit *because of the manner in which Florida has structured collection of its fuel tax*." Pet. App. 16a (emphasis added). As a result, unlike in the Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits, in the Eleventh Circuit, the way a state happens to administer a tax determines the availability of prospective relief against the unlawful enforcement of the tax. This Court should grant review to reconcile the conflict.

B. The Circuits Are Now Also Split Over Whether State Sovereign Immunity Bars Claims To Enjoin Future Violations Of Federal Law Merely Because The Injunction Might Require Future Payments From The State.

The decision below created a second, related circuit split by holding that state sovereign immunity bars *any* relief that might eventually result in a payment from the state to the plaintiff. Other circuits, following this Court's clear dictates on the issue, have held exactly the opposite.

Majority Approach. The First, Second, Fourth, Seventh, Ninth, and D.C. Circuits have all recog-

nized that *Ex parte Young* allows declaratory or injunctive relief against future violations of federal law, even when that relief might result in future reimbursements from the state. For instance, in *Ameritech Corp.* v. *McCann*, 297 F.3d 582 (7th Cir. 2002), the Seventh Circuit held that *Ex parte Young* authorized a claim for declaratory relief that would require future reimbursements to avoid future statutory violations. There, the plaintiff telecommunications company sued a Wisconsin district attorney in his official capacity. The company sought a declaration requiring the defendant to comply with section 2706 of the federal Electronic Communications Privacy Act, which directs government entities obtaining records under the Act from a telecommunications provider to reimburse the provider for any costs incurred in the process of responding to the government's request. 18 U.S.C. § 2706(b). The district court dismissed the complaint on Eleventh Amendment grounds. It reasoned that "the *res judicata* effect of a declaration of rights under § 2706 would translate into a monetary damages award against the state" by requiring the district attorney to issue reimbursements to the plaintiff when it responded to future records requests. *Ameritech Corp.*, 297 F.3d at 585. The Seventh Circuit unequivocally rejected that analysis. The court explained that the declaratory judgment sought was prospective in nature, "and the fact that the federal statute at issue creates a right to reimbursement does not alter the analysis." *Id.* at 588 (citing *Edelman*, 415 U.S. at 667-668).

The Second Circuit reached a similar conclusion in *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367 (2d Cir. 2005). There, the court held that an in-

junction requiring state officials to treat as timely filed claims for reimbursement under a state-administered federal environmental cleanup statute was proper under *Ex parte Young*. *Id.* at 375. It rejected the state officials' argument that the state was the real party in interest because "compelling the state of Kentucky to accept [the plaintiff's] claims as timely filed ultimately leads to reimbursement from the state treasury." *Id.* Rather, the court reasoned, "[i]f eventual payment is made to [the plaintiff] as an outcome of the injunction, such a depletion from the state treasury is a permissible ancillary effect of *Ex parte Young* because it is the necessary result of compliance with decrees which by their terms were prospective in nature." *Id.* (quotation marks omitted).

Consistent with these cases, courts of appeals regularly recognize that injunctive or declaratory relief is available under *Ex parte Young* even if it may eventually require payments from the state to the plaintiff—so long as the relief is not in effect a payment of monetary damages to compensate for past wrongs. Thus, in circuits other than the Eleventh, courts may issue orders pursuant to *Ex parte Young* that require states to pay future benefits. *See, e.g.*, *Greater New Orleans Fair Hous. Action Ctr.* v. *U.S. Dep't of Hous. & Urban Dev.*, 639 F.3d 1078, 1084 (D.C. Cir. 2011) ("At a minimum, it is clear that under *Edelman* [a] district court has jurisdiction to order [a state agency] to use a different formula" to calculate the amount of hurricane relief benefits due to "future grantees."); *Concilio de Salud Integral de Loiza, Inc.* v. *Perez-Perdomo*, 551 F.3d 10, 18 (1st Cir. 2008) (concluding that injunction forcing state officials to change their methodology for calculating Medicaid

reimbursements qualified as prospective relief); *State Empl. Bargaining Agent Coalition* v. *Rowland*, 494 F.3d 71, 97 (2d Cir. 2007) (explaining that injunction requiring the state to re-hire employees whose positions had been eliminated is not retrospective where it would force the state to compensate the plaintiffs only "for work performed in the course of their *future* employment") (emphasis in original); *Antrican* v. *Odom*, 290 F.3d 178, 185-187 (4th Cir. 2002) (holding that injunction requiring state to provide dental benefits under Medicaid fell within *Ex parte Young* exception); *Doe* v. *Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 841 (9th Cir. 1997) (concluding that injunction mandating reinstatement of state employee was prospective and observing that "other circuits have held overwhelmingly that job reinstatement constitutes prospective injunctive relief"). The possibility that relief might involve payment from state coffers is not dispositive of the *Ex parte Young* analysis.

The Eleventh Circuit's Approach. The decision below breaks from the rulings of the other courts of appeals. The Eleventh Circuit held that because "[t]he right to an exemption" from Florida's fuel excise tax "is the right to a refund under Florida law, * * * sovereign immunity bars that relief." Pet. App. 13a. Its brittle ruling rested on the premise that state sovereign immunity categorically bars declaratory or injunctive relief that could require payments to individuals "financed by the [State] fisc." Pet. App. 12a.

This reasoning cannot be squared with the decisions of the other courts of appeals. In the Eleventh Circuit, a claim for declaratory or injunctive relief against future violations of federal law will be denied at the outset if it might require a state to pay the

plaintiff money. In all the other circuits, that claim may go forward so long as it does not seek compensation for past wrongs. The Eleventh Circuit has therefore created a second circuit split on an important question of federal law. This Court's intervention is needed to resolve it.

II. THE DECISION CONFLICTS WITH THIS COURT'S *EX PARTE YOUNG* PRECEDENT.

Not only does the Eleventh Circuit's decision create a circuit split, it also directly contradicts this Court's *Ex parte Young* jurisprudence. Specifically, the lower court's analysis conflicts with this Court's tax injunction precedent dating back to the time of *Ex parte Young* itself, as well as this Court's instruction that the substance rather than the form of relief determines whether *Ex parte Young* applies. It misreads *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and its progeny as establishing a rule that bars even prospective relief if that relief might require payment out of the state treasury. And it distorts the holding of *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), to allow states to legislate around *Ex parte Young*'s protections. This Court should step in and bring the Eleventh Circuit back in line with this Court's precedent.

1. To begin, the Eleventh Circuit's opinion cannot be reconciled with this Court's decisions holding that *Ex parte Young* permits suits to enjoin state actors from enforcing unconstitutional tax schemes. That precedent, which is almost as old as *Young* itself, rejects the contention that such suits are "in effect suits against the State." *Greene*, 244 U.S. at 506. Rather, as has been established for over a century: "a suit to restrain a state officer from executing an

unconstitutional statute, in violation of plaintiff's rights and to his irreparable damage, *is not a suit against the State*." *Id.* (emphasis added); *accord Virginia Office for Prot. & Advocacy*, 131 S. Ct. at 1638.

Yet the majority decided to turn back the clock when it applied the very contention rejected by this Court in *Ex parte Young*, *Greene*, and many decisions since: it held that the Tribe's suit to enjoin Florida officials from enforcing the state's tax scheme was impermissible because "Florida is the real, substantial party in interest." Pet. App. 13a. This holding flatly contradicts this Court's precedent and is not justified by any of the cases cited by the court below.

2. The primary way in which the majority attempted to evade *Greene*'s straightforward holding—and distinguish the long line of precedent allowing tax injunctions under *Ex parte Young*—was by focusing on the *form* of the injunctive relief requested by the Tribe. But that purported distinction runs headlong into this Court's decision in *Papasan*. There, the Court instructed that courts must "look to the substance rather than to the form of the relief sought" when considering the application of *Ex parte Young*. *Papasan*, 478 U.S. at 279.

The Eleventh Circuit did exactly the opposite. Its ruling rests entirely on the fact that—because of the structure of Florida's tax scheme—injunctive relief would require the state to precollect fuel taxes from distributors and then issue refunds to the tribes, rather than simply barring collection from the tribes in the first place. Yet this, as the dissent aptly notes, is a "distinction without a difference." Pet. App. 24a. The *substance* of an injunction barring future state

tax collection altogether is the same as that of an injunction making future collection contingent upon a refund to certain consumers. Both are orders forbidding the state to enforce an unconstitutional tax, and both have the effect of preventing the state from enjoying any further revenues from that unconstitutional tax. The distinction to which the majority points is purely formal—it merely delineates whether the state may temporarily take possession of the revenue before returning it to a tribe. *Papasan* makes clear that such formalism cannot determine the availability *Ex parte Young* relief.

In any event, the majority's fixation on the form of the requested relief rests on a false factual premise. The majority is deeply concerned that declaratory or injunctive relief in this case will inevitably lead to tribal refunds. But that is simply incorrect as a factual matter. As the dissent points out, a declaratory judgment holding that the Tribe is exempt from the fuel tax will not *require* the state to pay the Tribe refunds. Pet. App. 25a-28a. The state is free to design some other means to comply with the judgment. *Id.* For example, the state might instruct fuel distributors to charge tribes a different, tax-exempt price for fuel used on tribal lands. Or it might issue tribes vouchers to be submitted in lieu of sales tax when purchasing exempt gas. Pet. App. 26a-27a. Thus, for all the majority's handwringing, the requested order may require the state to do no more than what the majority itself admits is permissible under *Ex parte Young*.

3. The majority below also failed to follow this Court's precedent establishing that—while retrospective awards of monetary damages are impermissible—"relief that serves directly to bring an end to a

present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Papasan*, 478 U.S. at 278; *see also, e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) ("a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury"); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977) (*Ex parte Young* "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury").

This Court's opinion in *Edelman* first articulated the distinction between a prospective injunction, which is allowed under *Ex parte Young*, and an injunction amounting to a "retroactive award" of damages, which is not. An impermissibly "retroactive award" is one that requires a state to disgorge funds to compensate for "a monetary loss resulting from a *past* breach of a legal duty." 415 U.S. at 668 (emphasis added). *Edelman* specifically distinguished such an award from a permissible order that would "require[] payment of state funds * * * as a necessary consequence of compliance *in the future* with a substantive federal-question determination." *Id.* (emphasis added).

Under *Edelman* and its progeny, the Tribe's claims for prospective relief are not barred by sovereign immunity. The Tribe seeks either a declaration that it is prospectively exempt from the ongoing collection of fuel tax or an injunction against the ongoing unlawful withholding of refunds. Both requests are intended to ensure the state's "compliance in the fu-

ture" with constitutional limitations on tribal taxation. *Id.* Any refund payments would simply be a "necessary consequence" of that compliance. *Id.*

The majority concluded otherwise only by grossly misreading *Edelman*. The majority found that the Tribe's requested injunction "is equivalent to 'a retroactive award' " because it could lead to future refunds. Pet. App. 13a (quoting *Edelman*, 415 U.S. at 677). That reasoning ignores *Edelman*'s clear holding that an award is retroactive only if it compensates for a "past breach" of a legal duty—that is, a breach that occurred *before* the plaintiff filed suit. *See* 415 U.S. at 668. An injunction is not "retroactive" merely because it mandates future compliance with a state law that is structured to require the issuance of refunds. *Id.*

The majority further erred in insisting that *Edelman* and its progeny bar the Tribe's claims because the effect on the state treasury is not merely "ancillary," but rather the primary goal of the requested relief. Pet. App. 15a-16a (citing *Edelman*, 415 U.S. at 667-668). The goal of every true *Ex parte Young* suit—and the goal of the Tribe's suit here—is to stop a state from violating federal law or the Constitution. It is common sense that the money expended to bring about that cessation is an inevitable "ancillary" effect on the state treasury.

The majority decision below rested on the view that an injunction's effect on a state treasury is not "ancillary" whenever it may lead to a direct payment from the state to an individual plaintiff. *See id.* But that conclusion is barred by the very precedent the majority cited.

For instance, in *Edelman* itself, the Court explicitly recognized the legitimacy of suits to enjoin state compliance with federal benefits programs, even though those injunctions were likely to lead directly to future monetary payouts from a state to an individual. 415 U.S. at 667-668. Likewise, in *Milliken*, the Court held in a school desegregation case that *Ex parte Young* allows a district court to order state officials to provide compensatory educational programs. 433 U.S. at 290. The Court reached this result even though these programs were " 'compensatory' in nature" because they were nevertheless "part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." *Id.* (emphasis added). And in *Papasan*, the Court held that a claim for relief from "the unequal distribution by the State of the benefits of the State's school lands" could be remedied under *Ex parte Young* even if that remedy "might require the expenditure of state funds" to provide equal benefits to the plaintiffs because the "essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State." 478 U.S. at 282.

Accordingly, the majority's conflation of an order for payment of accrued benefits to remedy past violations and an order to make future payments to remedy ongoing and future violations was erroneous—and directly conflicts with this Court's precedent.

4. Finally, the Eleventh Circuit's decision finds no support in *Ford*, which the majority interpreted as allowing states to structure their laws to evade federal review. Nothing in *Ford*, however, even hints that the supremacy of federal law depends on the method of administration of state law.

Ford considered a plaintiff's suit against state officials for reimbursement of taxes unlawfully extracted in the past. The plaintiff alleged that the tax violated the Commerce Clause and sought a refund under "§ 64-2614(a) of the Indiana statutes" in federal court. 323 U.S. at 461, 463. The Court examined the state statute in question and found that it "clearly provides for an action against the state." *Id.* at 463. From this, the Court reasoned that the plaintiff's claim for a "refund of gross income taxes paid to the department" was "in essence one for the recovery of money from the state." *Id.* at 460, 464. Therefore, the Court concluded, "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." *Id.* at 464.

It is obvious from *Ford*'s straightforward reasoning that the decision considered the propriety of compensatory relief for *past* taxes; the case did nothing to disturb federal courts' ability to issue injunctions against the *future* enforcement of a state tax scheme.[3] Moreover, the opinion makes clear that the structure of the state's statutory tax-refund regime was relevant only because the plaintiff sued for a refund under the state statute. *See* Pet. App. 16a. The majority below, however, read *Ford* to hold something entirely different: that states may "legislate their way around *Ex parte Young*." *Id.* It made this

[3] The Court confirmed as much several years later in *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952), where it affirmed that *Ex parte Young* permitted a federal district court to consider a plaintiff's suit to enjoin the State Revenue Commissioner's enforcement of "allegedly unconstitutional taxation." *Id.* at 305.

"proposition" out of whole cloth. Nothing in *Ford* suggests that a state's particular administration of its tax scheme governs the availability of prospective injunctive relief. Nor does any such rule make sense; it would subject the enforcement of federal law to the idiosyncrasies of state legislation. That subverts the very purpose of the Supremacy Clause—to make federal law "the supreme law of the land." U.S. const. art. VI, cl. 2. This fundamental misreading of *Ford* should not remain the law anywhere. Certiorari review is warranted.

III. IF LEFT UNCORRECTED, THE ELEVENTH CIRCUIT'S DECISION WILL IMPEDE ACCESS TO FEDERAL COURTS FOR INDIAN TRIBES AND OTHER VICTIMS OF UNCONSTITUTIONAL AND UNLAWFUL STATE SCHEMES.

As the numerous conflicts with the precedent of this Court and the other circuits demonstrate, the Eleventh Circuit's opinion places the circuit firmly on the wrong side of the law. There is little chance, however, that the Eleventh Circuit will correct its error in the near future.[4] The Tribe's request for en banc review in this suit was denied, Pet. App. 45a-46a, even in the face of a strong panel dissent that pointed out the majority opinion's numerous flaws, *see* Pet. App. 20a-32a. It is therefore imperative that this Court grant review, as it has in recent years in other cases where, as here, the sovereignty and self-determination of American Indian tribes were at

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[4] Indeed, the Eleventh Circuit rehears cases en banc the second least frequently of all the circuits (behind only the Second Circuit). Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 738 (2011).

stake. *See, e.g.*, *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014); *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012); *Madison Cnty.* v. *Oneida Indian Nation of N.Y.*, 562 U.S. 42 (2011).

Leaving the Eleventh Circuit's decision in place will not merely unjustly deprive the Tribe of an opportunity to vindicate its constitutional rights in federal court. If left uncorrected, the decision will allow states in the Eleventh Circuit to use precollection strategies to deprive tribes of the ability to challenge almost any state tax scheme through the federal courts. The opinion's effects also extend far beyond the tribal context. The Eleventh Circuit's mischaracterization of this Court's *Ex parte Young* precedent will make it more difficult for all plaintiffs to obtain federal relief from unconstitutional and unlawful state schemes, and will make it more difficult for the federal judiciary to protect the vitality of the Supremacy Clause.

A. The Eleventh Circuit's Decision Will Improperly Deprive Tribes Of The Ability To Challenge State Taxes In Federal Courts.

It is well established that the Constitution and tribal sovereign immunity prohibit states from applying many of their tax laws to Indian tribes. *See Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes * * * , and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory."). Again and again, tribes have been forced to vindicate this immunity through suits for federal

injunctive relief. *See, e.g.*, *Chickasaw Nation*, 515 U.S. 450; *Winnebago Tribe of Nebraska* v. *Stovall*, 341 F.3d 1202, 1203 (10th Cir. 2003); *Agua Caliente Band of Cahuilla Indians* v. *Hardin*, 223 F.3d 1041 (9th Cir. 2000). But the majority's opinion in this case deprives tribes in the Eleventh Circuit of the opportunity to obtain this federal relief for any tax that is pre-collected from a third party.

This is an extraordinarily large loophole for states. If left uncorrected, it will create strong incentives for states to reconfigure their tax schemes to introduce precollection from third parties whenever they believe a tax may not comply with federal laws or the Constitution. The decision therefore unjustly diminishes tribes' ability to protect their sovereignty and their constitutional rights.

Further, the "precollection" exception is contrary to congressional intent. Federal law mandates that "district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band * * * wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. This Court has found that in enacting § 1362, Congress "contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be, at least in some respects, as broad as that of the United States suing as the tribe's trustee." *Moe*, 425 U.S. at 473. And the Court specifically held that Congress intended that the tribes should have the same power as the United States to "enjoin the enforcement of a state tax law." *Id.* at 474 Yet by introducing the "precollection" exception, the Eleventh Circuit's opinion eviscerates tribes' ability to obtain injunctions on their own behalf.

Review is therefore necessary not only to remedy the conflict between the Eleventh Circuit's opinion and the precedent of this Court and the other circuits, but also to restore tribes' ability to fully vindicate their constitutional rights, and to bring Eleventh Circuit law into harmony with congressional intent.

B. The Decision Constricts The Availability Of Federal Judicial Relief From Unconstitutional And Unlawful State Schemes Beyond The Tribal Context.

The impact of the Eleventh Circuit's opinion is not limited to tribal plaintiffs. While the Tax Injunction Act generally shifts non-tribal challenges to state taxes into state courts, the Act permits federal jurisdiction over cases in which states have not provided an adequate means to challenge the tax. *See* 28 U.S.C. § 1341. But the Eleventh Circuit's opinion suggests that a state could prevent a taxpayer from obtaining judicial review altogether by precollecting the tax from a third party and declining to create a method for review in state court. Moreover, the Eleventh Circuit's logic would appear to extend to any state scheme in which funds are precollected from third parties, meaning that states may be encouraged to develop precollection strategies for fines and penalties in order to avoid federal judicial scrutiny.

Further, the opinion's misrepresentation of the *Ex parte Young* doctrine threatens to close the doors of the federal courthouse to any plaintiff in the Eleventh Circuit seeking review of an unconstitutional or unlawful state scheme that involves payments from the state fisc. The Eleventh Circuit's opinion sug-

gests that plaintiffs may never obtain a prospective federal injunction prohibiting a state official from violating federal law or the Constitution if future compliance could require payouts from the state treasury. That holding appears to exempt not only precollected taxes, but any state-implemented reimbursement or benefits program from federal judicial scrutiny under *Ex parte Young*.

Because the Eleventh Circuit's opinion shrinks the scope of *Ex parte Young*, it impedes federal courts' ability to maintain the supremacy of federal laws and the Constitution. As this Court observed many years ago, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green*, 474 U.S. at 68. The Eleventh Circuit's opinion therefore threatens not only the rights of individual plaintiffs, but also the very foundations of our federal constitutional system. It should not stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GLEN A. STANKEE
AKERMAN LLP
Las Olas Centre II
350 East Las Olas Boulevard
Suite 1600
Fort Lauderdale, FL 33301

KATHERINE E. GIDDINGS
KRISTEN M. FIORE
AKERMAN LLP
106 East College Avenue
Suite 1200
Tallahassee, FL 32301

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
COLLEEN E. ROH
EUGENE A. SOKOLOFF*
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5528
neal.katyal@hoganlovells.com

*Admitted in New York only; supervised by firm attorneys.

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Counsel for Petitioner