No. 02-628

In the Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, *ET AL.*,
Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *ET AL.*,
*Respondent*s.

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

RESPONDENTS' BRIEF

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QUESTIONS PRESENTED

1. Does the *Ex parte Young* exception to the Eleventh Amendment's restrictions on federal judicial power permit a federal court to enforce a consent decree by ordering remedies that substantially exceed the requirements of federal law?

2. Do state officials who lack authority under state law to waive the State's Eleventh Amendment immunity clearly and voluntarily invoke the jurisdiction of the federal courts by deciding to settle an *Ex parte Young* lawsuit with a consent decree that lacks any explicit waiver statement?

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RESPONDENTS' BRIEF

In *Ex parte Young*, the Court crafted a narrow exception to the Eleventh Amendment immunity that States have from suit in federal court to allow prospective injunctive suits against state officers to remedy ongoing violations of federal law. This case requires the Court to decide if those limitations apply when a court is enforcing a consent decree, or whether a federal court in equity may order relief against States far beyond any requirement of federal law.

Additionally, in the eleventh hour, Petitioner Frew has added an allegation that the state officials' decision to settle the case by consent decree waived the protections of the Eleventh Amendment. Therefore, the Court may also choose to decide whether settling an *Ex parte Young* suit through a consent decree—after the State has been dismissed on Eleventh Amendment grounds—constitutes a clear and unequivocal waiver of Eleventh Amendment immunity.

STATEMENT OF THE CASE

This case involves a district court's long endeavor to oversee state officials' administration of a cooperative federal-state Medicaid program aimed at the health care of indigent youth. The suit began in 1993 when Petitioners[1] filed a lawsuit under 42 U.S.C. §1983 against two state agencies—the Texas Health and Human Services Commission and the Texas Department of Health—and officials of those agencies. 1.R.1.[2] The suit, filed before Judge William Wayne Justice in the Eastern District of Texas, alleged that state officials and the agencies were failing to provide Medicaid benefits under Texas's "early and periodic screening, diagnostic,

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1. Petitioners are the named plaintiffs. Pet'r Br. ii. Because Linda Frew is the lead plaintiff, respondents reference petitioners collectively as "Frew." *See* 2.R.652.

2. References to the court of appeals's record are cited as "__.R.__," with the first numeral representing the volume of the record and the second numeral indicating the page.

and treatment services" (EPSDT) program in accordance with federal law. Pet. App. 6a-7a; 1.R.1; 3.R.821. Frew's complaint alleged that the defendants did not "assure" the delivery of EPSDT services, and that they did not "effectively inform" all persons eligible for the program. *E.g.*, 1.R.16-17.

The federal requirements for the States' EPSDT programs are limited to three categories of services: (1) informing eligible recipients of the services available; (2) providing screening services when they are requested; and (3) arranging for corrective treatment of needs disclosed through screening services. *See* 42 U.S.C. §§1396a(a)(43),1396a(r). Participating States are required to develop a plan for administering an EPSDT program and submit it to the Secretary of Health and Human Services, who must approve it if it satisfies the statutory conditions. *See id.* §1396a(b).

In November 1993, the state agency defendants moved for dismissal on Eleventh Amendment grounds. 1.R.42. Frew's response acknowledged the State's refusal to waive immunity: "Defendants object to suit against them in federal court and assert the protection from federal litigation that the eleventh amendment provides to them. Given Defendants' refusal to consent, Plaintiffs do not object to the dismissal of the two state agencies from this case." 1.R.215.

In June of 1994, before ruling on the state agencies' motion to dismiss, the district court certified a class of Texas Medicaid recipients under twenty-one, estimating that the class included over 1.5 million Texas youth. Pet. App. 7a & n.6, 54a; 2.R.668. Two months later, the district court granted the state agencies' motion and dismissed them from the lawsuit based on the State's Eleventh Amendment immunity. 3.R.818-20.

The district court refused, however, to dismiss Frew's claims against the state officials and denied their motion to dismiss, in which they had argued that class members lacked the necessary

federal rights to make their claims actionable under 42 U.S.C. §1983. 3.R.807; 1.R.42; 2.R.446.

Soon thereafter, the parties began settlement negotiations and developed a consent-decree proposal. Pet. App. 7a & n.7; 3.R.875; 3.R.1013. The proposed decree was filed with the district court in July 1995. 4.R.1028. After a fairness hearing in December of 1995, the district court entered a consent decree. 3.R.993; Pet. App. 7a; 4.R.1028.[3] The State is not a party to the consent decree—only the state officials are. The decree is a lengthy document entailing 308 paragraphs of detailed and specific procedures for Texas's EPSDT program. Pet. App. 7a-8a & n.9. Its requirements range from "effectively inform[ing]" recipients about the program, Lodging ¶¶11, 52, to providing regular data reports to Frew, ¶286, to offering toll-free telephone assistance that will be answered "promptly," by "a person who [i]s knowledgeable, helpful, and polite," ¶247.

The program experienced dramatic improvements. For instance, the number of workers assigned to the program increased from about ten in 1993 to almost 500 in 2000. Pet. App. 3a. The program made particular progress in the area of outreach. *See* Pet. App. 3a. For example, there were 435,818 outreach efforts made in 1999—nearly a three-fold increase from the 152,557 efforts in 1995. Pet. App. 69a n.17. The number of outreach contacts increased from two million in 1995 to 4.8 million in 1999. 5.SR.880. And the state officials entered into a $7.6 million contract for an outside group to provide outreach services—the largest EPSDT contract for outreach services in the United States. *See* Pet. App. 70a-71a n.19.

In addition to the substantial improvements in outreach efforts, there were significant improvements in two required participation

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3. Frew has lodged the consent decree with the Court. *See* Pet. 1.

screening ratios developed by the federal government. Pet. App. 3a (explaining that "participation ratio" increased from eighteen percent in 1991 to sixty-six percent in 1998). Utilization of dental services increased in Texas from 1996 to 1998 while the national average declined. Pet. App. 3a. And, the medical transportation budget had increased by 300%. 5.SR.883. In 1993, about 750,000 medical transportation rides were given, while in 1999 there were 2.5 million rides. 5.SR.884. The success of Texas's EPSDT program is best reflected by the fact that there was no evidence that *any* eligible individual requesting medical or dental services was denied those services. *See* Pet. App. 4a, 101a-02a & n.51; 11.R.3668. In spite of all the improvements in the EPSDT program, some eligible Texans nevertheless fail, for whatever reason, to utilize fully the services. *See* Pet. App. 4a.

Despite these tremendous advances, Frew filed a motion to enforce the consent decree in October 1998, contending that state officials had failed to comply with her interpretation of the decree. Pet. App. 9a-10a; 5.R.1697. The state officers contended that they had complied with the consent decree. The district court conducted an enforcement hearing in March 2000, 1.SR-6.SR,[4] and, five months later, issued a 175-page decision agreeing with Frew. Pet. App. 54a. The district court rejected the state officials' contentions that the decree was largely unenforceable due to an absence of federal rights; that the State's sovereign immunity precluded the district court from enforcing the decree beyond the requirements of federal law; and that Frew's extraordinarily expansive interpretation of the decree's provisions was not supported by its text. 11.R.3628; Pet. App. 10a, 54a-275a.

State officials appealed the August 14, 2000 order, which the Fifth Circuit stayed during the pendency of the appeal. *Id.* Notwithstanding the pending appeal and the stay, Frew successfully

4. "__.SR.__" references are to the Supplemental Record.

sought leave in the district court to file a supplemental complaint adding new claims regarding dental services. *Id.* The district court denied the state officials' motion to dismiss the supplemental complaint on the basis that the decree-enforcement appeal divested the district court of jurisdiction to grant the motion to supplement. After state officials filed a second appeal from that ruling, the Fifth Circuit consolidated the two appeals. *Id.*

The Fifth Circuit vacated the district court's orders in both appeals and remanded the case. Pet. App. 46a. Recognizing the Eleventh Amendment's restriction on the district court's jurisdiction, the court of appeals held that the *Ex parte Young* exception to the Eleventh Amendment's limitations on federal judicial power permitted the district court to enforce the consent decree only to the extent of federal-law violations. Pet. App. 19a-28a. To determine whether Frew alleged decree violations to which the *Young* exception applied, the court of appeals examined Frew's allegations of decree violations to determine whether they implicated federal rights that the district court could enforce. Pet. App. 13a-19a, 33a-39a. The Fifth Circuit held that no enforceable rights were the subject of the district court's decision. Pet. App. 12a. The Fifth Circuit explained that "'in enforcing the consent decree,'" the district court incorrectly regarded itself as "'bound *solely* by its language,' and that 'an interpretation of the decree must be based strictly on the language of the decree and *not* on the legal requirements of the Medicaid Act.'" Pet. App. 14a (quoting Pet. App. 71a) (emphasis added).

The Fifth Circuit explained that "[r]ather than focusing on the statutory requirements, the court focused on the consent decree requirements." Pet. App. 33a. Because the district court concluded that the consent decree, but not federal law, was violated, the court of appeals concluded that the district court's invocation of its enforcement authority was not bottomed on violations of federal

law. Accordingly, it held that *Young* did not permit enforcement.[5]

SUMMARY OF THE ARGUMENT

Our Federalism respects the fundamental sovereignty of the States and precludes federal-court jurisdiction over States absent clear and unambiguous consent. The *Ex parte Young* fiction—which deems injunctive suits against state officers not to be against the State—is a narrow exception to that Eleventh Amendment prohibition. Justified by the Supremacy Clause, *Ex parte Young* allows federal jurisdiction only for the limited purpose of remedying ongoing violations of federal law.

In this case, the federal district court, which has been supervising the Texas youth Medicaid program since 1996 pursuant to a consent decree, ordered a plan of relief that would extend far beyond anything required by federal law. Authority for such broad relief, Frew urges, can be found in the general equitable powers of a district court to administer a consent decree, powers that have been elaborated upon in the context of civil rights suits against municipalities and private parties.

A suit against a State is different. General equitable powers of a federal court do not trump the Eleventh Amendment. Rather, this suit has proceeded only under the *Ex parte Young* fiction, and the federal court has no jurisdiction under that doctrine beyond remedying ongoing violations of federal law. If federal law does

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5. The Fifth Circuit did not reach the alternative grounds raised on appeal challenging the district court's construction of the consent decree. The state officials advanced in the Fifth Circuit that the district court's enforcement of the decree should be reversed because it modified the decree's terms and held the state officials to requirements not reflected in the decree and never agreed to by the parties. The state officials contended that under a proper reading of the decree, utilizing established rules of construction, there would be no basis to find violations.

not require it, a federal court may not order it.

The fact that state officials agreed to a consent decree does not alter those constraints. Absent an ongoing violation of federal law, the fundamental predicate for the *Ex parte Young* fiction is eliminated, and jurisdiction is lacking.

Were it otherwise, *Ex parte Young* itself could be jeopardized by the serious structural constitutional infirmities that would result. As a basic tenet of separation of powers, state and federal, one administration may not bind the next, one officeholder may not bargain away the constitutional authority of his or her successor; as a concomitant tenet of federalism, federal district courts should not be administering and prescribing the minutiae of day-to-day operations of state programs and agencies. To conclude that a state official, by agreeing to a consent decree, can endow a federal court with perpetual jurisdiction to order equitable remedies directing the operation of the State's youth Medicaid program—irrespective of and far beyond the requirements of federal law—and can divest future state legislatures and executive officials of budget and policymaking authority over that program, would run afoul of both federalism and separation of powers.

Limiting government by consent decree is not, as Frew suggests, detrimental to the interests of States. Settlements will still occur, by private agreements and by consent decrees consistent with federal law, without federal courts needing to be empowered to subvert democratically accountable state legislatures by subjecting States to equitable remedies unmoored from the dictates of federal law. And, since the outer boundary of what a plaintiff could achieve litigating an *Ex parte Young* case to full victory on the merits is delimited already by the mandates of federal law, it would be untenable to say that plaintiffs must be able to get *more* than they could from full victory at trial in order to have an incentive to settle.

Nor is Frew's newest argument—that joining the consent decree

waived Eleventh Amendment immunity altogether, rendering *Ex parte Young* irrelevant—consistent with this Court's jurisprudence. At the outset of this lawsuit, the State of Texas was a party. Texas moved to dismiss based on Eleventh Amendment immunity, and that motion was granted. All that remained was the *Ex parte Young* suit against the state officials, which proceeded to this day.

Texas law makes clear that neither the Commissioner of the Health and Human Services Commission nor the Attorney General has the authority to waive sovereign immunity; only the Texas Legislature can do so. Given that the State had already prevailed on Eleventh Amendment grounds, it renders the *Ex parte Young* fiction a farce to say that the remaining state officials—lacking in any state authority to do so—could undo that dismissal.

Moreover, even if the Attorney General were empowered to waive, nothing he did constituted the clear and unambiguous statement that this Court requires for waivers of Eleventh Amendment immunity. And nowhere in the consent decree is there a provision purporting to waive such immunity.

The Court's recent *Lapides* decision is not to the contrary. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.,* 535 U.S. 613, 622 (2002). *Lapides*, by its terms, was expressly limited to the narrow question of removal of a state-law claim, for "which the State has explicitly waived immunity from state-court proceedings." *Id.*, at 617. At issue here, by contrast, are federal-law claims for which the Texas Legislature has not waived sovereign immunity. And in *Lapides* the Court deemed the State's removal of the case to federal court to be invoking the jurisdiction of that court; here, in contrast, rather than affirmatively acting to get *into* federal court, the State was haled into federal court as a defendant, and the state officials signed the decree in an attempt to get *out* of federal court and end the litigation.

In splitting the atom of sovereignty, the Framers never

envisioned that the federal government would seize the mantle of directly running state agencies. Madison, and Montesquieu before him, did foresee the risk that judges might assume "'legislative and executive powers . . . united in the same person,'" THE FEDERALIST, No. 47, at 338,[6] and the Constitution guards against that peril. Together, federalism and separation of powers ensure that federal courts cannot do what the district court has attempted—to use a consent decree to take over a state program and dictate its daily operation, freed in equity from the constraints of federal law.

ARGUMENT

I. THE *EX PARTE YOUNG* EXCEPTION TO THE ELEVENTH AMENDMENT DOES NOT PERMIT ENFORCEMENT OF CONSENT-DECREE PROVISIONS THAT EXCEED THE REQUIREMENTS OF FEDERAL LAW.

The Eleventh Amendment constrains a federal court's jurisdiction over a suit against an unconsenting State, and the existence of a consent decree does not remove that constitutional limitation on a federal court's equitable powers. The exception to the Eleventh Amendment afforded by *Ex parte Young* permits federal courts to remedy state officials' alleged violations of federal law, but it does not empower courts to impose obligations on States in excess of what federal law requires. Absent an ongoing violation of federal law, a federal court lacks authority to regulate state officials' conduct, and both federalism and separation-of-powers principles preclude the free-ranging enforcement power Frew advocates.

A. The *Ex parte Young* Doctrine Is a Limited Exception to the Sovereign States' Eleventh Amendment Immunity from Suit.

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6. (Benjamin F. Wright ed., 1961) (James Madison) (quoting Montesquieu).

Although the Constitution establishes a national government, it also specifically recognizes the States as sovereigns in their own right. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 (1996). The Constitution assumes the States' "continued existence and active participation in the fundamental processes of governance," and through the grant of only limited and enumerated powers to the branches of the national government "underscores[s] the vital role reserved to the States by constitutional design." *Alden v. Maine*, 527 U.S. 706, 714 (1999).

A fundamental aspect of state sovereignty is immunity from suits by individuals absent the State's express and unequivocal consent. *See*, *e.g.*, *Alden*, 527 U.S., at 712-14; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999). This residuary and inviolable attribute of sovereignty includes a specific immunity from suit in federal court that is confirmed by the Eleventh Amendment. U.S. CONST. amend. XI (withholding the "judicial power" of the federal courts from "any suit in law or equity . . . against one of the United States by Citizens of another State"); *see also Hans v. Louisiana*, 134 U.S. 1 (1890).

Certain limited circumstances exist, however, under which federal courts may exercise jurisdiction over suits alleging that state officials are committing ongoing violations of federal law. Although such official-capacity suits typically are deemed suits against the State barred by the Eleventh Amendment, the Court recognized an exception to this rule in *Ex parte Young*, 209 U.S. 123 (1908), which permits official-capacity suits against state officials to proceed when the suit seeks prospective injunctive or declaratory relief from an ongoing violation of federal law. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *Kentucky v. Graham*, 473 U.S. 159, 166, 167 n.14, 169 n.18 (1985); *Pennhurst State Hosp. v. Halderman*, 465 U.S. 89, 99, 114 n.25 (1984); *Young*, 209 U.S., at 158-60.

Young's exception rests on the notion that state officials' acts in contravention of federal law are *ultra vires* and, therefore, not attributable to the State. 209 U.S., at 159-60. By creating the "fiction" that such suits are not brought against the State and, consequently, do not implicate the Eleventh Amendment, *Young* reconciles state sovereignty with federal-law principles enforceable against States through the Supremacy Clause. *See*, *e.g.*,*Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S., at 104-05.[7]

The justification for *Young*'s exception to the Eleventh Amendment, however, exists only when a plaintiff suing the State alleges ongoing violations of federal law. *See Green*, 474 U.S., at 68. Absent this predicate, the state officials' acts are not *ultra vires* and an official-capacity suit remains a suit against the State that is barred by the Eleventh Amendment. *See Kentucky*, 473 U.S., at 169.

B. The Material Jurisdictional Inquiry for Enforcement of a Consent Decree Is Whether the Motion to Enforce—Not the Underlying Complaint—Identifies an Ongoing Violation of Federal Law.

Frew and the United States erroneously contend that Frew's 1993 complaint in the underlying lawsuit provides jurisdiction for the district court to enforce the consent decree because the complaint initially alleged violations of federal law (*i.e.*, the Medicaid Act.) *See* Pet'r Br. 36-37; U.S. Br. 22-23. An enforcement action, however, "is more than just a continuation or renewal of the [original] suit, and hence requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 378 (1994). Accordingly, the material inquiry is whether the

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7. The Court originally limited the *Young* exception to suits alleging violations of federal constitutional rights, 209 U.S., at 159-60, but later extended it to encompass suits alleging violations of federal statutory law as well. *See Pennhurst*, 465 U.S., at 105-06.

motion to enforce provisions of the decree alleges violations of federal law, not whether Frew's underlying complaint properly invoked *Young* jurisdiction at the time the suit was filed. *See id.*, at 380-81 (evaluating the trial court's "ancillary jurisdiction" by considering the dismissal order and parties' settlement agreement, not the underlying complaint); s*ee also*, *e.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Pennhurst*, 465 U.S. 89 (1984); *Milliken v. Bradley*, 433 U.S. 267 (1977).[8]

Nor, contrary to Frew's and the United States's assertions, does *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 649 (2002), suggest that Frew's 1993 complaint created jurisdiction for the district court to enforce the decree. Pet'r Br. 36; U.S. Br. 22-23. *Verizon* did not involve a consent decree or a settlement agreement. Rather, the Court analyzed whether a federal court could entertain a suit for injunctive relief against state utility commissioners who the plaintiffs alleged were violating federal telecommunications law. 535 U.S. 635 (2002). Because the issue was whether the suit could proceed in the first instance, the Court understandably examined the allegations in the complaint. *Id.*, at 646. In a suit involving enforcement of a consent decree, by contrast, the issue is not the court's jurisdiction at the time the underlying suit was filed, but its ability to enforce provisions of the decree that resolved the suit. Thus, the motion to enforce, not the complaint, provides the benchmark against which jurisdiction must be measured.

The United States also places substantial reliance on *Gunter v.*

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8. Frew misplaces reliance on *Suter v. Artist M.*, 503 U.S. 347 (1992), in suggesting that the Court determines jurisdiction over consent decrees by reference to allegations in a complaint. Pet'r Br. 37. In *Suter*, however, the Court did not consider an Eleventh Amendment question, and, in any event, nothing in *Suter* contradicts the jurisdictional principles reflected in the Court's subsequent opinion in *Kokkonen*. *See* 511 U.S., at 378, 380-81.

Atlantic Coast R.R., 200 U.S. 273 (1906), for the proposition that "the Eleventh Amendment has no application to an ancillary proceeding to enforce a judgment against a State, as long as the Court legitimately acquired jurisdiction over the State in the original proceeding . . . ." U.S. Br., at 7. But *Gunter* was a case that was fully adjudicated on the merits. 200 U.S., at 278-79. The trial court found and enjoined an ongoing violation of federal law, and, years later, this Court ruled, the trial court retained jurisdiction *to prevent that violation of federal law*. *Id.*, at 292. Thus, contrary to the United States's argument, *Gunter* is entirely consistent with the State's argument here that federal jurisdiction exists only to prevent ongoing violations of federal law.

As with any other jurisdictional constraint, the Eleventh Amendment's limitation of a federal court's equitable powers endures throughout a federal-court action. *Cf.*, *e.g.*, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (observing, regarding the jurisdictional constraint of mootness, the requirement that jurisdiction exist at all stages of a case). The mere filing of a complaint that includes *Young* allegations does not perpetuate federal jurisdiction for all time and all purposes. Instead, when plaintiffs ask a federal court to impose obligations on state officials—here through Frew's motion to enforce the consent decree—a federal court must determine whether the specific request implicates an ongoing violation of federal law. If not, *Young* does not provide jurisdiction for an enforcement action.[9]

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9. Although one of the questions presented, as framed by Frew, asks whether decree enforcement depends on a "violation of a federal right remediable under §1983," Pet'r Br. i., Frew does not identify a single decree provision for which the court of appeals found an ongoing violation of federal law but denied enforcement because a federal "right" was lacking. In fact, the court of appeals examined whether Frew's enforcement action alleged violations of federal law; and, because it did not, the court determined that *Young* jurisdiction was lacking.

Because EPSDT programs are creatures of both state and federal law, an alleged violation of a program provision may not constitute a violation of federal law. All aspects of the EPSDT program not required by federal law are matters of state law and state policy—left to the State's discretion in formulating its plan for submission to the Secretary of Health and Human Services, in implementing management policies, and in navigating the legislative budget process. *See* 42 U.S.C. §1396a(a) & (b); *see*

The material issue is not the enforceability of violations of federal law as opposed to violations of federal rights, as the AARP *amici* erroneously suggest, *see* AARP Br. 24, but whether a court may order broad equitable remedies unconnected to an ongoing violation of federal law. Although the Fifth Circuit referenced established standards for determining if a federal statute confers a "federal right," those standards merely ensure the existence of a "binding obligation" intended to benefit the plaintiff. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 510-11 (1990); *see also Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). As such, federal-right analysis mirrors traditional standing requirements applicable in any suit. *Compare Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (quoting 42 U.S.C. §1983) (rejecting the notion that a federal right exists when a plaintiff "falls within the general zone of interest that the statute is intended to protect" because "broad[] or vague[] 'benefits' or 'interests'" are not enforceable federal rights), *with Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (explaining that a party establishes standing by showing "an invasion of a legally protected interest that is concrete and particularized and actual and imminent"). Moreover, federal-right and *Young* analysis overlap to the extent both focus on the dictates of federal law. Just as 42 U.S.C. §1983 "provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States," *Gonzaga*, 536 U.S., at 283 (quoting 42 U.S.C. §1983), *Young* permits a federal court to exercise jurisdiction only to remedy federal-law violations. *Green*, 474 U.S., at 68. The Fifth Circuit never indicated, however, that there were provisions of the decree required by federal law that could not be enforced because they did not additionally implicate federal "rights."

also, *e.g.*, *Alexander v. Choate*, 469 U.S. 287, 307 (1985) (noting "the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid"). Accordingly, Frew's attempt to enforce consent-decree provisions not required by federal law would require a federal court to second-guess state decisions effected through state statutes, regulations, and executive policies. Because the Eleventh Amendment precludes such use of federal judicial power, *see Pennhurst*, 465 U.S., at 106, the Fifth Circuit correctly held that the district court lacked jurisdiction to entertain Frew's enforcement claims.[10]

C. A Consent Decree Does Not Expand the *Young* Exception to Eleventh Amendment Immunity.

Although a federal court has inherent equitable power to issue injunctive relief and "to manage its proceedings, vindicate its authority, and effectuate its decrees," *Kokkonen*, 511 U.S., at 380-

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10. Frew's *amici* attack the court of appeals's judgment by challenging Fifth Circuit precedent distinguishing a district court's power to enter a decree from its power to enforce a decree. *See* U.S. Br. 9; AARP Br. 13 (criticizing *Lelsz v. Kavanagh*, 807 F.2d 1243 (CA5 1987), and *Saahir v. Estelle*, 47 F.3d 758 (CA5 1995)), which distinguished the decree-entry standards suggested in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), from enforcement standards in a *Young* suit). In this case, however, the court of appeals did not invoke any distinction between entry and enforcement power. Rather, the court focused on the extent to which the Eleventh Amendment constrains efforts to enforce a decree against state officials through a *Young* suit. Thus, this Court need not decide whether different standards govern entry and enforcement of consent decrees—either in general or in the context of a suit against a State—because Frew's suit implicates only the constitutional limitations on a federal court's enforcement power when a plaintiff seeks to impose obligations on a State that exceed requirements under federal law.

81, that power does not supersede the constitutional constraints on jurisdiction imposed by the Eleventh Amendment.[11] Accordingly, the Court should reject Frew's attempt to transform a court's equitable powers into a license to enforce all consent-decree provisions against a State—even when those provisions impose obligations that exceed federal-law requirements and, therefore, lie beyond a federal court's limited jurisdiction under *Ex parte Young*. *Cf. Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 398-99 (1982) (recognizing that "fundamental limitations on the remedial powers of federal courts" permit the exercise of such powers "only on the basis of a violation of the law" with remedies that "extend no farther than required by the nature and the extent of that violation").

Frew erroneously proposes that litigants' agreement to a settlement by court order obviates the need for further consideration of Eleventh Amendment constraints on an enforcement action against a State, provided that: (1) the underlying settlement resolves a dispute over which the court had subject-matter jurisdiction; (2) the enforcement action requests relief in the "general scope" of the original allegations; and (3) enforcement promotes the "objectives" of the federal law on which the underlying suit was based. *See* Pet'r Br. 42-43. Such loose criteria ignore the narrow justification for a *Young* suit, which creates an exception to the Eleventh Amendment for the sole purpose of vindicating supreme federal law. *See supra* Part I.A.

By making the terms of the parties' settlement agreement

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11. For this reason, the United States's reliance on *Kokkonen*'s discussion of enforcing preexisting court orders, U.S. Br., at 17 (citing *Kokkonen*, 511 U.S., at 381), is unpersuasive; *Kokkonen* was discussing ancillary jurisdiction over court orders generally, not injunctive orders addressed to sovereign States, for which jurisdiction depends on continued compliance with *Ex parte Young*.

dispositive of the court's jurisdiction, Frew's contract rationale is not susceptible to objective limitations. *Cf. Jenkins*, 515 U.S., at 98-99 (noting district court's limitless authority and "numerous policy choices" when it moved beyond curing constitutional violations) (quotation and citation omitted). The Court should reject Frew's proposed approach because a federal court is "more than a recorder of contracts from whom parties can purchase injunctions." *Firefighters*, 478 U.S., at 525 (citation and quotation omitted). Although a consent decree has some attributes of a contract, *see*, *e.g.*, *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975), it is nonetheless a judgment predicated on the Article III power of the federal court. *See*, *e.g.*, *Pope v. United States*, 323 U.S. 1, 12 (1944); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). And, when a decree settles a *Young* suit against state officials, the federal court's Article III power—and, necessarily, its enforcement power—cannot exceed the jurisdictional constraints of the Eleventh Amendment or the limited exception to state immunity that *Young* affords.

Frew's contract-based enforcement theory also ignores that a federal court's power to adopt a consent decree does not derive from the parties' consent but "comes only from the statute which the decree is intended to enforce." *Ry. Employees v. Wright*, 364 U.S. 642, 651 (1961). In *Wright*, for example, employees sued under a provision of the Railway Labor Act prohibiting discrimination against non-union workers, and the suit resulted in a consent decree forbidding such discrimination. When Congress subsequently amended the Act to permit union shops, a union moved to modify the decree to reflect the change in federal law. Although lower courts reasoned that the agreement was enforceable because non-union shops remained legal, the Court held that failure to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights." *Id.*, at 648. The parties' agreement to the decree did not suffice because

"it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us . . . . The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.*, at 651-52; *see also Firefighters Local Union Number 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984).

Frew's theory that a federal court should have enforcement jurisdiction to prevent state officials from breaking a contractual commitment depends on an unsupportable contractual theory of federal judicial power.[12] A district court's authority to modify a decree "cannot be resolved solely by reference to the terms of the decree and notions of equity." *Id.* Moreover, enforcement of a decree entered in a *Young* suit should not be undertaken lightly because it entangles an arm of the national government in another sovereign's governance by requiring continuing supervision by a federal court. *See infra* Part I.D; *cf. Jenkins*, 515 U.S., at 98 (noting the "federalism concerns that are implicated when a federal court issues a remedial order against a State"); *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976) (same). The affront is most severe when enforcement actions coerce state officials into assuming obligations not required by federal law, as such obligations interfere with a State's authority to "order the processes of its own governance" and

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12. Frew also hints at some type of estoppel theory but has never identified, much less satisfied, the elements of estoppel, which include affirmative misconduct and detrimental reliance. *See*, *e.g.*, *Heckler v. Cmty. Health Servs. of Crawford County*, 467 U.S. 51, 67 (1984); *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 309 (Tex. 1936). Moreover, estoppel arguments do not apply to sovereign States. *See City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970); *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 419 (1990) (noting "[f]rom our earliest cases, we have recognized that equitable estoppel will not lie against the government"); *see also Heckler*, 467 U.S., at 60.

offend the States' "inviolable sovereignty." *Alden*, 527 U.S., at 752.[13]

Finally, *Firefighters v. City of Cleveland*, on which Frew heavily relies, does not support her contract-based theory of enforcement or the district court's exercise of enforcement powers in this case.[14] *Firefighters* was not a *Young* suit seeking entry,

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13. Frew contends that the district court should have the power to enforce the decree provisions at issue to preserve "judicial integrity." Pet'r Br. 16. But when no constitutional or federal statutory violation is alleged, judicial integrity is not impugned. Nor, as Frew's *amici*'s erroneously contend, do alleged violations of a decree equate with violations of "federal law" when the terms of the decree are not required by federal law. If that view prevailed, a federal court could invest itself with unlimited jurisdiction simply by entering a broad decree, rendering irrelevant the dictates of federal constitutional and statutory law as well as *Young*'s constraints on federal-court jurisdiction over a sovereign State.

Moreover, while the Court has utilized *Young* to enforce the federal Constitution, *see* 209 U.S., at 159-60, and federal statutory law, *see Pennhurst*, 465 U.S., at 105-06, *Young* has not served as a vehicle for vindicating court orders generally, and the Court should decline Frew's invitation to expand *Young* to permit enforcement of consent decrees against States that do not implicate violations of federal law. Federal decrees were never conceived as permanent displacements of state and local administration of programs. *See*, *e.g.*, *Bd. of Educ. of Okla. City Pub. Sch.. v. Dowell*, 498 U.S. 237, 247 (1991) ("[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination"). Instead, the overarching goal of a federal decree should be the "eventual restoration" of state control. *Jenkins*, 515 U.S., at 88. Limiting enforcement actions to violations of federal law ensures that federal courts will not retain unwarranted control of state programs that should be administered instead by state officials.

14. To decide that it had jurisdiction to enforce the decree violations it identified, the district court first concluded that its original entry of the decree was proper under *Firefighters*, Pet. App. 247a., then reasoned that,

much less enforcement, of a consent decree imposing state obligations in excess of federal law.[15] Accordingly, the Court had no occasion to consider the permissible parameters of an enforcement action in a *Young* suit. Instead, *Firefighters* was a statutory-construction case that addressed whether a consent decree in a Title VII suit against a city was an "order of the court" that, under that statute's terms, could not provide relief for individuals who were not the actual victims of a defendant's discriminatory practices. 478 U.S., at 514 & n.5, 515. The Court reasoned that the decree did not fall under Title VII's statutory prohibition because Congress did not intend to restrict employers from entering into voluntary agreements to resolve Title VII disputes. *Id.*, at 521-24.[16]

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because entry was proper, broad enforcement powers necessarily followed. Pet. App. 260a.

15. Because *Firefighters* did not involve an enforcement action, or a suit against a State, the Court's statement in *dicta* that "a federal court is not necessarily barred from *entering* a consent decree merely because the decree provides broader relief than the Court could have awarded after a trial," *Firefighters*, 478 U.S., at 525 (emphasis added), is of little service to Frew, who seeks to *enforce*—against a State—provisions of a consent decree that exceed federal-law requirements.

16. Although the United States now argues that a "court has inherent authority to enforce a valid decree," U.S. Br. 22, and that a consent decree that satisfies the *Firefighter* factors may provide broader relief than that available in a litigated judgment, U.S. Br. 15, that position directly contradicts the United States's position in *Firefighters*. Consistent with Respondents' arguments against Frew's enforcement attempt, the United States contended in *Firefighters* that a district court's remedial authority to enter a consent decree extends only as far as necessary to remedy a violation of federal law and that the *Firefighters* decree was void because the district court would have lacked the power to order such a judicial decree had the matter gone to trial. *See* U.S. Br., *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 1985 WL 670128, at *22 (Jul. 2, 1986).

Frew and her *amici* also misplace reliance on the Court's statement in *Rufo v. Inmates of Suffolk County Jail* that a court may enter a consent decree in which the parties undertook "to do more than the Constitution requires . . . but also more than what a court would have ordered absent the settlement." 502 U.S. 367, 389 (1992); *see* Pet'r Br 38. *Rufo* concerned the proper standard for *modification* of consent decrees in institutional reform litigation—not jurisdiction to enforce such decrees. Moreover, like *Firefighters*, *Rufo* did not address at all the limitations imposed by the Eleventh Amendment and the *Ex parte Young* doctrine.

In other decisions, the Court has recognized limitations on federal courts' remedial authority to enter consent decrees that result in federal oversight of state and local governments. In *Milliken v. Bradley*, for example, the Court recognized three guiding principles for a federal court's exercise of its remedial authority: (1) the remedy must be defined by the nature and scope of the federal-law violation; (2) the decree must be remedial in nature; and (3) the decree "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." 433 U.S., at 280-81; *accord Jenkins,* 515 U.S., at 88.[17] In a case like Frew's, in which a consent decree against state officials contains no admission or adjudication of liability under federal law, the district court's power should remain directly tied to alleged federal-law violations to ensure that the decree is truly remedial in nature and that it respects the State's authority to manage its own governmental affairs. *Cf. Taylor v. Freeman*, 34 F.3d 266, 269 (CA4 1994) (explaining that far greater

17. Moreover, the Framers did not intend Article III to imbue federal courts with the limitless equitable power envisioned by Frew. *See Jenkins*, 515 U.S., at 126-27 (Thomas, J., concurring) (concluding, in reviewing Federalist and Anti-Federalist exchanges about the scope of Article III equity power, that "the drafters and ratifiers of the Constitution approved the more limited construction offered in response").

judicial caution is necessary when ordering injunctive relief against state officers prior to an adjudication on the merits).

D. Eroding the Federal-Law Basis for *Young* Would Raise Serious Federalism and Separation-of-Powers Concerns.

As Justice Thomas has observed, "[t]wo clear restraints on the use of the equity power—federalism and the separation of powers—derive from the very form of our Government. Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States." *Jenkins*, 515 U.S., at 131 (Thomas, J., concurring). Extending federal court jurisdiction beyond the constraints of *Young*, and allowing equitable orders against States to do far more than remedying ongoing violations of federal law, would go a long way toward making "the Eleventh Amendment, and not *Ex parte Young*, . . . the legal fiction." *Verizon*, 535 U.S., at 649 (Kennedy, J., concurring).

1. The exercise of the federal judicial power under *Young* should respect the separation of powers of state governments.

To ensure that the doctrine of sovereign immunity remains meaningful, *Young* should not be expanded to permit a federal court's enforcement jurisdiction to ignore the distinct legislative and executive roles assigned by a State's constitution, as the district court did in this case. *Cf. Alden*, 527 U.S., at 751 (counseling against federal assertions of authority that blur the "branches of the state governments, displacing state decisions that go to the heart of representative government") (quotation and citation omitted); *see also Jenkins*, 515 U.S., at 88 (in devising remedial relief, courts must "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution") (citations and quotations omitted).

Moreover, serious separation-of-powers concerns arise

when one state officeholder is empowered through a federal district court to bind his or her successors and to bargain away their constitutional authority.[18] As Judge Easterbrook explained in his plurality opinion for the en banc Seventh Circuit:

> "'Chicago' did not reach a settlement with the plaintiffs. . . . Negotiations were conducted on Chicago's behalf by its corporation counsel, who we may suppose acted with the approval of [the mayor]. Although the decree purports to last for all time . . . democracy does not permit public officials to bind the polity forever. What one City Council enacts, another may repeal; what one mayor decrees during his four-year term, another may revoke. Today's lawmakers have just as much power to set public policy as did their predecessors. 'Chicago' speaks through its elected representatives, and the people are free to upset even the most enlightened policies of earlier times. The current mayor wants to be free of his predecessor's commitment, concluding that more flexibility over budgets will promote the public welfare. People of good will could be on either side of this disagreement; each mayor may have correctly perceived the needs of the moment.
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> "Governments are in this respect unlike corporations or other contracting parties. A corporate board of directors may enter into commitments that continue after new directors take office; a legislature may not. True, governments may form contracts (for example, to build a new road or repay a loan) and must keep these

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18. *See* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295 (1987) (explaining that consent decrees that deny future officeholders their constitutionally vested policymaking authority enable officials to sidestep structural limitations on their own authority).

> commitments by virtue of the contract clause of the Constitution, Art. I, §10, cl. 1. See *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). But temporary officeholders may not contract away the basic powers of government to enact laws—or in this case to adopt budgets—in the same way natural persons may make enduring promises about their own future behavior. *Wilbur v. United States,* 281 U.S. 206, 217 (1930); *Stone v. Mississippi,* 101 U.S. 814, 817-18 (1879); *Charles River Bridge Co. v. Warren Bridge Co.,* 36 U.S. (11 Pet.) 420 (1837). Why then should things differ if the parties choose not the device of a seal (or even of a statute) but the imprimatur of a district judge?" *Evans v. City of Chicago*, 10 F.3d 474, 478 (CA7 1993) (en banc) (plurality op.).

Not only would expanding *Young* beyond federal-law violations improperly allow one officeholder to bind the next, it would allow state executive officers unconstitutional latitude to bind their legislatures. "A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds to the desegregation plan at the expense of other citizens, other government programs, and other institutions not represented in court." *Jenkins*, 515 U.S., at 131 (Thomas, J., concurring).

The Texas Constitution does not extend legislative powers to executive officials. *See* TEX. CONST. art. II, §1 ("no person" of one of the "three distinct departments" "shall exercise any power properly attached to either of the others"). Yet the district court here sought to enforce the consent decree—without the justification of any ongoing violations of federal law—in a manner that would enshrine in perpetuity an obligation to expend considerable resources on endeavors not required by federal law and not tied to

the policymaking choices of the Texas Legislature.[19]

Respect for the structural limitations on state officials' authority, and their role in preserving the character of a republican form of government, is particularly important when resolving litigation by consent decree. Institutional reform litigation has been known to foster friendly adversaries:

> "There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation, or other policy goal for the institution. An adverse decree that would require additional spending is also a weapon used by officials to augment their budget. . . . Whether the defendants' friendly view of the suit derives from policy preferences or budgetary aspirations, the decree becomes a shortcut around political constraints." David L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265, 1294 (footnote omitted); *see also Milliken*, 433 U.S., at 293 (Powell, J., concurring) (explaining that parties to a consent decree are known to have "joined forces apparently for the purpose of extracting funds from the state treasury").

Because consent decrees can be used to evade the political power of other branches and levels of government, a federal court

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19. *See*, *e.g.*, Audio tape: Special Joint Meeting of the Texas House of Representatives Committee on Public Health and Appropriations Health and Human Services Subcommittee (Sept. 21, 2000) (on file with Texas House of Representatives Media Office) (comment by Representative Harvey Hilderbran that district court's order requires diversion of financial resources from EPSDT program to satisfy data reporting requirements of decree that go beyond the federal reporting system).

must exercise its powers in a way that respects the federalist structure of the Constitution.[20] Otherwise, the federal judicial power would impermissibly "deprive the legislature of the power of judging what the honor and safety of the state may require," which is an offense to sovereignty "attended with greater evils than such failure can cause." *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

2. Maintaining *Young*'s constraints ensures that federal courts operate within the bounds of federalism and separation of powers.

In our federal system, federal courts should not be making fundamentally legislative and executive decisions regarding the priorities of a State and its agencies by compelling program design, allocating the State's limited resources, or determining how to deliver public services. When a federal court does so, "[t]he substitution of government by the federal judiciary for local self-government involves dangerous disproportionality" inconsistent with the distribution of national powers. Robert Nagel, *Separation*

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20. "[T]he court must ensure that there is a substantial federal claim, not only when the decree is entered but also when it is enforced, and that the obligations imposed by the decree rest on this rule of federal law rather than the bare consent of the officeholder. When making these inquiries, courts are bound by principles of federalism (and by the fundamental differences between judicial and political branches of government) to preserve the maximum leeway for democratic governance." *Evans*, 10 F.3d , at 479 (plurality op.); *see also Washington v. Penwell*, 700 F.2d 570, 573 (CA9 1993) ([setting aside] consent decree because state officials lacked authority under Oregon's Constitution to commit to the decree's funding for prison legal services because that was a legislative decision); *Overton v. City of Austin*, 748 F.2d 941, 956-57 (CA5 1984) (affirming district court's refusal to adopt consent decree in which city council agreed to change from an at-large to a single-member district system when state law required a popular vote for such a change, explaining that parties' consent did not supply a sufficient basis).

of Powers and the Scope of Federal Equitable Remedies, 30 STAN. L. REV. 661, 664 (1978).

These limitations derive not only from federalism, but also from federal separation-of-powers principles:

> "The separation of powers imposes additional restraints on the judiciary's exercise of its remedial powers. To be sure, this is not a case of one branch of Government encroaching on the prerogatives of another, but rather of the power of the Federal Government over the States. Nonetheless, what the federal courts cannot do at the federal level they cannot do against the States; in either case, Article III courts are constrained by the inherent constitutional limitations on their powers." *Jenkins*, 515 U.S., at 132-33 (Thomas, J., concurring); *see also id.*, at 113 (O'Connor, J., concurring).

The exercise of judicial power involves adjudicating controversies. By contrast, judicial decrees dictating budgeting, staffing, data collection, recruitment, administrative oversight, and monitoring involve decidedly legislative or executive, rather than judicial, powers. It is the fundamentally political nature of these types of decisions that distinguishes them from judicial determinations. If federal courts venture into political decisions that are the purview of state governments, "they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise." *Jenkins*, 515 U.S., at 133 (Thomas, J., concurring).[21]

That lack of expertise is hardly in doubt. As the court of appeals correctly noted, federal courts are simply not equipped to

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21. Indeed, this specter is a far greater threat to the integrity of the court, U.S. Br., 5, than is maintain the constitution limits on the court's authority over sovereign states.

administer an indigent youth health services program.[22] *See* Pet. App. 4a. "Courts . . . are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills." *Jenkins*, 515 U.S., at 112 (O'Connor, J., concurring). Courts lack the capabilities of state government to develop and deliver social services programs. State governments not only properly bear the responsibility for such programs, but they are better able to make the day-to-day policy, program, and funding choices necessary to deliver social services. *See*, *e.g.*, *Jenkins*, 515 U.S., at 132 (Thomas, J., concurring) ("Federal courts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies.").

As this Court has noted with respect to federal prison injunctions, in recent years, federal courts have

> "become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are

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22. Indeed, Congress's design for the EPSDT program assumed that the States and the U.S. Secretary of Health and Human Services had the appropriate capacity. Congress requires each State to develop a Medicaid plan, which must be approved by the Secretary prior to implementation. *See* 42 U.S.C. §1396a(b). In addition, Congress established remedial mechanisms to address any shortcomings of States. The Secretary may curtail or limit federal payments to States that do not substantially comply with federal Medicaid requirements. *See* 42 U.S.C. §1396c. Congress also mandated a hearing procedure for recipients. 42 U.S.C. §1396a(a)(3); 42 C.F.R. §431.200 *et seq.*; *see also* 1 TEX. ADMIN. CODE §357.1-.29. Under the district court's interpretation, however, a consent decree overseen by a federal court will be perpetually substituted for Congress's planned remedial scheme.

> better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell v. Wolfish,* 441 U.S. 520, 562 (1979).

The institutional inability of federal courts to shoulder such tasks is accompanied by a decided lack of political accountability, leaving federal courts without the guidance of the state electorate's mandate or the State's fiscal priorities. Any presumption that federal courts should make public policy choices, allocate financial resources, and set effective administrative policy is at odds with the adjudicatory nature of the judicial power. "There simply are certain things that courts, in order to remain courts, cannot and should not do." *Jenkins*, 515 U.S., at 132 (Thomas, J., concurring); *see also id.*, at 113 (O'Connor, J., concurring) (expressly agreeing with Justice Thomas's separation-of-powers argument).

E. Consent Decrees Will Not Lose Their Utility in the Absence of the Enforcement Power Advocated by Frew.

Allowing federal courts to exercise their equitable powers as broadly as Frew desires would permit federal courts to escape their ordinary constraints, and, in the process, may actually reduce the incentives for settlement by consent decree. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 336 (1988) ("Any consent decree model that gives the courts an overly active role will unnecessarily inhibit parties from settling by consent decree."). Frew complains that there would be little value to a decree that is limited to federal law under *Young*. Pet'r Br. 42. Yet compliance with federal law is ostensibly the precise objective of her lawsuit; accomplishing that end should at minimum be a satisfactory result.

In any event, incentives for consent decrees will remain even if they are subject to the limitations imposed by the Constitution. They will remain an exit strategy for parties wishing to avoid binding or adverse rulings. *See*, *e.g.*, *Rufo*, 502 U.S., at 383 (explaining that easing the standard for modification of consent decrees would not deter consent decrees because parties will still prefer to avoid trial and a potential loss on the merits).

> "Recognizing that a substantial federal claim must undergird a consent decree does not make plaintiffs less willing to settle: the decree still provides relief, which may be tailored more closely to the parties' circumstances than a remedy of the judge's devising could be. Plaintiffs' alternative remains a trial, at which they might lose everything or obtain less suitable relief. From defendants' perspective . . . [K]nowledge that a change in the course of judicial decisions permits modification or withdrawal of the decree may make a responsible public official more willing to consent to relief based on the state of the law at the time." *Evans*, 10 F.3d, at 482 (plurality op.).

Frew helpfully suggests that maintaining the existing limits on *Ex parte Young* suits may ultimately be detrimental to the interests of the States. The State of Texas and the *amici* States disagree. The States will retain ample ability to settle litigation without ceding to federal courts the authority to run state agencies unrestrained by the requirements of federal law.[23] Moreover, since the maximum relief plaintiffs could hope for at trial would be a prospective injunction against ongoing violations of federal law, *Green*, 474 U.S., at 68, it would a perverse incentive indeed to offer

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23. Of course, parties wishing to escape the strictures of the Constitution on a federal court's remedial authority can always settle a case on their own terms and file a stipulation of dismissal. *See* FED. R. CIV. P. 41(a)(1).

greater relief from settlement than full victory on the merits.[24]

Frew's real complaint is that limiting the federal judicial power to remedying violations of federal law may impose a litigation burden on plaintiffs because they will have to demonstrate that a decree violation constitutes a federal-law violation in order to obtain enforcement. Pet'r Br. 41-42. Such a jurisdictional showing is no different from the many jurisdictional disputes parties litigate in district courts. Moreover, the requirement does not necessitate a trial on the merits, as Frew claims, Pet'r Br. 41, and in any event, plaintiffs must always demonstrate violations before a federal court orders compliance. *See*, *e.g.*, 1.SR-5.SR (transcript of enforcement hearing).

And any fear that Medicaid recipients will be left without remedies if federal courts cannot enforce consent decrees as broadly as Frew hopes is unwarranted. The United States is able to ensure the States' compliance with federal Medicaid law in at least two ways. If not satisfied with a State's performance of its Medicaid obligations, it can sue that State. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965). In addition, Congress has charged the Secretary of Health and Human Services with monitoring each participating State's performance of its Medicaid plan, and extended the Secretary the power to enforce program requirements by terminating or limiting the payment of federal funds. *See* 42 U.S.C. §1396c. And there is a state administrative hearing process for individuals to complain about services. *See* 42 U.S.C. §1396a(a)(3); 42 C.F.R. §431.200 *et seq.*; 1 TEX. ADMIN. CODE §357.1-.29. The ability of the United States to file suit, of the

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24. By analogy, were a plaintiff auto-accident victim to sue a defendant for $100,000, no one would maintain that the defendant would need to be able to offer $200,000 in settlement in order to provide sufficient incentive. Typically, settlements are for less than full recovery, not more.

Secretary to withhold funds, of claimants to request state hearings, and of litigants to proceed under *Young*—along with the good faith efforts of the States—together ensure that States will continue to uphold federal law.

Ultimately, the only settlements likely to be seriously inhibited are those in which state officials choose to bargain away matters left to the State's discretion through its republican form of government, rather than face the consequence of litigation. Curtailing such settlements is not regrettable. The constitutional considerations that preclude the enforcement of the alleged decree violations at issue in this case far outweigh any possible deterrence to the frequency of consent decrees. "[P]reserving democratic governance, separating the judicial and political spheres, [and] respecting state autonomy in the absence of a federal rule" all take priority over any preference to assign institutional reform of state programs to federal courts. *Evans*, 10 F.3d, at 482 (plurality op.).

II. THE STATE DOES NOT CONSENT TO SUIT IN FEDERAL COURT WHEN STATE OFFICERS AGREE TO SETTLE AN *EX PARTE YOUNG* CASE THROUGH A CONSENT DECREE.

Perhaps realizing that her expansive view of the district court's enforcement jurisdiction would not carry the day, Frew incorrectly asserted for the first time after briefing in the Fifth Circuit that the State of Texas waived its Eleventh Amendment immunity through a particular paragraph in the consent decree. She now advances a different argument—that the state officials' decision overall to settle the case by consent decree waived the protections of the Eleventh Amendment. *See* Pet'r Br. 26. The Court should not consider these belated arguments. And, if it does, Frew's arguments must fail for several reasons.

Frew's contention cannot survive the fact that the State invoked the protections of the Eleventh Amendment early in the case and was dismissed on those grounds. In addition, the state officials in

this *Ex parte Young* suit did not constitute a clear and voluntary invocation of the federal court's jurisdiction on behalf of the State. And, the language of the consent decree, to which the State was not a party, falls far short of manifesting a clear and unequivocal intent by the State to waive its Eleventh Amendment immunity. Lastly, no valid waiver of immunity could have occurred because any semblance of an implied consent to suit in federal court was not authorized by Texas law, and a contrary finding would disregard the constitutional principles supporting the political accountability of state governments.

A. Frew Defaulted the Argument That the State of Texas Consented to Suit in Federal Court.

By never raising the issue of waiver of sovereign immunity until after briefing of the case was completed in the court of appeals, Frew waived the issue. She never argued in the district court that the State waived its sovereign immunity and never raised the issue in the court of appeals, until after the close of briefing. It was not until October 2001 that Frew contended that the State somehow waived its sovereign immunity. *See* Appellees' FED. R. APP. P. 28(j) Letter 1 (Oct. 3, 2001) (asserting with one sentence that ¶303 of the consent decree represented an express waiver of Eleventh Amendment immunity). And at no point in the courts below did Frew argue that the state officials' mere agreement to the consent decree waived the State's sovereign immunity, as she contends for the first time in this Court.

Frew had ample opportunity to advance properly a waiver argument in the courts below and failed to do so. As the Fifth Circuit explained, "[w]aiver of sovereign immunity is not a new concept." Pet. App. 39a n.95. Just as with other belated arguments, the courts of appeals have uniformly barred late invocations of alleged waivers of sovereign immunity like that of Frew, even under an "intervening-decision" exception. *See*, *e.g.*, *In re Hood*,

319 F.3d 755, 760 (CA6 2003), *pet. for cert. filed*, 71 U.S.L.W. 3724 (U.S. May 2, 2003) (No. 02-1606); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50-51 (CA1 2002); *Power v. Summers*, 226 F.3d 815, 819 (CA7 2000). This Court should confirm the propriety of these decisions and decline to reach the waiver issue.

Consistent application of the waiver rule to waiver-of-immunity claims enables courts to evaluate the issue with the benefit of argument and record development. Permitting plaintiffs who bring suits against States to hold in reserve contentions that a State has waived immunity from suit would be inconsistent with the courts of appeals' insistence that parties timely raise issues, as well as this Court's practice of declining to consider issues raised for the first time in this Court.[25] To indulge the belated suggestion of waiver invites gamesmanship with this issue and disserves the lower courts' abilities to consider and adjudicate the issue. The Court should hold plaintiffs suing States to the same rules that govern the presentation of all parties' arguments and decline to address Frew's waiver theory in this case.

B. Negotiating and Proposing the Consent Decree Was Not a Clear Waiver by the State of Texas of Its Eleventh Amendment Immunity.

1. A State's Eleventh Amendment immunity from suit is not relinquished except when done so expressly and unequivocally.

To accomplish an effective waiver of immunity from suit in federal court, a State must expressly agree to be sued in federal court or voluntarily invoke the jurisdiction of the federal court. *See* (*Lapides*, 535 U.S., at 622); *Coll. Sav. Bank v. Fla. Prepaid*

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25. *See*, *e.g.*, *Meyer v. Holley*, 123 S.Ct. 824, 832 (2003); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991).

Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-76 (1999). Frew has not suggested that any express waiver occurred in this case. Instead, she advances that the state officials' agreement to the consent decree—to which the State was not a party—invoked the jurisdiction of the federal court on behalf of the State. *See*, *e.g.*, Pet'r Br. 22. By asking the Court to infer the State's consent to suit from the negotiation and proposal of the consent decree by the defendant state officials, Frew in effect seeks a resurrection of the long-repudiated constructive-waiver doctrine. *Cf. Coll. Sav. Bank*, 527 U.S., at 667.

The Court has established the prerequisites for an effective waiver of sovereign immunity. It must be "unequivocal[]" and "express" so as to "leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The Court has also insisted that a State's intent to invoke the federal court's jurisdiction be voluntary, *see Coll. Sav. Bank*, 527 U.S., at 676-77, and possessed of "clarity," *Lapides*, 535 U.S., at 621. In short, the Court has imposed a "stringent" standard for waiver of immunity that requires a State to conclusively register its consent to suit in federal court. *Atascadero*, 473 U.S., at 241. "The whole point of requiring a clear declaration by the State of its waiver is to be certain that the State in fact consents to suit." *Coll. Sav. Bank*, 527 U.S., at 680 (emphasis omitted).

2. A State does not voluntarily invoke the jurisdiction of a federal court when state officials settle an *Ex parte Young* suit in federal court.

a. Entry into a consent decree is not a voluntary invocation of federal court jurisdiction.

Frew erroneously asks the Court to treat the voluntary aspect of settlement agreements as manifesting not only a purpose of avoiding adjudication of a lawsuit, but also an intention to waive

the Eleventh Amendment's limitations on federal-court jurisdiction over the States. Agreement to a consent decree, however, is a distinct and separate decision from waiver of sovereign immunity. The "voluntary" quality of a consent decree relates only to a decision by the parties to give up their "right to litigate the issues involved in the case and thus save themselves the time, expense, and the inevitable risk of litigation." *U.S. v. Armour & Co.*, 402 U.S. 673, 681 (1971). That decision does not demonstrate the purposeful, clear, and unequivocal intent of achieving the very different result of waiving the State's Eleventh Amendment immunity. For example, the settlement agreement did not concede any liability, nor was it a submission of claims to the district court for an adjudication. *See* Lodging, ¶301 (explicitly disclaiming any admission of liability). Instead, it was an effort to end the litigation.

Far from affirmatively invoking the jurisdiction of the federal court, the State asserted its immunity from suit under the Eleventh Amendment immunity early in the litigation, successfully obtaining dismissal of the named state agency defendants. 3.R.818. The suggestion now—nine years after the State's dismissal from the suit—that the State consented to the lawsuit is fatally inconsistent with the State's assertion of its immunity and its dismissal from the suit on that basis. Indeed, by invoking its sovereign immunity, the State expressly disavowed any waiver of its immunity.

Given that the State preserved its immunity by filing a motion to dismiss on Eleventh-Amendment grounds and obtaining such a dismissal, it cannot be said that the State unequivocally expressed a consent to be sued in federal court. Moreover, defensive litigation conduct on behalf of defendant state officials, does not function as consent to suit. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 547 (2002); *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998). The State did not voluntarily initiate this action, voluntarily become a party to this action through intervention, or voluntarily file a claim in this action. *Cf. Clark v. Barnard*, 108

U.S. 436 (1883); *Gardner v. New Jersey*, 329 U.S. 565 (1947). And unlike the situation in *Lapides*, the state agencies and state health officials in this case did not elect a federal forum. Rather, they were brought into federal court involuntarily as defendants. Accordingly, this case does not come within the "general principle" recognized in *Lapides* of voluntary invocation of federal-court jurisdiction.

b. Voluntary consent cannot be given in an *Ex parte Young* case because the State is not a party.

The actions relied upon by Frew to make her case—the general course of conduct by the state official *Young* defendants over a period of years—do not constitute a clear and unequivocal waiver of the *State's* sovereign immunity. Frew's inability to identify a particular point in time at which the purported waiver occurred confirms the indefiniteness and ambiguity of the waiver that she advances. The conduct cited by Frew in this case was not "unequivocal" evidence of consent to suit so as to "leave no room for any other reasonable construction." *Edelman*, 415 U.S., at 673.

Moreover, the States have had no warning that entry into consent decrees in *Ex parte Young* suits could constitute a waiver of immunity. To attribute waiver to unsuspecting States whose state officials have already entered into consent decrees would not comport with the Court's insistence on a knowing waiver of immunity nor the court's customary indulgence of every reasonable presumption against waiver. *See Coll. Sav. Bank*, 527 U.S., at 682; *see also Lapides*, 535 U.S., at 624 (noting Justice Kennedy's observation in *Schacht* that "once the States know or have reason to expect that removal will constitute a waiver," then removal could be regarded as a voluntary invocation of federal jurisdiction); *Schacht*, 524 U.S., at 397 (Kennedy, J., concurring).

c. The language of the decree does not reveal a waiver.

The language of the consent decree fails to evince consent by the State to suit in federal court. The provisions of the decree relied upon by Frew state that "[t]he term 'will' . . . creates . . . mandatory, enforceable obligations," and that "the parties may request relief from [the district court]" if the "Defendants' future activities [do not] comport with the terms and intent of this Decree." Lodging, ¶¶302, 303. By their own terms, these provisions fail to establish a clear and unequivocal intent by the State to waive its immunity. Indeed, they do no more than define a term and acknowledge that the parties "may request relief" from the district court; they do not purport to determine whether that relief will be available, which remains constrained by the limitations of *Ex parte Young*.

Paragraph 303—the sole basis of Frew's belated argument before the court of appeals—reveals no unequivocal expression of waiver. That provision appears in a "miscellaneous" set of provisions at the close of the decree; its acknowledgment that the parties "may request relief from" the federal court does not declare that the State waived its immunity or any other affirmative defense to all types of relief a party might request in the future. Paragraph 303 does not mention sovereign immunity or the Eleventh Amendment, nor are they the subject of any surrounding provisions.

Frew's argument is further undermined by ¶301's statement that "[p]laintiffs do not concede the validity of Defendants' defenses," which implicitly acknowledges that the State preserved defenses notwithstanding agreement to the decree. If ¶302 and ¶303 represented the parties' understanding that the State was waiving its immunity from suit, as Frew advances, there would have been no need to include ¶301 because there would be no immunity defenses at all. Because the meaning of a decree's provisions must be discerned in light of the entire decree, ¶301 reveals the implausibility of Frew's reading of ¶302 and ¶303. At a minimum, the tension between ¶301, ¶302 and ¶303 creates an ambiguity that precludes an inference of waiver. *Coll. Sav. Bank*, 527 U.S., at 682.

3. *Lapides* did not alter the requirements for a State's consent to suit in federal court for federal-law claims.

Lapides's removal holding did not establish a new waiver standard under the Eleventh Amendment. Rather, the Court's analysis rested on the same principles of clear and unequivocal consent that inform all valid waivers of sovereign immunity. Frew incorrectly reads the Court's decision in *Lapides* as a license to imply waivers of sovereign immunity from litigation conduct. The Court, however, expressly limited its waiver-by-removal holding to the narrow "context of state-law claims, in respect to which the State had explicitly waived immunity from state-court proceedings." *Lapides*, 535 U.S., at 617; *id.*, at 617-18 (explaining that Court was not "address[ing] the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court"). Contrary to Frew's suggestion, the Court in no way altered the requirements for a State's consent to suit in federal court for federal-law claims.

Frew's suit does not fit within *Lapides*'s rubric because no removal occurred and because this case does not involve a claim—state or federal—for which the State's "underlying sovereign immunity" has been waived (*i.e.*, by state statute) or abrogated (*i.e.*, by Congress through §5 enforcement powers) in state court.[26] In any event, the only question in *Lapides* was which *forum* could adjudicate the suit in light of Georgia's statutory consent to tort suits in state court *coupled with* Georgia's removal of the suit to federal court. Given that Georgia already waived its underlying sovereign immunity through a statute, the State's

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26. No Texas statute consents to Medicaid suits in state court. And Congress did not validly abrogate the State's sovereign immunity from suit under the Medicaid Act. *See Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147 (1981).]

removal was deemed sufficient to invoke federal jurisdiction and, therefore, waive the *forum* immunity otherwise afforded by the Eleventh Amendment. *See Lapides*, 535 U.S., at 624; *cf. Pennhurst State Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (requiring State's express consent to suit in federal forum regarding claims for which underlying sovereign immunity is waived in state court).

In other words, the States possesses two types of sovereign immunity. First and foremost is the States' constitutional sovereign immunity, which inheres in the Nation's framework and emanates from the States' sovereign status. *Alden*, 527 U.S., at 728-29. Second, included within that sovereign immunity is a specific immunity from suit in a federal forum—which the Eleventh Amendment's text confirms. *Id.*; *see* U.S. CONST. amend. XI. Thus, Eleventh Amendment "forum immunity" is but one aspect of the underlying sovereign immunity that prevents a State from being sued—at all—in any forum.[27] *See Alden*, 527 U.S., at 728-29.

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27. The forum-immunity concept was crystallized in a brief submitted by the United States as *amicus curiae* in support of Petitioner Lapides, which emphasized the limited nature of the waiver that occurred when Georgia removed Lapides's suit:

> Although a State's removal of a case effects a waiver of its immunity from suit in a federal forum, there are significant limits on the scope of that waiver. The Eleventh Amendment incorporates two forms of immunity. A State may choose not to be sued at all, or it may choose to be sued, but only in its own courts. *Pennhurst*, 465 U.S., at 99. A removal of a case to federal court waives only *forum immunity*. By voluntarily and affirmatively selecting a federal forum for litigation of a case, the State consents to have a federal court rather than the state court decide the case. The act of removal, however, cannot be understood to waive any defenses that would have been available to the State in state court. The constitutional right not to be sued at all is just such a defense.

Even if *Lapides* were extended to federal claims for which no consent exists—which the Court should not do—the only waiver would be of forum immunity. Texas's underlying constitutional immunity would remain intact because the Texas Legislature has not consented to Medicaid suits and the State's "constitutional right not to be sued at all," U.S. Br., *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 2001 WL 1643411, at *22 (Dec. 20, 2001) would bar the enforcement action even if forum immunity did not.

D. An Assistant Attorney General's Representation of State Officials in Negotiations and Proposal of a Consent Decree Cannot Be Regarded as the Consent of the Sovereign.

1. The Attorney General for the State of Texas is not authorized to waive the State's immunity from suit in federal court.

Frew erroneously urges the Court to construe the negotiation and proposal of the consent decree as an implied consent by the State to federal court jurisdiction. But the type of constructive or implied consent Frew proposes cannot support a waiver of Eleventh Amendment immunity because: (1) this Court has repudiated the constructive-waiver doctrine, *see Coll. Sav. Bank*, 527 U.S., at 680; and (2) any alleged implied waiver was not authorized under state law. In *Ford Motor Co. v. Department of Treasury*, the Court determined that a state official's ability to consent to suit turned on the "power under state law to do so," and that immunity from suit could not be waived by the litigation conduct of an executive officer who lacked the authority to effectuate such a waiver. 323 U.S. 459, 467 (1945). Although, in *Lapides*, the Court overruled *Ford* in the context of an Attorney General's removal of state-law claims for which the state had consented to suit in state court, the

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U.S. Br., at *22, *Lapides* (No. 01-298)

Court expressly stated that it was overruling *Ford only to the extent* it was inconsistent with *Lapides*'*s* narrow waiver-by-removal rule. 535 U.S., at 622. In this case, *Ford*'s holding remains of vital importance because the state officials involuntarily found themselves in federal court because neither the assistant attorneys general representing the state-official defendants, nor the defendants themselves, are empowered to contract away legislative powers, such as the authority to make policy and budgetary decisions for the State's EPSDT program.

Although, as emphasized by Frew and her *amici*, whether a "particular set of state laws, rules, or activities amounts to a waiver of the State's Eleventh Amendment immunity" is a "question[] of federal law," 535 U.S., at 622-23, the Court has never suggested that state laws and rules should not be consulted in making the determination. Indeed, the Court has explained that the ultimate "federal question can be answered only after considering the provisions of state law." *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 428 n.5 (1997) (cited with approval in *Lapides*, 535 U.S., at 623).

To be sure, the Court in *Lapides* did scale back the reach of *Ford*'s holding that state law defines the limits of state officials' authority to offer consent to suit in federal court. The Court concluded that *Ford* was inconsistent with the principle of voluntary invocation of federal jurisdiction and overruled *Ford* "insofar as it would otherwise apply." *Lapides*, 535 U.S., at 622 (explaining that *Ford* did not apply because the State had "*voluntarily* invoked the jurisdiction of the federal court," and it had not been "*involuntarily* made a defendant in federal court"). *Ford*'s establishment of the limits of state officials' authority, however, retains force in this case because none of the defendants voluntarily came to federal court.

Texas law makes clear that neither the attorney general nor the

defendant state officials can waive the State's immunity. Only the Texas Legislature can waive the State's sovereign immunity.[28] *See*, *e.g.*, *Tex. Nat. Res. Conservation Comm'n v. IT-Davy,* 74 S.W.3d 849, 853 (Tex. 2002); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). Indeed, the Texas Legislature has expressly disclaimed any authority for the Attorney General to waive immunity from suit: "An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." TEX. GOV'T CODE §402.004; *see also League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 840 (CA5 1993) (stating that the Attorney General "cannot bind state officials, his clients, to his own policy preferences").

Despite Texas law establishing that the Texas Attorney General lacks authority to waive the State's Eleventh Amendment immunity, Frew claims that mere empowerment to represent the State in litigation means that the Attorney General enjoys authority to waive the State's immunity. Pet'r Br. 29-30. Frew's argument, however, is directly refuted by *Ford*, which rejected the notion that the powers conferred on a state attorney general "to appear and defend actions brought against the State or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued." 323 U.S., at 468. And *Ford*, for claims where state defendants were involuntarily haled into federal court, remains good law.

Aside from this discredited authority theory, Frew's only other

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28. Frew does not suggest that the state officials had the authority to waive the State's immunity. Nor could she. The defendant officials' authority is limited to "responsibility for ensuring the delivery of state health and human services," TEX. GOV'T CODE §531.002, and "administer[ing] and enforc[ing] the health laws of this state under the board's supervision," TEX. HEALTH & SAFETY CODE §12.021.

alleged source of Attorney General waiver authority is an implied power from the Texas Attorney General's authority "to propose" settlements in litigation. *See* Pet'r Br. 30 & n.18 (quoting *Terrazas v. Ramirez,* 829 S.W.2d 712, 722 (Tex. 1991)). Frew misplaces reliance on *Terrazas*, which was a plurality opinion that merely noted that the Attorney General, in the course of representing state defendants, may "propose a settlement agreement." 829 S.W.2d, at 722. Indeed, the Texas Supreme Court has since confirmed that "the Attorney General can only act within the limits of the Texas Constitutional and statutes, and courts cannot enlarge the Attorney General's powers." *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (citing *Terrazas*, 829 S.W.2d, at 735 (Cornyn, J., concurring)).

Because no properly authorized officer of the State waived the State's immunity to suit in the federal courts—through agreement to the consent decree or any other action—no valid waiver of Texas's Eleventh Amendment immunity occurred.

2. The States' legislatures—not executive or administrative officials—are uniquely equipped to decide whether and where to consent to suit.

The Court should look to *Ford*'s reliance on state law to define the authority to waive a State's immunity—especially when state defendants find themselves involuntarily in federal court—because to ignore state law on this question would divest state legislatures of the ability to manage both the public fisc and public programs providing for the health and welfare of the State. Indeed, ignoring the authority issue would permit a small group of executive officials and their lawyers to bind the State to ongoing multi-million-dollar obligations without any input from the politically responsive and accountable legislative branch.

The decision to consent to suit has traditionally rested with the legislatures of the States. *See*, *e.g.*, *Alden*, 527 U.S., at 757-58. Not surprisingly, States have consistently confirmed their legislatures'

exclusive authority to waive sovereign immunity. *See*, *e.g.*, TENN. CONST. art. I, §17; *Baker v. Ives*, 294 A.2d 290, 298 (Conn. 1972). States have chosen to locate that authority in their legislatures because legislatures are best equipped to determine the circumstances under which a State should consent to suit, given that suits may drain the States of scarce monetary resources and threaten "other important needs and worthwhile ends [that] compete for access to the public fisc." *Alden*, 527, U.S., at 751. Indeed, because "allocation of scarce resources among competing needs and interests lies at the heart of the political process," decisions to surrender the protections of sovereignty likewise "must be reached after deliberation by the political process established by the citizens of the State." *Id.*

The inherent need to allocate responsibilities appropriately between branches of government is particularly compelling in institutional reform litigation. Entering into a consent decree in such cases can reach far beyond the parties to the suit, significantly affecting the State's fisc, available public services, and altering financial burdens on citizens through increased taxes. Assistant attorneys general and state agency officials should not be permitted, by agreement, to usurp the legislature's key policy-making function. *See* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 34 (1987) ("If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds"); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265, 1294-95, 1294-95 (1983) ("Nominal defendants are sometimes happy to be sued and happier still to lose.").

Accordingly, a State should not be deemed to consent to suit unless its legislature has determined that such consent promotes the State's interests and reflects its citizens' will. Inferring consent to

suit from other sources—such as an assistant attorney general's litigation conduct—would impermissibly "deprive the legislature of the power of judging what the honor and safety of the state may require," which is an offense to sovereignty "attended with greater evils than such failure can cause." *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

E. Limiting a Federal Court's Enforcement Authority to Violations of Federal Law Effectuates the Eleventh Amendment's Jurisdictional Constraints on Federal Power and Does Not Promote Gamesmanship or Impugn the Integrity of Federal Courts.

Equating state officials' agreement to a consent decree with a waiver of the State's Eleventh Amendment immunity from suit would not advance the interests that ordinarily motivate recognition of waivers through voluntary invocations of a federal court's jurisdiction. *See Lapides*, 535 U.S., at 614 ("In large part the rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create."). Unlike in *Lapides*, here the circumstances do not support any inference of gamesmanship or forum shopping.

Frew's suit involuntarily haled two sets of state defendants into federal court on federal-law claims. The state-agency defendants invoked Eleventh Amendment immunity and were dismissed from the suit. The state-official defendants also moved to dismiss, but the district court retained jurisdiction over those claims under *Ex parte Young*. Contrary to Frew's assertion, these officials' effort to avoid litigation by settling the case through a consent decree was not an invocation of federal jurisdiction akin to that in *Lapides* (removal), *Gardner* (filing a proof of claim), or *Clark* (intervening). Rather than seeking to get *into* federal court for an adjudication of rights, these state defendants found a way out of defending Frew's

federal lawsuit by entering into an agreed decree. As soon as Frew attempted to enforce decree provisions that exceeded federal law, the state officials objected because an official-capacity suit seeking to impose obligations beyond federal law falls outside the *Young* doctrine and, therefore, is barred by the Eleventh Amendment. *See supra* Part I.A. That objection was an assertion of a proper constitutional defense at the first available opportunity.

Nor, as Frew suggests, does it impugn the integrity of federal courts to respect the constitutional constraints on federal power imposed by the Eleventh Amendment and to deny enforcement of provisions in court-ordered decrees that exceed the requirements of federal law. Federal courts routinely vacate or modify consent decrees that no longer serve the legitimate purpose of vindicating supreme federal law. And, to the extent ongoing violations of federal law remain, *Young* continues to afford jurisdiction to remedy those violations. *Young* does not, however, afford perpetual jurisdiction for federal courts to micromanage state programs that do not contravene federal law.

As a result of the state officials' choice to avoid federal litigation and settle Frew's suit, Frew obtained a decree under which the state officials made strides with the EPSDT program to the significant benefit of the plaintiff class. Those gains are not compromised by recognition that the suit proceeded from the outset under the authority of *Ex parte Young*, and, pursuant to that doctrine, future requests for judicial enforcement of the decree remain dependent on allegations of ongoing violations of federal law.

III. EVEN IF THE COURT DECIDES THAT THE STATE RELINQUISHED ITS ELEVENTH AMENDMENT IMMUNITY, THE STATE RETAINED OTHER INVIOLABLE ATTRIBUTES OF SOVEREIGNTY THAT RESTRICT THE DISTRICT COURT'S ENFORCEMENT POWER.

If the Court decides that the State waived its Eleventh Amendment immunity, the district court nevertheless cannot enforce the decree provisions at issue because the state officials' entry into the consent decree did not relinquish the other inviolable aspects of the State's sovereignty. *See Alden*, 527 U.S., at 715 (recognizing the States' "residuary and inviolable sovereignty"); *see also supra* p. __. Indeed, Frew has advanced only that Eleventh Amendment immunity was surrendered through the consent decree; she has never suggested that all of the attributes of the State's sovereignty were relinquished. *See*, *e.g.*, Pet'r Br. i. As a sovereign—absent the mandate of the Supremacy Clause and an ongoing violation of Federal Law—the State should not be subject to the commands of a federal court regarding policy decisions for a social services program that it has been charged with administering.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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