United States Court of Appeals
for the First Circuit

No. 21-1058

JOHN DOE; CHARLES COE; JANE ROE; DEBORAH A. TAYLOR, as guardian for Scott Stephen Johnstone, on behalf of themselves and all others similarly situated,
Plaintiffs–Appellees,

NEW HAMPSHIRE HOSPITAL ASSOCIATION; ALICE PECK DAY MEMORIAL HOSPITAL; ANDROSCOGGIN VALLEY HOSPITAL; CATHOLIC MEDICAL CENTER; CHESHIRE MEDICAL CENTER; COTTAGE HOSPITAL; ELLIOT HOSPITAL; FRISBIE MEMORIAL HOSPITAL; HCA HEALTH SERVICES OF NEW HAMPSHIRE, (Parkland Medical Center and Portsmouth Regional Hospital); HUGGINS HOSPITAL; LITTLETON HOSPITAL ASSOCIATION, (Littleton Regional Hospital); LRGHEALTHCARE, (Franklin Regional Hospital and Lakes Region General Hospital); MARY HITCHCOCK MEMORIAL HOSPITAL; MONADNOCK COMMUNITY HOSPITAL; NEW LONDON HOSPITAL; SPEARE MEMORIAL HOSPITAL; UPPER CONNECTICUT VALLEY HOSPITAL; VALLEY REGIONAL HOSPITAL; WEEKS MEDICAL CENTER,
Intervenor-Plaintiffs–Appellees,

v.

LORI SHIBINETTE, Commissioner, NH Department of Health and Human Services, official capacity,
Defendant–Appellant,

SOUTHERN NEW HAMPSHIRE MEDICAL CENTER; CONCORD HOSPITAL; ST. JOSEPH'S HOSPITAL, Nashua; MEMORIAL HOSPITAL, North Conway,
Defendants \ Intervenor-Plaintiffs–Appellees,

NEW HAMPSHIRE CIRCUIT COURT DISTRICT DIVISION,
Defendant,

HONORABLE DAVID D. KING,
Third Party Defendant.

On Appeal from the United States District Court
for the District of New Hampshire,
No. 1:18-cv-01039-JD

BRIEF FOR CLASS PLAINTIFFS–APPELLEES

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Class Plaintiffs–Appellees respectfully request oral argument. *See* Local Rule 34.0(a). The Commissioner has raised novel legal theories that are untethered to controlling precedent. Class Plaintiffs believe that oral argument would assist this Court in focusing on the core legal issues at issue in this appeal.

PRELIMINARY STATEMENT

Imagine going to the emergency room seeking mental health care only to be told that you will not be treated by a psychologist or social worker anytime soon, will be placed in a cramped and windowless room, will not be allowed to go outside or leave the hospital, and will not have any opportunity to contest your detention until you are transferred to a mental health facility three or four weeks later. For over six years, hundreds, if not thousands, of people in New Hampshire have endured this experience or ones similar to it. This case is an effort to defend those patients' constitutional rights to contest their involuntary detention.

The Commissioner of the New Hampshire Department of Health and Human Services oversees the involuntary emergency admission of patients to the state mental health services system. But in recent years, she and her predecessors have allowed the system to descend into crisis. Instead of ensuring that people who are involuntarily admitted receive proper care and due process, the Commissioner now relies on hospitals to detain these patients in emergency rooms while they wait for space in specialized mental health facilities to become available. Even though these patients are often detained in emergency rooms for many days or weeks at a time, the

Commissioner refuses to provide them due process, appointed counsel, or any opportunity to contest their detention. The situation that has resulted is cruel, inhumane, and, in the words of New Hampshire Supreme Court Justice James Bassett, "like a Kafka novel."[1]

On November 10, 2018, Plaintiff John Doe brought this lawsuit to enforce Class Plaintiffs' rights to procedural due process under the Fourteenth Amendment. But two and a half years into this case, the Commissioner persists in refusing to provide any due process to patients who are detained in emergency rooms. Instead, she has obstructed this litigation at every turn, including by filing a series of motions to dismiss, each of which the district court has denied. This interlocutory appeal concerns the Commissioner's third motion to dismiss, filed nearly two years after this case began, which asserted that Class Plaintiffs' Fourteenth Amendment claims are barred by the Eleventh Amendment and that Class Plaintiffs lack Article III standing. Both theories are baseless.

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[1] Josie Albertson-Grove, *'Kafkaesque' Emergency Room Boarding Practice for Mental Health Patients Probed in State Supreme Court*, N.H. UNION LEADER (Mar. 26, 2021), https://www.unionleader.com/news/health/kafkaesque-emergency-room-boarding-practice-for-mental-health-patients-probed-in-state-supreme-court/article_7a7df476-c6f2-5b00-9c21-85957c983e27.html.

For over a century, the *Ex parte Young* exception to Eleventh Amendment sovereign immunity has permitted federal courts to order prospective injunctive relief against state officers to remedy ongoing violations of the U.S. Constitution. Class Plaintiffs' claims fall squarely within this exception: They seek a permanent injunction requiring the Commissioner to provide hearings and counsel to patients detained in emergency rooms as required under the Fourteenth Amendment.

Having no basis for asserting sovereign immunity, the Commissioner attempts to rewrite Class Plaintiffs' complaint and inject confusion into a straightforward analysis. She asserts that (1) Class Plaintiffs' claims somehow arise under state law, not the Fourteenth Amendment, (2) other parties are to blame for the crisis occurring in the state mental health services system that she oversees, and (3) the relief sought would interfere with her administration of that system. These assertions have no merit. First, Class Plaintiffs clearly allege violations of the Fourteenth Amendment, which guarantees due process protections for people who are involuntarily detained pursuant to a compulsory mental health admission process. Second, the Commissioner is directly responsible for safeguarding the rights of patients who are detained pursuant to the involuntary

emergency admission process. And third, courts have consistently affirmed injunctive relief that interferes with the administrative status quo and requires state officers to conform their policies to the U.S. Constitution—that is the whole point of the *Ex parte Young* doctrine.

Finally, to establish standing, Class Plaintiffs need only allege an injury in fact that is fairly traceable to the Commissioner's conduct and that is redressable by a favorable order from the district court. Class Plaintiffs have done just that. They allege that the Commissioner herself has directly harmed Class Plaintiffs by refusing to provide them procedural due process. And the district court can remedy that harm by issuing an injunction requiring the Commissioner to provide hearings and counsel to patients detained in emergency rooms.

This Court should affirm.

STATEMENT OF THE ISSUES

I. Whether *Ex parte Young* permits Class Plaintiffs to pursue Fourteenth Amendment claims against the Commissioner where Class Plaintiffs allege that the Commissioner continues to withhold procedural due process from class members involuntarily detained in emergency rooms

and Class Plaintiffs seek an injunction requiring the Commissioner to provide procedural due process to those class members going forward.

II. Whether Class Plaintiffs have standing to pursue their Fourteenth Amendment claims against the Commissioner where the Commissioner is responsible for overseeing the involuntary emergency admission process and refuses to provide any procedural due process to class members who are involuntarily detained in emergency rooms.

STATEMENT OF THE CASE

A. The Commissioner Refuses to Provide Hearings and Appointed Counsel to Patients Involuntarily Detained in Emergency Rooms for Days or Weeks at a Time

Under New Hampshire law, a person who may be experiencing a mental health emergency can be involuntarily admitted to the state mental health services system for evaluation and treatment. *See* RSA 135-C:27–33. Historically, when a physician or nurse practitioner in an emergency room believed that a patient was in need of emergency mental health treatment, the patient was immediately transferred to one of several specialized mental health facilities in New Hampshire known as designated receiving facilities. App. 248–49. The physician or nurse practitioner would initiate the involuntary emergency admission process by completing

a certificate that described the patient's condition and the reasons the medical provider believed that involuntary emergency treatment was necessary. *See* RSA 135-C:28, I. Once the certificate was completed, a law enforcement officer would immediately transport the patient to a receiving facility for further evaluation and, if necessary, appropriate mental health care. RSA 135-C:29, I. At the receiving facility, the patient would be given access to counsel and a probable cause hearing before the New Hampshire Circuit Court within three days to assess whether the patient posed "a likelihood of danger to himself or others." *See* RSA 135-C:27, -C:30; -C:31.

Since at least 2015, however, there has been a statewide shortage of beds at designated receiving facilities. App. 222–23, 242–44. As a result, when hospital personnel complete an involuntary emergency admission certificate, the patient is no longer immediately transferred to a receiving facility and given a hearing. Instead, the Commissioner has responded to this shortage by relying on hospitals to involuntarily detain patients in emergency rooms for extended periods of time while they await transfer to receiving facilities. App. 248. This practice has come to be known as "psychiatric boarding." App. 222, 242. To justify the patients' continued involuntary detention in emergency rooms, the Commissioner has directed

hospitals to renew the patients' involuntary emergency admission certificates every three days—a completely new procedure that is not part of the involuntary emergency admission process outlined in the applicable state law. *Id.*; *see* RSA 135-C:27–33.

As the named plaintiffs' experiences illustrate, individuals are often held for many days or weeks while awaiting transfer to designated receiving facilities. App. 245. For example, Scott Stephen Johnstone was confined in an emergency room for twenty-seven days, and Jane Roe was detained in St. Joseph's Hospital for twenty days. App. 238, 240.

While detained in emergency rooms, these individuals receive no appointed counsel, no probable cause hearing, and no opportunity to contest their detention. App. 222. Making matters worse, the emergency rooms where these patients are held are not designed to support people experiencing mental health crises, and patients are regularly denied the mental health treatment they may need. App. 222–23. In many cases, patients are held in windowless and poorly maintained rooms, deprived of basic necessities, and denied access to the outside world. *See, e.g.*, App. 236, 240. For example, Plaintiff Jane Roe was forced to sleep on a small, four-

foot mattress for an entire week, was not allowed to get fresh air or exercise, and was cut off from using the phone and visits from a priest. App. 238.

B. The Commissioner Has Failed to Rectify the Inhumane Psychiatric Boarding Crisis

This crisis has steadily worsened since 2015. App. 243–44. In the second quarter of 2015, approximately fourteen adults and six children were involuntarily detained in hospital emergency rooms on average each day. App. 243. Shortly before this lawsuit began in November 2018, the number of adults detained in emergency rooms had risen by over 350% to a daily average of fifty adults. *Id.* And just over a month ago, on March 23, 2021, an all-time high of eighty-nine people—including thirty-three children and fifty-six adults—were waiting to be transferred to designated receiving facilities. Fifty-three of those adults were detained in hospital emergency rooms, while the other three were held in correctional facilities.

The Commissioner has failed to fix this problem for years despite repeated efforts by advocates and state-court judges to address the crisis. *See* App. 251–55. In November 2016, Chief Judge Kelly of the New Hampshire Circuit Court documented the cases of three individuals who were involuntarily detained for periods ranging from seventeen to twenty days without any procedural due process. App. 327–29. Judge Kelly noted

that the cases raised "significant statutory and constitutional issues," and stressed the "pressing public interest" in resolving those issues expeditiously. App. 329.

Similarly, in August 2018, the Merrimack County Superior Court held that state law required the Commissioner to provide a probable cause hearing within three days of the completion of an involuntary emergency admission certificate. App. 149–50. The court noted that the New Hampshire legislature established this statutory requirement, "which allows an individual to contest erroneous deprivation of his liberty interest," "[i]n order to comport with the State and federal requirements of due process." App. 149. Nevertheless, while record numbers of patients continue to be detained in emergency rooms, the Commissioner has ignored the state courts' decisions and refused to provide these patients with access to appointed counsel or an opportunity to contest their detention.

C. The Commissioner Has Repeatedly Delayed this Case

In an effort to remedy the ongoing crisis, Plaintiff John Doe filed this lawsuit on November 10, 2018, raising a claim under the Fourteenth Amendment. App. 48. He later amended his complaint to address the defenses raised in the Commissioner's first motion to dismiss and to add

three additional named plaintiffs. App. 219. The amended complaint asked the district court to declare that the Commissioner's policy, practice, or custom of refusing to provide hearings and counsel to patients detained in emergency rooms violates the Fourteenth Amendment, and asked the court to enter a permanent injunction requiring the Commissioner to provide prompt procedural due process to those patients. App. 270–71. Even though this lawsuit has been pending for more than *two and a half years*, the Commissioner has not remedied the problem and instead has pursued an aggressive litigation strategy in both federal and state court in an effort to avoid all responsibility for the involuntarily detained patients under her care. The Commissioner has filed three motions to dismiss, refused to engage in any discovery, and repeatedly asked the district court to stay the lower-court proceedings.[2]

On September 16, 2019, the Commissioner filed her second motion to dismiss, arguing that there was no state action. App. 28. On April 30, 2020, following extensive briefing and oral argument, the district court rejected

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[2] *See* Mot. to Stay Disc., ECF No. 131; Obj. to Pls.' Mot. to Compel. Rule 26(f) Conf., ECF No. 176; Joint Disc. Plan 6, ECF No. 179; Order, ECF No. 181 (holding discovery in abeyance in response to jurisdictional arguments Commissioner raised in Joint Discovery Plan); Mot. to Stay Disc., ECF No. 187; Mot. to Stay, ECF No. 210.

the Commissioner's arguments and denied her second motion to dismiss. App. 657–88. The district court noted that completion of an involuntary emergency admission certificate is "the first step in the process by which persons in need of emergency mental health services are involuntarily admitted into the mental health services system and are placed in the custody and control of the Commissioner." App. 684. The court concluded that the Commissioner's refusal to provide procedural due process to patients under her supervision constitutes state action. App. 685–86.

Dissatisfied with this outcome, the Commissioner suddenly decided that she wanted the New Hampshire Supreme Court to weigh in, even though she had previously represented to the federal district court that it was unnecessary to certify any questions of state law to the state court. App. 652. On October 2, 2020, the Commissioner appealed a New Hampshire state trial court decision granting habeas corpus relief to a class member who was involuntarily detained in an emergency room for more than two weeks. App. 811–17. The "crux of the legal issue" in that case was whether the habeas petitioner "was afforded the prompt probable cause hearing mandated by state law." App. 813. That appeal is currently

pending before the New Hampshire Supreme Court, which heard oral argument on March 25, 2021.

In addition, on November 3, 2020—nearly two years after this federal case began—the Commissioner filed her *third* motion to dismiss, raising jurisdictional defenses that she could have raised in her first two motions to dismiss. App. 42. For the first time, the Commissioner argued that she was entitled to sovereign immunity under the Eleventh Amendment and that Class Plaintiffs lacked standing to pursue their Fourteenth Amendment claims against her. ECF No. 185. The Commissioner also filed a motion to stay the federal proceedings while her state habeas appeal was pending. App. 43.

On December 18, 2020, the district court denied the Commissioner's third motion to dismiss. Addendum 26. The district court stressed that "plaintiffs seek a declaratory judgment and a prospective injunction to stop the Commissioner's practice of failing to provide probable cause hearings within a reasonable time," and explained that "plaintiffs are challenging that practice as a violation of the due process clause of the Fourteenth Amendment." Addendum 9. The court concluded that "plaintiffs' claim is

within the exception to sovereign immunity provided by *Ex Parte Young*." Addendum 22.

With respect to standing, the district court emphasized that "the Commissioner bears the ultimate responsibility for supervising and administering the mental health services system, including the procedures necessary to provide due process to IEA-certified persons," and "it is the Commissioner's failure to provide probable cause hearings that is at issue in this case." Addendum 24.[3] Thus, the court held that the alleged injury "is fairly traceable to the Commissioner," and "the relief the plaintiffs seek, an injunction to stop the Commissioner's practice of detaining IEA-certified persons without providing hearings, will redress their injury." Addendum 25–26.

The Commissioner then brought this interlocutory appeal. After filing her notice of appeal, however, the Commissioner sought to delay this case yet again by filing motions to stay both the district court proceedings and this interlocutory appeal while her habeas appeal before the New Hampshire Supreme Court remained pending. The district court granted the motion to stay the lower-court proceedings during the duration of this

[3] "IEA" is shorthand for "involuntary emergency admission."

interlocutory appeal. *See* Order Granting Mot. to Stay, ECF No. 212. But this Court denied the Commissioner's motion for a stay and granted Class Plaintiffs' motion for expedited briefing, acknowledging that the state habeas appeal will have no impact on the purely jurisdictional issues that the Commissioner has raised in this case. Order, Mar. 22, 2021, ECF No. 117720415.

SUMMARY OF ARGUMENT

I. Class Plaintiffs brought Fourteenth Amendment claims against the Commissioner that are clearly permitted under the *Ex parte Young* exception to Eleventh Amendment immunity.

A. *Ex parte Young* allows a suit against a state official that seeks prospective injunctive relief to prevent a continuing violation of federal law. In this case, Class Plaintiffs allege that the Commissioner is continuing to violate their federal constitutional rights by refusing to provide probable cause hearings and appointed counsel to patients who are involuntarily detained in emergency rooms. And Class Plaintiffs seek declaratory relief and a permanent injunction requiring the Commissioner to provide hearings and counsel to those patients on a going-forward basis. Thus, *Ex parte Young*'s requirements are easily satisfied here.

B. Class Plaintiffs' federal constitutional claims are not state-law claims in disguise as the Commissioner contends. Class Plaintiffs assert that the Commissioner is violating their procedural due process rights under the Fourteenth Amendment, regardless of what state law requires, and those rights are clearly established by both the Fourteenth Amendment's text and Supreme Court precedent.

C. The Commissioner also has the ability to provide the procedural due process that Class Plaintiffs seek. State law provides that the Commissioner is responsible for overseeing the state mental health services system and protecting the rights of patients who are detained pursuant to the involuntary emergency admission process. Although the Commissioner would have this Court believe that she bears no responsibility for providing probable cause hearings, she is actually the one preventing patients from receiving hearings while they are detained in emergency rooms.

D. The Commissioner's contention that the district court is barred from granting any relief that would affect the administration of the state mental health services system is also without merit. As an initial matter, Class Plaintiffs are not seeking drastic changes to the state mental

health services system—they are simply asking that the Commissioner be required to provide prompt hearings and access to counsel. But even if Class Plaintiffs were seeking broader systemic change, that relief would be permissible under *Ex parte Young*. The entire purpose of the *Ex parte Young* doctrine is to require state officials to change their existing policies or practices to conform with the U.S. Constitution.

II. Class Plaintiffs have standing to pursue their Fourteenth Amendment claims against the Commissioner. To establish standing under federal law, plaintiffs need only show that they have suffered an injury in fact that is fairly traceable to the defendant's actions and redressable by a favorable decision. Those requirements are satisfied here. The amended complaint alleges that the Commissioner is violating the Fourteenth Amendment rights of patients who are involuntarily detained in emergency rooms by refusing to give them any procedural due process, and a permanent injunction requiring the Commissioner to provide prompt hearings and access to counsel will redress those constitutional violations.

STANDARD OF REVIEW

This Court reviews a district court's denial of Eleventh Amendment immunity and its standing determinations *de novo*. *Redondo Constr. Corp.*

v. P.R. Highway & Transp. Auth., 357 F.3d 124, 126 (1st Cir. 2004); *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 12 (1st Cir. 1996). The Court must "construe the [c]omplaint liberally and treat all well-pleaded facts as true, according the plaintiff[s] the benefit of all reasonable inferences." *Town of Barnstable v. O'Connor*, 786 F.3d 130, 138 (1st Cir. 2015); *accord N.H. Right to Life*, 99 F.3d at 12.

ARGUMENT

I. CLASS PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT

A. Class Plaintiffs Allege that the Commissioner Deprived Them of Their Liberty Without Due Process and They Seek Prospective Injunctive Relief

Class Plaintiffs have raised federal constitutional claims that fall squarely within the *Ex parte Young* exception to Eleventh Amendment sovereign immunity. For more than a century, *Ex parte Young* "has stood for the proposition that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Negrón-Almeda v. Santiago*, 528 F.3d 15, 24 (1st Cir. 2008) (citations omitted). Such injunctive relief is "justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts

unconstitutionally is 'stripped of his official or representative character.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)).

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (citation omitted). Accordingly, the analysis is simple in this case.

First, Class Plaintiffs allege that the Commissioner is currently violating the Fourteenth Amendment, which bars state officials from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Specifically, the Commissioner is depriving Class Plaintiffs of their liberty by directing hospitals to detain Class Plaintiffs against their will in emergency rooms and to renew their involuntary emergency admission certificates every three days. App. 117, 247–48. The Commissioner's policy and practice of then refusing to provide Class Plaintiffs with hearings and access to counsel while they are detained in emergency rooms for days or weeks at a time violates their procedural

due process rights. App. 258–60; *see Zinermon v. Burch*, 494 U.S. 113, 127–28, 131 (1990) (cataloguing cases establishing rights to due process in the compulsory mental health admission process).

Second, Class Plaintiffs ask the district court to "permanently enjoin" the Commissioner from "failing to provide procedural due process" to patients who are involuntarily detained in emergency rooms. App. 258–60, 271. Thus, the amended complaint seeks prospective injunctive relief. Nothing more is required to survive dismissal under the Eleventh Amendment. *Verizon*, 535 U.S. at 645. This Court's inquiry should end there.

B. Class Plaintiffs' Fourteenth Amendment Claims Are Not State-Law Claims in Disguise

The Commissioner argues that the "federal claims in this case . . . turn on state, not federal, law, and are accordingly barred under *Pennhurst*." Appellant Br. 57. Not so. Class Plaintiffs challenge the Commissioner's practice of refusing to provide probable cause hearings within a reasonable time under the Fourteenth Amendment, whether or not that practice also violates state law. App. 258–60, 272.

There can be no real dispute that Class Plaintiffs have a federal constitutional right to timely due process. Indeed, "civil commitment for

any purpose constitutes a significant deprivation of liberty that requires due process protection" under the Fourteenth Amendment. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also Zinermon*, 494 U.S. at 131 ("[T]here is a substantial liberty interest in avoiding confinement in a mental hospital."); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (explaining that "procedural safeguards against unwarranted confinement . . . are guaranteed to insane persons"); *Vitek v. Jones*, 445 U.S. 480, 491–92 (1980) ("[C]ommitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection." (citations omitted)). Furthermore, "[t]he fundamental requirement of due process is the opportunity to be heard *at a meaningful time* and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added) (citation omitted).

To assess how quickly the hearings should occur as a matter of federal constitutional law, Class Plaintiffs looked to state law as a benchmark for what procedures are feasible under the circumstances. *See Zinermon*, 494 U.S. at 128 (noting that "a statutory provision for a postdeprivation hearing . . . satisfies due process" in some circumstances); *Addington*, 441 U.S. at 431–32 (considering state laws when defining the contours of federal

procedural due process rights). The New Hampshire legislature's determination that a patient should receive a hearing within three days of the completion of an involuntary emergency certificate demonstrates that such hearings are foreseeable, possible, and fully authorized by state law. *See Zinermon*, 494 U.S. at 136–39. Thus, when Class Plaintiffs are involuntarily detained in emergency rooms without receiving hearings within three days, they are unquestionably "deprived of a substantial liberty interest . . . by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards." *See id.* at 138.

Importantly, however, the Commissioner must "meet the constitutional minimum" regardless of what state law requires. *Addington*, 441 U.S. at 431; *accord Vitek*, 445 U.S. at 491. Even if the New Hampshire Supreme Court were to decide that state law does not require a hearing within three days of the completion of an involuntary emergency admission certificate, Class Plaintiffs would still be entitled to relief in this federal class action because the Fourteenth Amendment independently requires procedural due process within a reasonable period of time once the

involuntary emergency admission process begins. *See Zinermon*, 494 U.S. at 127–28, 131, 138–39.

In attempting to rewrite the amended complaint and transform Class Plaintiffs' federal constitutional claims into state-law claims, the Commissioner also argues that this Court lacks "the authority to declare one way or the other how RSA chapter 135-C operates." Appellant Br. 40. But this Court's authority to decide state-law questions is irrelevant here. The question presented in this interlocutory appeal is whether the Eleventh Amendment shields the Commissioner from suit for violating Class Plaintiffs' due process rights under the Fourteenth Amendment. This Court can resolve that question without opining on the meaning of the state statute.

In addition, the Commissioner takes the confounding position that Class Plaintiffs would "have no Fourteenth Amendment claim" if the New Hampshire Supreme Court were to rule that a "hearing under RSA 135-C:31, I, must be provided within three days of the completion of an IEA certificate" because "plaintiffs would be entitled to due process they seek under the statute itself." Appellant Br. 57–59. But the possibility that federal and state law may overlap in some respects does not mean that

Class Plaintiffs have no Fourteenth Amendment claims. The "minimum requirements" that the U.S. Constitution imposes "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate." *Vitek*, 445 U.S. at 491; *accord Addington*, 441 U.S. at 431 (explaining that state civil commitment "procedures must be allowed to vary so long as they meet the constitutional minimum"). "The state has no power to impart to [its officials] any immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, 209 U.S. at 160.[4]

Moreover, the Commissioner has never given any assurance that she will provide any relief on a class-wide basis if she loses her appeal of the individual state habeas case before the New Hampshire Supreme Court. Only this federal class action can definitively ensure that the Commissioner

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[4] The cases the Commissioner cites on this point simply stand for the principle that federal courts are not tasked with enforcing state rules or causes of action. *See Wozniak v. Adesida*, 932 F.3d 1008, 1011 (7th Cir. 2019) ("Wozniak contends that the Committee and Board did not follow all of the University's rules and regulations for tenure-revocation proceedings, but this has nothing to do with the Constitution."); *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005) (holding that Eleventh Amendment immunity applied to claims that were not based on federal constitutional law and instead "coincide[d] with [plaintiffs'] state-law breach-of-fiduciary-duties claim"). Those cases are inapposite here, where Class Plaintiffs are seeking to enforce basic due process protections under the Fourteenth Amendment, not state rules or causes of action.

provides class-wide relief that safeguards the Fourteenth Amendment rights of people currently detained in emergency rooms and those who will be detained in the future. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst*, 465 U.S. at 105 (citation omitted). Thus, Class Plaintiffs' federal claims must continue as long as the Commissioner refuses to conform her conduct to the requirements of the U.S. Constitution.

C. The Commissioner Is Capable of Facilitating Due Process Hearings

Even though Class Plaintiffs have requested only prospective relief requiring the Commissioner to cease her ongoing Fourteenth Amendment violation, the Commissioner asserts that Class Plaintiffs "cannot proceed under an *Ex parte Young* theory" because the Commissioner supposedly lacks "authority under state law to administer the probable cause hearings the plaintiffs seek." Appellant Br. 43–44, 46–48. But this assertion is false. The Commissioner is fully capable of effectuating the relief Class Plaintiffs have requested, and in fact, she is the one actor who *can* ensure that patients detained in emergency rooms receive prompt procedural due process.

First, state law authorizes—and indeed requires—the Commissioner to provide probable cause hearings and appointed counsel to people who are detained pursuant to the involuntary emergency admission process. The applicable statute specifically provides that the state mental health services system "shall be supervised by the commissioner," RSA 135-C:3, that "involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner," RSA 135-C:28, I, and that "[t]he commissioner may adopt rules . . . relative to the requirements for services within the state mental health services system," including the "[r]ights of persons . . . receiving services," RSA 135-C:5, I. Thus, as Class Plaintiffs have alleged, the Commissioner has the authority to ensure that the state mental health services system that she supervises "is providing appropriate procedural due process to individuals who are being involuntarily detained." App. 226.

Second, the Commissioner's alleged lack of authority over the circuit court, law enforcement, and hospitals does not absolve her of responsibility for ensuring that patients receive timely due process. The facts on the ground show that the Commissioner is actually the critical player who is preventing patients from receiving probable cause hearings. In a 2016

decision, the circuit court explained that, while a person is involuntarily detained in an emergency room, the circuit court is "not aware that the person [is] the subject of a petition." App. 251, 332. The circuit court only becomes aware of the patient when "the individual [is] eventually transferred to the receiving facility and the petition [is] filed [with the circuit court]." App. 251, 332. In other words, the Commissioner controls when a probable cause hearing occurs by deciding when to send the petition to the circuit court, and under her current policy and practice, the Commissioner has chosen not inform the circuit court of the need for a hearing until a patient arrives at a receiving facility. The Commissioner alone has the power to change that policy.

The Commissioner claims that she cannot "control proceedings in circuit court," "dictate when or how the circuit court conducts probable cause hearings[,] or require the circuit court to adopt a particular construction of law." Appellant Br. 46. But this misses the point. Class Plaintiffs seek prospective relief requiring the Commissioner to conform her own actions to the Fourteenth Amendment, not relief requiring her to control the actions of every party that might play some role in providing those hearings. The circuit court is no longer a party to this action, and

Class Plaintiffs allege that the Commissioner, not the circuit court, is responsible for depriving Class Plaintiffs of their rights to procedural due process. Any injunctive relief granted in this case would require the Commissioner to facilitate hearings for patients held in emergency rooms, and to coordinate with the circuit court as needed, not to direct the circuit court in how it administers hearings.

In arguing that she lacks authority to provide any relief, the Commissioner also points to arguments Class Plaintiffs made in seeking to join Administrative Judge David King of the New Hampshire Circuit Court as a necessary third party. Appellant Br. 45. But Class Plaintiffs never argued that the Commissioner lacked the ability to comply with a remedial order in this case. They instead argued that the circuit court's absence presented a risk that the relief ordered by the district court would be less effective, and that Judge King's participation was needed to ensure that any injunctive relief reflected "input from the Administrative Judge." Pls.' Obj. to King Mot. Dismiss 5–6, ECF No. 97. Throughout the COVID-19 pandemic, however, the circuit court has conducted almost all probable cause hearings by videoconference, demonstrating that hearings can be done virtually, and eliminating many of the logistical concerns that

prompted Class Plaintiffs to seek the circuit court's participation in the first place. *See* Class Pls.' Resp. to Hosp. Mot. for Prelim. Inj. 2, ECF No. 174.

Moreover, the Commissioner's attempt to point the finger at the circuit court system, *see* Appellant Br. 44–45, is perplexing given that the New Hampshire Department of Justice—the same office that represents the Commissioner here—argued that Judge King is *not* a necessary party in this case. When seeking Judge King's dismissal as a nominal defendant, the Department of Justice argued that the circuit court "would not participate in the relief requested" and would merely "hear those cases related to involuntary commitments that come before it." King Mot. Dismiss 10–11, ECF No. 91-1. Counsel thus asserted that the circuit court would be only "*tangentially* related to an eventual outcome." *Id.* at 11 (emphasis added). Indeed, the Commissioner, not the circuit court, determines when probable cause hearings will occur because she decides when to send involuntary emergency admission petitions to the court. App. 251, 332. That is why Class Plaintiffs sued the Commissioner and only included Judge King as a nominal defendant.

Next, law enforcement's role in transporting patients to receiving facilities does not prevent the Commissioner from providing relief in this

case. *See* Appellant Br. 46–47. If the Commissioner arranges hearings by videoconference, law enforcement officers do not need to transport patients to hearings at all. And the Commissioner has provided no reason to believe that law enforcement officers would not voluntarily comply with requests to transport patients to in-person probable cause hearings—indeed, she already relies on law enforcement to transport patients to designated receiving facilities. *See* App. 838.

Further, the Commissioner fails to explain why she is unable to require "hospitals to provide probable cause hearings in their emergency rooms." Appellant Br. 47–48. As discussed above, state law gives the Commissioner broad authority over the state mental health services system and the involuntary emergency admission process. *See, e.g.*, RSA 135-C:3, -C:5, -C:28. The Commissioner also fails to mention that the New Hampshire legislature recently passed legislation expressly granting her authority to establish regulations requiring hospitals to cooperate. In 2019, the legislature passed a law directing the Commissioner to "initiate emergency rulemaking consistent with either the first decision on the merits or the court-approved agreement" in this case. RSA 151:2-h. The new statutory provision is located in RSA chapter 151, which gives the

Commissioner authority over the "establishment and enforcement of basic standards for the care and treatment of persons *in hospitals*." RSA 151:1 (emphasis added); *accord* RSA 151:9 (granting the Commissioner authority to license and regulate hospitals). Thus, the legislature clearly intended to confer authority on the Commissioner to further regulate the care of patients who are involuntarily detained in hospital emergency rooms and ensure that they receive procedural due process.

Even without hospitals' cooperation, however, the Commissioner is perfectly capable of providing due process to patients. Nothing is stopping the Commissioner from immediately securing counsel for people detained in emergency rooms, sending involuntary emergency admission petitions to the circuit court to begin the hearing process, coordinating transportation for patients to and from hearings, and arranging for certain patients to be placed in community-based mental health treatment programs that divert people away from receiving facilities and alleviate stress on the existing system. Her ostensible lack of control over the hospitals themselves is no excuse for depriving patients of their rights to due process.

D. Class Plaintiffs Seek Injunctive Relief that Is Permitted Under Ex Parte Young

The Commissioner next claims that the State of New Hampshire is "the real, substantial party in interest" because Class Plaintiffs request relief that would purportedly "interfere with [the] public administration of the state mental health system." Appellant Br. 52 (citation omitted). But the Commissioner fails to show how the prospective relief that Class Plaintiffs seek would interfere with the existing system. And the "additional administrative inconvenience" of complying with a federal injunction cannot "justify invasion of fundamental constitutional rights." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 691 (1977).

The Commissioner bases her argument on the false premise that Class Plaintiffs are "ask[ing] the district court to order the Commissioner to create a new apparatus for providing probable cause hearings that does not currently exist" and demanding "a complete overhaul of the state mental health system itself." Appellant Br. 53, 55. But the relief Class Plaintiffs seek requires no such "overhaul" of the system. They are simply asking the district court to require the Commissioner to make hearings and appointed counsel available to patients who are involuntarily detained in emergency rooms. App. 270–71. And the New Hampshire legislature has

already authorized the Commissioner to do precisely that. RSA 151:2-h (requiring the Commissioner to "initiate emergency rulemaking consistent with either the first decision on the merits or the court-approved agreement" in this case).

The Commissioner also suggests that any relief in this case will interfere with the mental health services system because, after the district court held that state law requires a hearing within three days of the completion of an involuntary emergency admission certificate, "some state-court judges started ordering patients released from custody" if they did not receive hearings within that timeframe. Appellant Br. 52–53. In those orders, however, state-court judges were merely enforcing state law and concluding that a person who has not received a timely due process hearing, as required by RSA 135-C:31, cannot be involuntarily detained.[5] The Commissioner can prevent the release of "patients in the midst of acute

[5] *See* ECF No. 156-3 (Notice of Decision) (dismissing involuntary emergency admission petition because "[p]robable cause hearing was not scheduled within required 3 days" under RSA 135-C:31); ECF No. 156-4 (Notice of Decision) (dismissing petition because "hearing was not scheduled [within] required 72 hours of the Petition being sworn to"); App. 814 (granting petition for habeas corpus and finding petitioner's "continued confinement is unlawful" because petitioner "did not receive a probable cause hearing within three days of her emergency admission").

mental-health crises," Appellant Br. 54, by providing prompt hearings to patients who are involuntarily detained in emergency rooms.

The Commissioner is also wrong on the law. Her theory—that a state official is immune from any suit seeking prospective relief that could alter the public administration status quo—would eclipse *Ex parte Young* entirely, leaving federal courts powerless to enforce federal law. The Commissioner "imagines a world where *Ex parte Young* suits cannot proceed if they will have any effect on a sovereign. But that is what *Ex parte Young* suits have always done." *Vann v. Kempthorne*, 534 F.3d 741, 754 (D.C. Cir. 2008). Indeed, "[t]he *Ex parte Young* doctrine's very existence means that a plaintiff may frustrate the efforts of a state policy when those efforts violate or imminently threaten to violate the plaintiff's constitutional rights." *O'Connor*, 786 F.3d at 140.

Thus, courts have consistently affirmed injunctive relief imposed on state officials that interferes with the public administration status quo,[6]

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[6] *See, e.g.*, *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 9, 24–25 (1st Cir. 2007) (holding that Eleventh Amendment did not bar suit seeking to enjoin Puerto Rico official from diverting insurance premium revenues to cover Puerto Rico's budgetary shortfalls); *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96–98 (2d Cir. 2007) (holding that injunctive

and they have affirmed decisions requiring significant expenditures of state resources.[7] Although governments "are ordinarily free to choose among various social services competing for legislative attention and state funds," that "does not mean that a [government] is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights." *Wyatt v. Aderholt*, 503 F.2d 1305, 1314–15 (5th Cir. 1974); *accord Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations."). If the Commissioner is to operate a system of involuntary emergency admission into the state mental health services system, "it is

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relief requiring reinstatement of state employee fell within the *Ex parte Young* exception, even where the position no longer existed).

[7] *See, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 278 (1986) ("[R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury."); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (affirming that *Ex parte Young* "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"); *Edelman v. Jordan*, 415 U.S. 651, 667–68 (1974) ("[A]n ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.").

going to have to be a system that is countenanced by the Constitution of the United States." *Wyatt*, 503 F.2d at 1315 (citation omitted).

II. CLASS PLAINTIFFS HAVE STANDING TO PURSUE THEIR FOURTEENTH AMENDMENT CLAIMS AGAINST THE COMMISSIONER

Class Plaintiffs also have standing to pursue their claims against the Commissioner under Article III of the U.S. Constitution. Standing requires (a) an "injury in fact" that is (b) fairly traceable to the challenged action of the defendant and (c) redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Class Plaintiffs' allegations easily satisfy each of these elements. Class Plaintiffs' alleged injury in fact is the Commissioner's violation of their Fourteenth Amendment rights to procedural due process. That injury is "fairly . . . trace[able] to the challenged action" because it results directly from the Commissioner's refusal to provide hearings and appointed counsel to patients detained in emergency rooms under involuntary emergency admission certificates. *Id.* And the injury will be "redressed by a favorable decision" that requires the Commissioner to ensure that members of the class receive prompt probable cause hearings and access to counsel. *Id.* at 561.

The Commissioner does not seriously attempt to contest Class Plaintiffs' standing to assert Fourteenth Amendment claims against her.

Nor could she. In disputing that Class Plaintiffs' injuries are traceable and redressable, she merely repeats her flawed argument that "the Commissioner does not have the authority under RSA chapter 135-C to provide probable cause hearings in private hospital emergency departments." Appellant Br. 67–68.

The Commissioner's attempt to blame other parties for Class Plaintiffs' injuries ignores Class Plaintiffs' well-pleaded allegations that it is the Commissioner's refusal to provide probable cause hearings and counsel to patients detained in emergency rooms that is the direct cause of their injuries. *See Aversa v. United States*, 99 F.3d 1200, 1209–10 (1st Cir. 1996) (explaining that a court must treat "all well-pleaded facts as true" in ruling on subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)). As the amended complaint explains, the Commissioner "abandons these patients and compels them to detention in . . . emergency rooms . . . often for weeks at a time," and despite creating this crisis, the Commissioner refuses to "provid[e] them with a lawyer" or any "ability to contest their detention." App. 247.

Moreover, despite the Commissioner's claim that she plays no role in administering probable cause hearings, Appellant Br. 67, the reality is that

the Commissioner is the person who decides when a probable cause hearing can occur. Indeed, the circuit court does not become aware that a patient is "the subject of a petition until the individual [is] eventually transferred to the receiving facility" and the Commissioner provides the petition to the circuit court. App. 251, 332. Thus, Class Plaintiffs' injuries are fairly traceable to the Commissioner's policy, practice, or custom of refusing to provide procedural due process to people involuntarily detained in emergency rooms. And their injuries are redressable by simply ordering the Commissioner to make hearings and counsel available to those patients.

Finally, the Commissioner asserts that she is unable "to redress the plaintiffs' alleged harm" because she supposedly "cannot force private hospitals to hold or otherwise accommodate due process hearings." Appellant Br. 69. As discussed above, state law provides that the Commissioner is responsible for overseeing all aspects of the involuntary emergency admission process. *See, e.g.*, RSA 135-C:3, -C:5, -C:28. And the New Hampshire legislature recently passed legislation giving the Commissioner express authority to create new regulations requiring

hospitals to accommodate probable cause hearings in their facilities. RSA 151:2-h.

But even if the Commissioner was unable to facilitate hearings in hospitals, that would not defeat standing in this case. To establish redressability, Class Plaintiffs need only show that "a favorable ruling could potentially lessen [their] injury; [they] need not definitively demonstrate that a victory would completely remedy the harm." *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 318 (1st Cir. 2012). The district court could, at the very least, require the Commissioner to secure counsel for patients detained in emergency rooms, immediately send involuntary emergency admission petitions to the circuit court to initiate the probable cause hearing process, coordinate transportation for patients to and from hearings, and arrange for certain patients to be placed in community-based mental health treatment programs. These actions, which are indisputably within the Commissioner's authority, would lessen Class Plaintiffs' injuries by eliminating critical barriers to due process.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's December 18, 2020 order denying the Commissioner's third motion to dismiss and remand the case to the district court for further proceedings.

Dated: May 3, 2021

Respectfully submitted,

John Doe, et al., in their individual capacities and on behalf of themselves and all others similarly situated,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation and Weil, Gotshal & Manges LLP,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5)(A). The brief contains 7,652 words, exclusive of those items that are excluded from the word count under Federal Rule of Appellate Procedure 32(f), and was prepared in proportionally spaced Century Schoolbook 14-point type.

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Dated: May 3, 2021

CERTIFICATE OF SERVICE

I certify that this brief was served on all counsel of record registered in the CM/ECF system of the U.S. Court of Appeals for the First Circuit on May 3, 2021.

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