No. 20-40337

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID ALLEN HAVERKAMP, ALSO KNOWN AS BOBBIE LEE HAVERKAMP,
Plaintiff-Appellee,

v.

DOCTOR LANNETTE LINTHICUM; CYNTHIA JUMPER; F. PARKER HUDSON; PHILLIP KEISER,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi Division
No. 2:17-cv-18
Hon. Hilda G. Tagle, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

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December 2, 2020

AMICUS CURIAE'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULE 29.2

No. 20-40337

DAVID ALLEN HAVERKAMP, ALSO KNOWN AS BOBBIE LEE HAVERKAMP,
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DOCTOR LANNETTE LINTHICUM; CYNTHIA JUMPER; F. PARKER HUDSON; PHILLIP KEISER,
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Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amicus curiae Public Citizen submits this supplemental certificate of interested persons to fully disclose all those with an interest in the amicus brief and provide the required information as to their corporate status and affiliations.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to those listed in the briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Amicus curiae **Public Citizen, Inc.**, is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

B. Amici curiae are represented by **Matthew A. Seligman** and **Allison M. Zieve** of **Public Citizen Litigation Group**, which is a non-profit, public interest law firm that is part of **Public Citizen Foundation**, Inc., a non-profit, non-stock corporation that has no parent corporation and in which no publicly traded corporation has an ownership interest of any kind.

/s/ Allison M. Zieve
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December 2, 2020

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with members in every state. Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues. Among other things, Public Citizen advocates to preserve and expand access to courts for individuals harmed by corporate or government wrongdoing, and for the federal courts' authority to provide appropriate redress efficiently and effectively. In service of these goals, Public Citizen has a longstanding interest in the scope of government immunity from suit, which diminishes the ability of individuals injured by state actors to seek redress.

In this case, Texas proffers a limitation on *Ex parte Young*, 209 U.S. 123 (1908), that would restrict federal courts' remedial authority to issue injunctions requiring state officials to comply with the Constitution or federal statutory law. Public Citizen is concerned that this limitation, if

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

adopted by the Court, would interfere with the courts' ability to prevent ongoing violations of individuals' rights under federal law. Public Citizen writes to explain why that proposed limitation is incorrect and to illustrate the wide range of contexts in which it would preclude effective prospective relief to ensure that state officials comply with federal law.

SUMMARY OF ARGUMENT

The *Ex parte Young* exception to state sovereign immunity authorizes federal courts to adjudicate cases where the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment)). Here, Texas proposes a radical restriction on the scope of injunctive relief available to plaintiffs under *Ex parte Young*. Seeking to limit the doctrine to what it refers to as "negative" injunctions, Texas argues that the *Ex parte Young* exception does not apply when a plaintiff seeks a federal court order that a state official "take official action using their state authority." Aplt. Br. 13.

This Court should reject Texas's novel position, which has no basis in the cases of either the Supreme Court or this Court applying *Ex parte Young*. Rather, Texas's proposed restriction is inconsistent with scores of cases in the Supreme Court, this Court, and other federal courts granting "affirmative" injunctive relief to protect a wide range of federal constitutional and statutory rights, including rights under the First Amendment, the Eighth Amendment, the Fourteenth Amendment, and federal civil rights statutes. Accordingly, this Court should reject Texas's argument and affirm the well-settled view that *Ex parte Young* authorizes federal courts to issue an "affirmative" injunction such as Appellee Haverkamp seeks here.

ARGUMENT

I. *Ex parte Young* authorizes suits against state officials to enjoin prospective violations of federal law, whether the injunction is characterized as prohibitory or affirmative.

The Supreme Court's decision in *Ex parte Young* "established an important limit on the sovereign-immunity principle" that otherwise protects states from liability in federal court. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011). "[T]he *Ex parte Young* exception 'permits suits for prospective ... relief against state officials

acting in violation of federal law.'" *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 471 (5th Cir. 2020) (en banc) (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004)). The exception reflects the recognition that, when a state official seeks to act in "violation of the Federal Constitution, the officer in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. 123, 159–60 (1908). Because the "State has no power to impart to [the officer] any immunity from responsibility to the supreme authority of the United States," a federal court may properly issue "[a]n injunction to prevent" a state officer "from doing that which he has no legal right to do." *Id.* at 159; *see also Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

"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.,* 535 U.S. at 645 (internal quotation marks and citation omitted). This Court recently re-affirmed its three-part test for determining the propriety of injunctive relief under *Ex parte Young*: "(1) A plaintiff must name individual state officials as defendants in their official capacities; (2) the plaintiff must allege an ongoing violation of federal law, and (3) the relief sought must be properly characterized as prospective." *Green Valley Special Util. Dist.*, 969 F.3d at 471 (cleaned up). If those requirements are satisfied, when "a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984). The test thus ensures that injunctive relief ordered by a federal court against a state officer serves the purpose the Supreme Court recognized in *Ex parte Young*: to require that state officials prospectively comply with the Constitution and other federal law in their treatment of the plaintiff.

Here, Texas seeks to introduce a new requirement for relief under *Ex parte Young*. In its view, "*Ex parte Young* does not allow a federal court to order a state official to take affirmative action using her official

state authority." Aplt. Br. 22. That novel limitation rests on a spurious distinction between a permissible prohibitory injunction to "refrain from violating federal law" and an allegedly impermissible "injunction requiring a state official to take affirmative official action." *Id.* at 15. That distinction has no legitimate basis in precedent, logic, or the rationale supporting *Ex parte Young*. Indeed, in this case, appellee Haverkamp alleges that the defendants acted to prevent the individualized treatment that was prescribed by her treating physician. ROA.621, 630–31. Although Texas recasts the injunction she seeks as affirmative (an order requiring the state to provide treatment), it is just as naturally framed as prohibitory (an order requiring the state not to block the treatment prescribed).

To be sure, where a violation of federal law involves the commission of acts forbidden by the Constitution or a federal statute, an injunction is often framed as a prohibition on those acts. *See, e.g.*, *Verizon*, 535 U.S. at 645 (holding that Verizon's "prayer for injunctive relief … that state officials be restrained from enforcing an order in contravention of controlling federal law" was proper under *Ex parte Young*). By contrast, where the violation of federal law involves the omission of acts required

by the Constitution or a federal statute, an injunction may be framed as an order requiring an official to take those required acts. *See, e.g.*, *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255–56, (2011) (permitting suit to proceed under *Ex parte Young* where complaint "alleges that [state officials'] refusal to produce the requested medical records violates federal law [and] seeks an injunction requiring the production of the records, which would prospectively abate the alleged violation"). *Cf. District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.").

The rationale underlying *Ex parte Young* applies equally with respect to both types of violations, and regardless of how the injunction is framed. Texas recognizes that "'when a federal court commands a state official to do nothing more than *refrain from violating federal law*, [the official] is not the State for sovereign-immunity purposes.'" Aplt. Br. at 15 (quoting *Stewart*, 563 U.S. at 255). Texas fails to appreciate, however, that when the law imposes an affirmative duty upon that official, as federal law often does, "refraining from violating federal law" requires an

official to act. *Ex parte Young* and its progeny rest on the premise that officials acting under the color of state authority lose the protection of state sovereign immunity when they violate federal law because states themselves have no authority to do violate that law. And states have neither authority to violate a prohibition in federal law nor authority to ignore a duty in federal law. Accordingly, when federal law requires state officials to take action that benefits a plaintiff, sovereign immunity does not protect them if they fail to do so.

II. The many cases granting affirmative injunctive relief to protect a wide range of federal rights belie Texas's limitation on *Ex parte Young*.

Texas's mistaken understanding of *Ex parte Young* could, if accepted, undercut the availability of relief for a wide range of violations of federal law. Because the distinction between a prohibitory injunction and an affirmative injunction is so malleable, Texas's view would enable state officials potentially to eliminate plaintiffs' ability to seek relief for a broad range of federal-law violations by state officials, simply by reframing the relief sought. For example, if a state official acting pursuant to a discriminatory state law refused to issue a driver's license to people of a particular race, gender, or religious group, Texas's proffered

limitation on *Ex parte Young* would bar suit by an individual seeking an injunction ordering issuance of a license (but not an injunction against enforcement of the discriminatory law). Or if a state official acting under state law refused food to an inmate, Texas's limitation would disable a federal court from ordering the state official to provide food to prevent a violation of the Eighth Amendment (but not an injunction ordering the official to stop withholding food).

Decades of precedent preclude such absurd results. Texas's rule is inconsistent with cases in the Supreme Court, this Court, and other federal courts that have granted affirmative injunctive relief to protect a wide range of federal constitutional and statutory rights.

1. Racial Discrimination. Texas's limitation on *Ex parte Young* flouts decades of equal protection cases in the Supreme Court and this Court, both of which have upheld injunctions requiring precisely the sort of affirmative compliance by a state official that Texas alleges exceeds the authority of the federal courts. In *Milliken v. Bradley*, 433 U.S. 267 (1977), for example, the Supreme Court upheld an injunction ordering comprehensive "remedial educational programs for schoolchildren who have been subjected to past acts of de jure segregation." *Id.* at 269. That

injunction included an order to a state official "to institute a remedial reading and communications program." *Id.* at 275. The Court held that the injunction, including the "decree to share the future costs of educational components in this case[,] fits squarely within the prospective-compliance exception" to state sovereign immunity in *Ex parte Young*. *Id.* at 289. That exception, the Court explained, "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." *Id.* The Court concluded that "[t]he order challenged here does no more than that" because it simply "requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system [by] tak[ing] the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.'" *Id.* at 289-90 (quoting *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 15 (1971)).

This Court likewise has repeatedly upheld orders of similar prospective relief that required state officials to take affirmative actions to remedy racial discrimination. *See, e.g.*, *NAACP v. Allen*, 493 F.2d 614, 616 (5th Cir. 1974) (upholding district court order requiring state, among

other things, to institute statewide recruitment and advertising programs directed Black job applicants); *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc) (requiring "affirmative hiring relief" including "order that additional appropriate recruitment measures be taken to insure that black applicants will be attracted" to Mississippi Highway Patrol). Other federal courts have done the same. *See, e.g.*, *Jenkins ex rel. Jenkins v. Missouri*, 103 F.3d 731, 736, 738 (8th Cir. 1997) (upholding injunction requiring the preservation of an extended day program, the hiring of permanent substitute teachers at language magnet schools, and the restoration of budget cuts).

2. First Amendment Rights. Both the Supreme Court and this Court have also upheld injunctions compelling state officials to act to prevent violations of the First Amendment right of freedom of speech. Earlier this year, for example, this Court in *Freedom from Religion Foundation v. Abbott*, 955 F.3d 417 (5th Cir. 2020), considered whether the *Ex parte Young* exception to sovereign immunity applied to a suit brought by a nonprofit organization seeking to display a secular scene on the grounds of the Texas State Capitol. The relevant state officials had denied the organization's request but had permitted a religious nativity

scene. *Id.* at 421. This Court explained that the nonprofit's suit against those state officials "falls within the *Ex parte Young* exception to sovereign immunity" because it sought relief including "an injunction preventing 'the [state officials] from excluding the [nonprofit's] exhibit at issue from future display.'" *Id.* at 424 (cleaned up). Although stated as a negative, such an injunction is effectively an order compelling the state officials to include the group's display. *See also, e.g.*, *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2017 (2017) (in case seeking declaratory and injunctive relief, holding a state aid program that provided grants to help schools, daycare centers, and nonprofits resurface their playgrounds violated the plaintiff's First Amendment right to free exercise by denying a grant on account of the plaintiff's religious identity); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 822–23 (1995) (in case seeking injunction ordering the state officials to provide funding to a student group, holding that a public university's policy withholding authorization for payments to third-party printers on behalf of the group "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a

deity or an ultimate reality'" constituted viewpoint discrimination in violation the First Amendment right of free speech).

3. Eighth Amendment Prohibition on Cruel and Unusual Punishment. Texas's proposed rule is also inconsistent with cases ordering affirmative injunctions to remedy ongoing violations of prisoners' Eighth Amendment rights. "A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious medical needs, constituting an 'unnecessary and wanton infliction of pain.'" *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006) (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). In numerous cases, federal courts have issued affirmative injunctions requiring state prison officials to provide the requisite medical attention. For example, this Court recently held that a "straightforward inquiry indicates the *Ex parte Young* exception applies" where a prisoner "alleges an ongoing violation of federal law and seeks prospective injunctive relief" on the ground that prison officials "violated his Eighth Amendment rights by failing to provide required hip surgery and requested in his prayer for relief that he receive the surgery that he needs." *Delaughter v. Woodall*, 909 F.3d

130, 137 (5th Cir. 2018) (cleaned up). *See also Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001) (stating that "the Eighth Amendment's prohibition against cruel and unusual punishment … require[s] that prisoners be afforded 'humane conditions of confinement' and prison officials are to ensure that inmates receive adequate food, shelter, clothing, and medical care" (quoting *Farmer v. Brennan*, 511 U.S. 825 (1994))).

As the Supreme Court has explained, because the Eighth Amendment "requires that inmates be furnished with the basic human needs … [i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). It would be odder still to deny such an injunction when such conditions are already manifest. Yet Texas's limitation would allow states to avoid precisely that relief by manipulating the description of the injunction sought.

4. Fourteenth Amendment Right to Marry. In *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Supreme Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and

under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty [and] that same-sex couples may exercise the fundamental right to marry." *Id.* at 675. In so holding, the Court granted relief to plaintiffs who sought to "marry[] someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." *Id.* at 653. The relief was straightforward: It required state officials, such as Hodges, the Director the Ohio Department of Health, to take the affirmative step of granting marriage licenses to same-sex couples and recognizing same-sex marriages from out of state.

This Court subsequently enforced *Obergefell*'s holdings in three cases, all of which invalidated state constitutional provisions prohibiting same-sex marriage and issued injunctions requiring state officials to issue marriage licenses to same-sex couples and to recognize same-sex marriages from other states. *See Robicheaux v. Caldwell*, 791 F.3d 616, 617 (5th Cir. 2015) (ordering judgment entered in favor of the plaintiffs, who "seek to marry in Louisiana or to have their marriage in another state recognized in Louisiana"); *De Leon v. Abbott*, 791 F.3d 619, 624 (5th

Cir. 2015) (granting injunction to plaintiffs "who seek to marry in Texas or to have their marriage in another state recognized in Texas"); *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 626 (5th Cir. 2015) (granting injunction to plaintiffs who "seek to marry in Mississippi or to have their marriage in another state recognized in Mississippi"). On Texas's view, however, the state official might have avoided this result in each case, and evaded the Supreme Court's decision, by asserting Texas's novel limitation on *Ex parte Young*.

5. Unlawful Discharge of State Employees. Federal courts routinely order the reinstatement of state employees discharged in violation of federal law. Those orders unquestionably constitute affirmative injunctive relief, ordering the state officials to restore the employees to their prior positions. This Court has long recognized that "the *Ex parte Young* doctrine [i]s an appropriate vehicle for pursuing reinstatement to a previous job position." *Corn v. Mississippi Dep't of Pub. Safety*, 954 F.3d 268, 276 (5th Cir. 2020) (citing *Warnock v. Pecos Cty.*, 88 F.3d 341, 343 (5th Cir. 1996)).

In accord with that rule, this Court has repeatedly rejected States' argument that injunctions ordering the reinstatement of employees who

were unlawfully discharged are barred by sovereign immunity. *See, e.g.*, *Corn*, 954 F.3d at 276 (plaintiff's "injunctive prayer" for reinstatement "is not subject to the Eleventh Amendment's jurisdictional bar"); *Jones v. Tex. Juv. Just. Dep't*, 646 F. App'x 374, 376 (5th Cir. 2016) ("[T]he Eleventh Amendment does not bar Jones's § 1983 claims against the Director for reinstatement and other prospective injunctive relief."); *Kobaisy v. Univ. of Mississippi*, 624 F. App'x 195, 198 (5th Cir. 2015) ("[C]laims against state officials for prospective injunctive relief under § 1983, such as Kobaisy's request for reinstatement, are not barred by sovereign immunity."); *Nelson v. Univ. of Texas at Dallas*, 535 F.3d 318, 324 (5th Cir. 2008) ("[A] request for reinstatement is sufficient to bring a case within the *Ex parte Young* exception to Eleventh Amendment immunity, as it is a claim for prospective relief designed to end a continuing violation of federal law."); *Sternadel v. Scott*, 254 F.3d 1080 (5th Cir. 2001) ("[B]ecause of the very nature of the relief sought—reinstatement to her job as a parole officer in the TDCJ, which is under Scott's direction as Executive Director of TDCJ—Scott is the properly named party and is subject to the *Young* exception to sovereign immunity."). Texas's proposed rule is inconsistent with all of these cases.

6. Other Statutory Rights. Finally, federal courts routinely rely on *Ex parte Young* to compel state officials to take affirmative action to comply with federal statutory law. For example, in *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247 (2011), the Supreme Court relied on *Ex parte Young* to affirm an injunction ordering state officials to produce documents and records to comply with the Developmental Disabilities Assistance and Bill of Rights Act of 2000 and the Protection and Advocacy for Individuals with Mental Illness Act. *Id.* at 256.

This Court similarly held that *Ex parte Young* authorizes affirmative injunctive relief against state officials to comply with the Medicaid Act, Americans With Disabilities Act, and Rehabilitation Act. *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407 (5th Cir. 2012). In that case, a group of intellectually and developmentally disabled individuals sued the Commissioners of the Texas Health and Human Services Commission and others, claiming that the state officials "denied them access" to two Texas programs for which the state received federal Medicaid funding in violation of federal law. *Id.* at 409–11. The plaintiffs sought injunctive relief compelling the state officials to provide access to

the programs. "[A]ddress[ing] the simple question whether [the plaintiffs] properly have proceeded under *Ex parte Young*," this Court held that "the Eleventh Amendment d[id] not apply to the suit." *Id.*

* * *

Across this wide range of doctrinal contexts, the Supreme Court and this Court have not hesitated to order state officials to take affirmative action to comply with federal constitutional and statutory law. Decades of settled precedent applying *Ex parte Young* reflects "the culmination of efforts by [the Supreme] Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (citation and quotation marks omitted). This Court should reject Texas's plea to undo that work.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of the plaintiff-appellee, this Court should affirm the order of the district court.

Respectfully submitted,

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December 2, 2020

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016, is 3,819, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I certify that on December 2, 2020, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case, including all parties required to be served.

/s/ Allison M. Zieve
Allison M. Zieve