No. 20A126

IN THE

Supreme Court of the United States

TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI; PHILIP GUNN, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; DELBERT HOSEMANN, IN HIS OFFICIAL CAPACITY AS LIEUTENANT GOVERNOR OF MISSISSIPPI; MICHAEL WATSON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF MISSISSIPPI; CAREY M. WRIGHT, IN HER OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF EDUCATION AND EXECUTIVE SECRETARY OF MS STATE BOARD OF EDUCATION; ROSEMARY AULTMAN, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION, JASON DEAN, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE MISSISSIPPI STATE BOARD OF EDUCATION; KAREN ELAM, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; ANGELA BASS, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; RONNIE MCGEHEE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; GLEN EAST, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION

Applicants,

v.

INDIGO WILLIAMS, ON BEHALF OF HER MINOR CHILD J.E.; DOROTHY HAYMER, ON BEHALF OF HER MINOR CHILD, D.S.; PRECIOUS HUGHES, ON BEHALF OF HER MINOR CHILD A.H.; SARDE GRAHAM, ON BEHALF OF HER MINOR CHILD, S.T.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE SAMUEL A. ALITO, JR., CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT:

INTRODUCTION

The decision below resolved a routine sovereign immunity question in a unique factual context. The Fifth Circuit held that respondents' claim that Mississippi law conflicts with the federal Readmission Act was not barred by sovereign immunity. There is nothing remarkable about that holding. Federal courts cannot hear state-law claims against state officials, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), but they are obviously competent to hear claims, like this one, alleging violations of federal statutes, *Ex parte Young*, 209 U.S. 123 (1908). Applicants also raised several other issues below—including the argument that the Readmission Act is not privately enforceable—but the district court had never considered those issues, so the court of appeals remanded the case to the district court to consider them in the first instance. After the court of appeals denied *en banc* review, applicants requested a stay of the court's mandate pending a petition for certiorari. The court of appeals denied the application.

Applicants now ask this Court to take the extraordinary step of itself staying the mandate. There is no basis to do so. A grant of certiorari is improbable. Reversal is unlikely. And applicants will suffer no harm if the district court is permitted to consider their alternative bases for dismissal while their petition is pending.

Applicants assert that a stay is warranted pending review of the following question: "May litigants privately enforce the congressional acts that readmitted the former confederate states to Congress when the claim is comprised, in sum and

substance, of alleged violations of state law, and the effect of the relief sought would vindicate a right granted only under a prior State Constitution?" Application ("App.") 12. Although applicants assert that this is a single question, it is actually two separate and distinct questions: (i) whether respondents' suit is barred by *Pennhurst*'s sovereign immunity rule that state-law claims against state officials cannot be heard in federal court; and (ii) whether the Readmission Act is privately enforceable. Neither of these questions warrants a stay.

The first question—the only one actually resolved by the decision below—is *sui generis*, and the principles applied by the Fifth Circuit in resolving it accord with the decisions of every other court of appeals and with the decisions of this Court. That is enough to make this Court's ultimate review exceedingly unlikely. At most, applicants argue that the Fifth Circuit misapplied this Court's decision in *Pennhurst*, but that is no basis for certiorari either. *See* Sup. Ct. R. 10.

Nor is this Court likely to reverse even if it did grant certiorari on the first question. Respondents allege a violation of federal statute, which places this case squarely within the ambit of *Ex parte Young*. It is true that in adjudicating this statutory claim, a federal court will have to consult state law—but that is also true under many other federal statutes, none of which implicate *Pennhurst*. *Pennhurst* applies, this Court has explained, where the claim asserts a violation "of state law alone." *Papasan v. Allain*, 478 U.S. 265, 277 (1986). Respondents' claim does not.

Applicants also will not suffer irreparable harm absent a stay. The most that will happen while their petition is pending is that they will have to brief their other

threshold arguments for dismissal in the lower courts. That is not a harm in any meaningful sense. And it is not irreparable: even if applicants were to prevail under *Pennhurst*, the result would be state court litigation, where applicants would be required to brief the same arguments.

As to the second question—whether the Mississippi Readmission Act is privately enforceable—no court below ever considered it, let alone decided it. In fact, *no* court has answered the question. And the Fifth Circuit sent the case back to the district court to consider this question in the first instance, in accordance with standard appellate procedure. There is simply no reason to preclude the district court from resolving the question, especially when resolution in applicants' favor would moot the sovereign immunity issue.

In the end, applicants seek extraordinary relief, but fail to make an extraordinary showing. In its current posture, this case presents only a narrow question of sovereign immunity that cannot justify staying the Fifth Circuit's mandate. This Court will have every opportunity to pass upon that question, the private enforceability question, and any other threshold questions if and when they are presented after remand. But right now, the motion to stay the mandate should be denied and the district court allowed to consider applicants' arguments for dismissal in the first instance.

STATEMENT OF THE CASE

Though this case arises in a unique factual context, the legal principles, applied faithfully by the court below, are routine. *Ex parte Young* authorizes suit in federal court to remedy ongoing violations of federal law. *Pennhurst* holds that *Ex*

parte Young does not extend to state-law claims against state officials. After a "careful analysis" that focused on the "substance" of the relief sought by respondents, the court below held only that sovereign immunity did not bar respondents' request for a declaration that Mississippi law conflicts with the federal Readmission Act. Stay Appendix ("Stay App'x") 6a-7a. The factual backdrop for that decision is as follows.

A. Statutory And Historical Background

In 1870, Congress passed *An Act to Admit the State of Mississippi to Representation in the Congress of the United States*, 16 Stat. 67 (1870), also known as the Mississippi Readmission Act. The Readmission Act was the last in a series of steps required for Mississippi to regain its representation in Congress, which the State voluntarily forfeited when it attempted to secede. Stay App'x 2a-3a. In the 1867 *Military Reconstruction Act*, Congress found that "no legal State government[] or adequate protection for life or property" existed in Mississippi. 14 Stat. 428 (1867). To secure a "loyal and republican State government[,]" Congress required Mississippi (among other things) to adopt a new constitution and submit it to Congress "for examination and approval." 14 Stat. at 428-29. Mississippi adopted a new constitution containing a robust education guarantee:

> As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the Legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools ....

Miss. Const., art. VIII, § 1 (1868).

Satisfied with the new constitution, *see* 16 Stat. 40, 41 (1869), Congress chose to make that guarantee permanent. The Readmission Act "admitted [Mississippi] to representation in Congress," but it did so on the condition "[t]hat the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State," 16 Stat. at 68.[1]

This last proviso was integral to Congress's goals of guaranteeing a republican form of government, creating a lasting peace, and breathing life into the Civil War Amendments. *See, e.g.*, Cong. Globe, 41st Cong., 2nd Sess. 1253 (Feb. 14, 1870) (Statement of Senator Howard), *id.* at 1255 (Statement of Senator Morton); Cong. Globe, 41st Cong., 2nd Sess. 1333 (Feb. 16, 1870) (statement of Senator Edmunds). "[C]ongress saw closing the educational gap in the South as indispensable to rebuilding the South and the overall Union." Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 Stan. L. Rev. 735, 777 (2018); *see* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 146-47 (2004) ("[E]nsuring that blacks would be eligible for public offices, and that public education would be available to blacks, can be seen as efforts to ensure that the political system was open to blacks, and that blacks would have sufficient education and understanding to effectively use their voting power.").

[1] Congress included identical requirements in the acts readmitting Virginia and Texas to representation. *See* 16 Stat. 62 (1870) (Virginia); 16 Stat. 80 (1870) (Texas).

In 1954, this Court declared segregation in public education unconstitutional, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), and the following year required the states to integrate their schools "with all deliberate speed," *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955). In response, Mississippi amended its Constitution in 1960 (i) to allow for the abolition of public schools, and (ii) eliminated the uniformity guarantee. As amended, the new education clause read: "The Legislature may, in its discretion, provide for the maintenance and establishment of free public schools for all children between the ages of six and twenty-one years, by taxation or otherwise, and with such grades, as the Legislature may prescribe." Miss. Const., art VIII, § 201 (1960).

The education clause was amended again in 1987. In its current form, it provides: "The legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." Miss. Const., art. VIII, § 201 (1987). A side-by-side review of the 1868 constitution and its current counterpart illustrates the differences:

Mississippi Constitution's Education Clause, 1868 and Present

1868	Present
As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the Legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvements, by establishing a uniform system of free public schools, by taxation, or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade.	The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.

B. Procedural Background

1. Respondents, the parents of African-American children in Mississippi who attend some of the State's worst public schools in the State's worst public school districts, brought suit to remedy this violation of the federal Readmission Act. *See* Stay App'x 4a-5a (detailing some of the disparities between predominantly white and black Mississippi public schools). They sought two declarations. First, respondents sought a declaration "that Section 201 of the Mississippi Constitution is violating the Readmission Act." Stay App'x 6a. Second, respondents sought a declaration "that the requirements of Article VIII, Section 1 of the Constitution of 1868"—which guaranteed a uniform system of free public schools—"remain legally binding on the Defendants." *Id.*

2. The district court held that respondents' suit was barred by sovereign immunity, but did not reach any of applicants' alternative bases for dismissal, includ-

ing the argument that the Readmission Act is not privately enforceable. *Id.* at 7a-8a. A unanimous Fifth Circuit panel affirmed in part and vacated and remanded in part. The court held that the first of respondents' two declarations was not barred by sovereign immunity. Recognizing that the Readmission Act imposes a federal "obligation for the State to continue to provide the same educational rights that were protected in 1868," the court below held that sovereign immunity did not bar respondents' claim "that Section 201 [of the current constitution] violates the Mississippi Readmission Act." *Id.* at 16a-18a. The court explained that "determin[ing] the meaning of 'school rights and privileges'" as protected in the federal Readmission Act would "require analysis of the 1868 Constitution" but, the court held, merely ascertaining the meaning of state law does not run afoul of *Pennhurst* "because it does not ask the court to compel compliance with 'state law *qua* state law.'" *Id.* at 16a (quotations omitted). "Instead," the Fifth Circuit recognized, "it asks the court to interpret the meaning of a *federal* law—the Mississippi Readmission Act—by reference to a related state law." *Id.*

The court's analysis led it to a different conclusion with respect to the second declaration—i.e., an order "that the requirements of Article VIII, Section 1 of the Constitution of 1868 remain legally binding." *Id.* at 6a. The court held that this declaration ran afoul of *Pennhurst* because it would compel "state officials to comply with a specific state law." *Id.* at 19a. "[W]hile the Readmission Act imposes an obligation for the State to continue to provide the same educational rights that were protected in 1868, it does not demonstrate that Congress intended to force Missis-

sippi to retain fixed, 200-year-old language in its education clause." *Id.* at 18a. Put differently, while the Readmission Act prohibited the State from depriving its citizens of the "school rights and privileges" set out in the congressionally-approved constitution of 1868, it does not require the State to adhere to that constitution *in particular* so long as the "school rights and privileges" originally protected remain protected today.

The Fifth Circuit's decision went no further. As they did in the district court, applicants asserted numerous alternative bases for dismissal—including the absence of a private right of action, the political question doctrine, and standing—invoking the familiar rule that an appellate court "may affirm on any grounds raised below and supported by the record." Br. of Appellees at 30, *Williams v. Bryant* (5th Cir. No. 19-60069); *see* Stay App'x at 7a-8a. But affirming on alternative grounds is a discretionary decision, and the Fifth Circuit found no circumstances that would warrant exercising that discretion. Stay App'x 7a-8a (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)). Accordingly, the court "express[ed] no opinion on the merits of this lawsuit or defendants' alternative jurisdictional arguments," and remanded the case to the district court for it to consider those arguments "in the first instance." *Id.*

3. Applicants sought rehearing *en banc*, which the Fifth Circuit denied. Judge Jones dissented from the denial of rehearing. *See* Stay App'x 23a-35a. She would have held that respondents' suit was barred by *Pennhurst*. Only five judges concurred in this part of her dissent. *Id.* at 23a n.*. Seven judges shared her view

that the court should have exercised its "discretion" to reach the question "whether the Readmission Act creates a private right of action" and should have held that it did not. *Id.* at 31a.

4. Following the Fifth Circuit's denial of rehearing *en banc*, applicants moved the panel for a stay of the mandate pending a forthcoming petition for a writ of certiorari. Judge Higginson denied the motion. Stay App'x 37a. Applicants sought panel reconsideration, which was also denied. *Id.* at 39a.

REASONS FOR DENYING THE APPLICATION

Applicants offer no persuasive reason why a stay should issue. Staying the mandate is "extraordinary relief," *Teva Pharms., USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1302 (2014) (Roberts, C.J., in Chambers), so it requires an extraordinary showing. As applicants recognize, a stay should only issue where: (i) there is a reasonable probability that certiorari will be granted; (ii) there is a fair prospect this Court will reverse; and (iii) the movant likely will be irreparably harmed in the absence of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Stay applicants always bear a heavy burden, but applicants' burden here is especially heavy because they already presented their stay arguments to the Fifth Circuit, and that court rejected them. "[A]bsent unusual circumstances [this Court] defer[s] to the decision of that court not to stay its judgment." *Graddick v. Newman*, 453 U.S. 928, 933 (1981) (Powell, J., in Chambers) (quotations omitted). Moreover, even if the factors just described are satisfied, a stay remains a matter of "sound equitable discretion" that requires "a clear case and a decided balance of convenience."

Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surg. Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in Chambers) (quotations omitted).

There is no reasonable probability that this Court will grant certiorari to review the first question presented by the Application, which contests the Fifth Circuit's straightforward application of sovereign immunity law. Much less is there a fair prospect that this Court would reverse even if it did grant review. Nor will applicants suffer irreparable harm in the absence of stay because the parties will still be litigating applicants' threshold arguments for dismissal (which have already been briefed in the district court) by the time their petition is resolved.

One of those threshold arguments is applicants' contention that the Readmission Act is not privately enforceable. But that contention has never been resolved—not by the district court, not by the Fifth Circuit panel, and not by the *en banc* court—so there is no basis to grant certiorari on this question, much less a stay pending certiorari at this time.

I. THE FIFTH CIRCUIT'S APPLICATION OF WELL-SETTLED SOVEREIGN IMMUNITY LAW DOES NOT WARRANT STAYING THE MANDATE

A. A Grant Of Certiorari Is Highly Unlikely

The sovereign immunity question presented by the decision below satisfies none of the criteria for certiorari.

There is no circuit split. No other court of appeals has ever considered whether sovereign immunity bars a suit under any state's Readmission Act, and applicants do not actually argue that this Court should grant certiorari to resolve a conflict in the courts of appeals. *See* App. 12-13. Applicants later suggest in pass-

ing, however, that the decision below conflicts with decisions from the Third and Fourth Circuits. *See* App. 22-23 (citing *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 2002), and *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001)). To the extent applicants make such a claim, it is incorrect.

Both *Hess* and *Bragg* involved the Surface Mining Control and Reclamation Act ("SMCRA"), which requires states to adopt mining laws that complied with minimum federal standards. *Hess*, 297 F.3d at 315-19; *Bragg*, 248 F.3d at 288-89. In both cases, *Pennhurst* barred claims alleging that state officials were violating those state laws, which satisfied the states' federal obligations. *Hess*, 297 F.3d at 324-27; *Bragg*, 248 F.3d at 287, 295-96. But unlike in those cases, the very problem here is that state law does *not* satisfy Mississippi's federal obligations. Neither the Third nor the Fourth Circuit held that sovereign immunity would bar such a claim. Had the parties in those cases alleged that a state mining program did not comply with the SMCRA's minimum federal standards, then those cases would be comparable to this one. They are not, and there is no conflict.

Nor does the decision below implicate "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The question whether *Pennhurst* bars a suit under a Readmission Act is "unique," App. 22, and is exceedingly unlikely to arise with any frequency, if at all. *See infra* at 15 n.3. At the same time, the principles applied by the court below are well settled. At most, applicants complain that the court below misapplied *Pennhurst*, but "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of …

the misapplication of a properly stated rule of law." Sup. Ct. R. 10. That should be the end of the matter.

In the absence of a certworthy question, the thrust of applicants' argument appears to be that a grant of certiorari is likely because "important constitutional issues"—i.e., state sovereign immunity—"are at stake." App. 13. But applicants confuse the importance of sovereign immunity generally with the importance of the narrow and routine sovereign immunity *question* that was actually resolved by the court below. Sovereign immunity is important—no one disputes that. But this Court obviously does not grant certiorari in every sovereign immunity case. And it certainly does not grant review when the court below simply applied settled precedent, even when the state believes that court misapplied that precedent. Applying settled precedent is all the Fifth Circuit did here: although federal courts have no authority to adjudicate claims against state officials alleging violations of state law, *Pennhurst*, 465 U.S. 89, the claim here alleges an ongoing violation of a *federal statute*, and thus fits comfortably within the doctrine of *Ex parte Young*.

Finally, even if this sovereign immunity question were otherwise potentially certworthy, there is no reasonable likelihood this Court will grant certiorari *now*, before the district court decides in the first instance numerous other threshold issues that may well moot the sovereign immunity question. As the federal government has explained: "[i]t would be a strange principle of sound judicial administration that would counsel granting review in a case in which the question may be irrelevant to the disposition of the merits (and staying ongoing proceedings below to

prevent them from mooting the petition)." Brief for the U.S. in Opposition, *Evans v. Stephens* (U.S. No. 04-828), 2005 WL 123450, at *9 (quotations, alterations, and citation omitted). That principle independently precludes a stay here.

B. There Is Little Prospect Of Reversal

A stay should also be denied because the decision below is entirely correct.

1. Federal courts are competent to adjudicate alleged violations of federal law. Respondents allege that applicants are violating the *federal* Readmission Act. That a federal court must "reference … a related state law"—here, Mississippi's 1868 constitution—"to interpret the meaning of [that] *federal* law" is irrelevant, because federal courts routinely construe and apply state law in adjudicating federal claims. Stay App'x 16a. True, respondents allege that applicants are depriving them of rights originally secured in the State's 1868 constitution. But those rights are only applicable today because that is what a federal statute, not state law, requires.[2] *Pennhurst*, by contrast, applies only "where the official action is asserted to be illegal as a matter of state law alone." *Papasan*, 478 U.S. at 277. And respondents do not allege that applicants are violating state law alone. Applicants say that only a Mississippi state court can decide whether they are violating the *federal* Readmission Act. That is as wrong as it sounds.

[2] The Readmission Act is best thought of as a specific reference statute. *See* J.G. Sutherland, Statutes and Statutory Construction §§ 51:7-8 (7th ed. 2019); *see also Jam v. IFC*, 139 S. Ct. 759, 769 (2019) (applying the reference canon). Contrary to applicants' suggestion, however, respondents have never argued or suggested that the entirety of Mississippi's constitution was "federalized." App. 19; *see also* Stay App'x 14a-15a. Just the opposite. *See* Reply Br. for Plaintiffs-Appellants at 10-12, *Williams v. Bryant* (5th Cir. No. 19-60069).

2. Applicants raise a host of other arguments, but none is persuasive—some have already been resolved by this Court (thus confirming the case *against* certiorari), while others have little or nothing to do with the question presented.

Applicants suggest, for example, that the decision below is incorrect because there is an absence of precedent in which Readmission Acts have been enforced. *See* App. 14. That argument only underscores the *sui generis* nature of this case. It is also incorrect. This Court has already rejected the contention that novelty alone is a reason to apply sovereign immunity. *See Va. Office for Protection & Advocacy v. Stewart (VOPA)*, 563 U.S. 247, 260-61 (2011). And in any event, there is nothing novel about the principles employed by the court below—consistent with *Ex parte Young*, the court held that sovereign immunity did not bar a claim alleging that state law conflicts with a federal statute.[3]

Meanwhile, applicants spend the first part of their merits argument attacking a strawman—namely, respondents' reliance on this Court's decision in *Papasan* before the Fifth Circuit panel. *See* App. Part. II.A. Respondents invoked *Papasan* in the Fifth Circuit to rebut applicants' contention that the relief they seek is im-

[3] There is also a simple explanation for the relative lack of Readmission Act litigation. Most Readmission Act conditions have been made redundant by *other* federal guarantees, so there usually is no reason for a plaintiff to invoke a Readmission Act. The majority of Readmission Acts, for example, protect only the right to vote, *see* 15 Stat. 72 (1868) (Arkansas); 15 Stat. 73 (1868) (North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida), which is now safeguarded by the Fourteenth and Fifteenth Amendments and an array of federal statutes. The same is true of the right to hold political office. 16 Stat. at 68. There is, in other words, "no reason to believe" that the alleged novelty of this suit is "the consequence of past constitutional doubt." *VOPA*, 563 U.S. at 260-61.

permissibly retrospective. *See* Br. of Appellees 21-23; *see also* Stay App'x 11a-14a. Applicants no longer make that argument, so *Papasan* is no longer relevant.

Applicants separately suggest that Congress in 1870 "wasn't intending enforcement of the Readmission Acts via Section 1983 or *Ex parte Young*." App. 23. But applicants never explain why that matters. It plainly has no relevance to the sovereign immunity question presented by the Application, which concerns only whether respondents' claims, by their nature, allege a violation of state law under *Pennhurst*. Nor is applicants' observation relevant to the altogether different argument—not asserted in the Application—that relief under *Ex parte Young* and § 1983 are unavailable, *Pennhurst* notwithstanding, because Congress *expressly* displaced those procedural mechanisms through an "intricate remedial scheme." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 & n.4 (2002).[4] To the extent applicants suggest that *Ex parte Young* and § 1983 are unavailable to enforce federal enactments that predate them, applicants are wrong: *Ex parte Young* itself authorized suit to enforce a pre-existing federal enactment, and the whole point of § 1983 and its extension to federal statutes was to make available a federal forum for the vindication of pre-existing

[4] At most, applicants and Judge Jones simply *assumed* that enforcement of the Readmission Act "is in the exclusive domain of Congress." App. 6. That assumption, in the absence of any relevant statutory text, is clearly incorrect, *see, e.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647-48 (2002), but the more important points for present purposes are that this issue (i) falls well outside the scope of the sovereign immunity question presented, and (ii) was not addressed by the court below.

federal rights. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731 (1989); *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

Finally, applicants appear to suggest that the Readmission Act *itself*—whether enforced in federal or state court—violates state sovereignty because it prevents the State from amending its constitution in certain ways. *See* App. 23. Applicants are incorrect, but that is a *merits* argument that has never been briefed, let alone resolved. *See* En Banc Petition at 5 n.8, *Williams v. Reeves* (5th Cir. No. 19-60069). It has nothing to do with *Pennhurst* or the narrow sovereign immunity question resolved by the court below. *See Verizon*, 535 U.S. at 646 ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."); *see VOPA*, 563 U.S. at 260 & n.7 (constitutional "limits cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity").

There is, in short, no fair prospect that this Court will reverse on the sovereign immunity question.

C. A Stay Will Not Remedy Any Irreparable Harm

Applicants significantly overstate the possibility of irreparable harm. To start, a grant of certiorari and then reversal is highly unlikely, so a stay of the mandate will serve only to delay this suit even further. Nor is applicants' theory of harm persuasive. There is virtually no chance this case will proceed "past motion practice," App. 6 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993)), while their petition for certiorari is pending. The Fifth Circuit decided only one of many threshold issues that applicants raised in

their motion to dismiss and that will now be resolved on remand—including standing, the political question doctrine, and whether the Readmission Act is privately enforceable. It took years for the sovereign immunity issue alone to be conclusively resolved by the district court and Fifth Circuit. If that history is any guide, it will take many years more for applicants' other threshold arguments for dismissal to be decided. This Court, meanwhile, will consider applicants' petition for certiorari no later than this fall.

Even if applicants were to succeed in convincing the Court to grant certiorari and reverse, the only conceivable benefit of a stay from their perspective will be delay. That is because *Pennhurst* is a forum-selection rule, not a rule of absolute immunity. 465 U.S. at 122-23. So the most applicants can hope to achieve is a change in venue, and the harm that will supposedly befall them—briefing their dismissal arguments (one of which they want *this* Court to reach out and decide, *infra* Part II)—will occur anyway. Put differently, a stay would only delay, not avoid, the alleged "harm" applicants would sustain while their petition for certiorari is pending.

II. THERE IS NO REASONABLE PROSPECT THAT THE COURT WILL REVIEW THE QUESTION WHETHER THE MISSISSIPPI READMISSION ACT IS PRIVATELY ENFORCEABLE BECAUSE THAT QUESTION IS NOT PRESENTED HERE

A. The question whether Mississippi's Readmission Act is privately enforceable supplies no basis to stay the Fifth Circuit's mandate because no court has ever resolved that question. Indeed, the court of appeals' decision "express[ed] no opinion" on anything other than sovereign immunity, and remanded the case for the dis-

trict court to consider applicants' remaining threshold arguments "in the first instance." Stay App'x 8a; *see also id.* at 10a.

Two familiar maxims thus require denying the Application. First, this is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). This Court ordinarily will not exercise its certiorari jurisdiction to pass on an issue that was not resolved below, and this case should prove no exception. Second, while some members of the Fifth Circuit would have reached the private enforceability question, "this Court reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), and certainly not opinions dissenting in the alternative from the denial of rehearing *en banc*. *Cf. Mathian v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam) (dismissing writ as improvidently granted where petitioners sought "review of uncongenial findings not essential to the judgment and not binding upon them in future litigation").

The Court will have the opportunity to consider the private enforceability question if and when it is fairly presented. But in its current unresolved posture, that question obviously is not ripe for this Court's review. *See, e.g.*, Robert L. Stern & Eugene Gressman, *et al.*, Supreme Court Practice §§ 4.4.(G), 5.15 (11th ed. 2020) (noting this Court's practice of denying certiorari where "the case at hand does not fairly present the legal question" and dismissing petitions as improvidently granted where "[a]n important issue may be found not to be presented by the record").

B. Recognizing as much, applicants at times suggest that this Court should stay the mandate and grant certiorari to resolve yet another question—*viz.*, wheth-

er a federal court is required to consider whether a statute is privately enforceable as part of its sovereign immunity analysis. *See* App. 13-14, 26-27. That question does not warrant the extraordinary relief that applicants seek for a number of reasons.

First, even a favorable resolution of that question would not change the outcome. Assuming this Court agreed with applicants and concluded that courts must consider private enforceability at the same time as sovereign immunity, the proper remedy would be the same one the Fifth Circuit already ordered: a remand for the district court to consider whether the Readmission Act here is privately enforceable. Applicants assume that if the Court decided that private enforceability must be decided at the outset, then the Court would then proceed to the merits, i.e., whether the Readmission Act is privately enforceable. But again, there is no reasonable prospect that this Court would consider that merits question before any other court has. *See supra* at 19.

Second, this order-of-operations question plainly is not certworthy. Applicants allege a conflict with the Sixth Circuit's decision in *Michigan Corrections Organization v. Michigan Department of Corrections*, 774 F.3d 895 (6th Cir. 2014), but they mischaracterize the decision. The Sixth Circuit did not hold that in evaluating the threshold issue of sovereign immunity, a federal court must always also decide whether the statute sued upon is privately enforceable. Instead, the court held that the *Ex parte Young* "doctrine does not supply a right of action *by itself*," *id.* at 905-06 (emphasis added)—an unremarkable proposition with which respondents agree.

Indeed, even the part of *Michigan Corrections* that applicants repeatedly quote is inapposite. In discussing *Seminole Tribe*, the Sixth Circuit observed that federal courts cannot use *Ex parte Young* to supply *remedies* that Congress meant to foreclose in the applicable statute. *Id.* ("Even in a case involving relief sought under *Ex parte Young*, courts must determine whether Congress intended private parties to enforce the statute *by private injunction*." (emphasis added)). There, the plaintiffs could not use *Ex parte Young* to circumvent Congress' decision not to provide for equitable relief under the FLSA. *Id.* at 903, 905. But applicants here do not argue that the Readmission Act itself forecloses equitable relief. *Supra* at 16 & n.4.

Third, applicants' position on the merits is incorrect. As this Court has repeatedly emphasized, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646. In evaluating this "jurisdictional bar," *Pennhurst*, 465 U.S. at 100, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," *Verizon*, 535 U.S. at 645 (quotations and alteration omitted). Whether Congress "create[d] a private cause of action" in any given statute, however, is a merits question, *Verizon*, 535 U.S. at 642-43, and federal courts are usually *precluded* from resolving merits issues before jurisdictional ones, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). There is thus "no support for [applicants'] contention that a court must determine the validity of a plaintiff's cause of action in the course of deciding whether an *Ex parte Young* suit can proceed in the face of a state's Eleventh

Amendment defense," and this Court's decision in *Verizon* in fact is strong support to the contrary, *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 415-16 (5th Cir. 2004) ("[A]nalyzing the applicability of the *Ex parte Young* exception should generally be a simple matter, which excludes questions regarding the validity of the plaintiff's cause of action."). If anything, applicants' position here is in direct tension with their theory of irreparable harm: they say that a stay is necessary to spare them the indignity of litigating on the merits in federal court, yet they also contend that federal courts are *required* to address this merits issue when evaluating sovereign immunity. That cannot be right.

Fourth, applicants do not even attempt to allege that they will be irreparably harmed if the district court is not prohibited from resolving the private enforceability question while their petition is pending. *See Teva*, 572 U.S. at 1302. Nor could they. The asserted lack of a private right of action is not an "immunity from suit," App. 31-32, so applicants' irreparable harm argument rings hollow as to this issue. It stands to reason, moreover, that applicants would *prefer* a speedy resolution of this issue in the district court, not a stay, because a favorable ruling in that forum would abate the "constitutional injury" they claim to be suffering. *Id.*

III. THE BALANCE OF EQUITIES FAVORS RESPONDENTS

This is not a close case, so no balancing of the equities is necessary. As detailed above, there is little prospect this Court will grant certiorari on any of the questions presented, and an even smaller prospect this Court will reverse. The Fifth Circuit's resolution of the sovereign immunity question satisfies none of the criteria for certiorari, and is clearly correct. And the private enforceability question

that applicants really want this Court to resolve is not presented by the decision below.

Still, applicants argue that a stay should issue to preserve the status quo. App. 33. But the status quo will not change while their petition is pending. Respondents have not been awarded any relief; the sole consequence of the Fifth Circuit's decision is to remand this case for resolution of applicants' myriad other arguments for dismissal. The public interest clearly favors that result—it benefits everyone, applicants included, for this case to be resolved as expeditiously as possible. Granting a stay will prevent that result.

CONCLUSION

For the foregoing reasons, the Application should be denied.

Respectfully submitted,

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