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 A MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; GLEN EAST, IN HIS OFFICIAL CAPACITY AS A 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.

REPLY IN SUPPORT OF 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

LYNN FITCH
Attorney General of Mississippi

STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 220
Jackson, Mississippi 39205-002
(601) 359-3680
krissy.nobile@ago.ms.gov

KRISSY C. NOBILE
Deputy Solicitor General
Counsel of Record

JUSTIN L. MATHENY
Assistant Solicitor General

CANDICE L. RUCKER
DREW D. GUYTON
Special Assistant Attorneys General

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INTRODUCTION

The Eleventh Amendment is not a "forum-selection rule." Resp. at 18. That plaintiffs label it as one only demonstrates the severe and anomalous intrusion on State sovereignty here.

So, too, do the primary reasons advanced by plaintiffs for why the State's application should be denied. According to plaintiffs, the loss of sovereign immunity cannot be irreparable "even if [the State was] to prevail under *Pennhurst*," because plaintiffs may later choose to pursue "state court litigation." Resp. at 3. Plaintiffs go on to contend that the resolution of other defenses in the State's favor will "moot the sovereign immunity issue." *Id.* While these arguments surely were advanced in an attempt to rebut the State's position, they instead only solidify why a stay of the mandate is warranted.

Haling the State into federal court to have the federal court dictate and adjudicate 1868 state law school rights is itself irreparable harm. And it matters not that plaintiffs' lawsuit is dubious for countless other reasons. The State's immunity will not be "mooted" by eventual dismissal of this suit on other grounds—it will be *lost*. And, on this point, both majority and dissenting opinions of this Court are in harmony. *See, e.g.*, *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 267 (2011) ("*VOPA*") (Roberts, C.J., joined by Alito, J., dissenting) (explaining that "[sovereign] immunity does not turn on whether relief will be awarded."); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 n.5

(1993) ("The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.").

State sovereign immunity plays a key role in our federal system; it is the heart of Federalism. And States have a vested constitutional interest in having their own courts decide issues of their own state law. *See generally Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Here, there is no mistaking that the Constitution of the State of Mississippi, both in 1868 and today, is state law—irrespective of how plaintiffs dress it up.

The Eleventh Amendment is not a pleading device. And plaintiffs should not be permitted to turn it into one. This Court should recall and stay the mandate of the court of appeals pending the timely filing and disposition of the State's petition for a writ of certiorari.

REASONS FOR GRANTING THE STAY

I. There is a Reasonable Probability that Four Justices will Grant Certiorari.

The State's application, and eventual certiorari petition, has considerable merit. This case presents an appeal from a final judgment in the district court dismissing plaintiffs' suit in its entirety. And eight Fifth Circuit judges thought the issues raised were not only worthy of rehearing en banc, but that the State's position also was correct. *See Williams on behalf of J.E. v. Reeves*, 981 F.3d 437 (5th Cir. 2020) (Jones, J., dissenting from denial of rehearing en banc). Importantly, too, there is no doubt this case satisfies this Court's preference for pure issues of law on important constitutional issues. *See* Sup. Ct. R. 10(a); Robert L. Stern et al., Supreme Court Practice §§ 4.11 to .15 (7th ed. 1993) (discussing Supreme Court preference for important constitutional, federal statutory, and federal procedural issues).

Indeed, this Court has granted even interlocutory decisions to resolve important jurisdictional questions, *Land v. Dollar*, 330 U.S. 731 (1947), *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), and to hasten or finally resolve litigation, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (reversing class certification order). Moreover, when "the question presented is of substantial importance, and . . . further proceedings below would not likely aid [this Court's] consideration of it," the Court has granted certiorari. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The potential to "obviate the need for further proceedings" is yet another reason cited for certiorari review of decisions involving a remand. *New Orleans v.*

Dukes, 427 U.S. 297, 302 (1976) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-478, 480, 485-486 (1975)).

These types of considerations all weigh heavily in favor of review here. The question of whether litigants may privately enforce the congressional acts that readmitted the former confederate states to Congress after the Civil War, when the claim is comprised, in sum and substance, of alleged violations of state law, is constitutionally substantial and involves the jurisdictional limitations of the federal courts.

Worse still, the question presented is one that unequally impacts ten States. Because of this, plaintiffs' contention that this Court should deny the State's application because there is not a wide circuit split is disingenuous. Only ten States have Readmission Acts, and only Texas, Virginia, and Mississippi have a congressional Readmission Act with education language. Thus, the purported lack of a circuit split is due only to happenstance of location and context. And, if anything, the unequal treatment of ten sovereign States only heightens the need for review of the Eleventh Amendment issue here.

It also bears reiterating that, in 150 years, no court in any federal or state court has accepted a private litigant's attempt to refashion a State's Readmission Act into a privately enforceable federal mandate used to dictate and adjudicate rights secured only by state law. *See Butler v. Thompson*, 97 F. Supp. 17, 20 (E.D. Va.) (three judge panel), *aff'd*, 341 U.S. 937 (1951); *Merritt v. Jones*, 259 Ark. 380, 389, 533 S.W.2d 497, 502 (1976). The question presented is of momentous importance to the State of

Mississippi (and nine other States), fully ripe, and immediate review will obviate the need for further proceedings on a patently barred claim.

II. There is a Fair Prospect that the Judgment Below will be Reversed.

Because there is such a strong case that this Court will review and reverse the panel decision below, a stay should be granted.

A. *Pennhurst* bars the federal court from issuing a declaration that current state law violates the school rights and privileges secured by the 1868 State Constitution.

Plaintiffs contend that Section 201 of the Mississippi Constitution violates the Readmission Act because it no longer contains a uniformity guarantee. Yet, as the Fifth Circuit determined, the uniformity guarantee was a right granted only by state law. Because the Fifth Circuit is correct in that regard, both of plaintiffs' requested declarations have to be barred—as both seek to vindicate rights secured *only* under a prior State Constitution. *See Pennhurst*, 465 U.S. at 121 ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.").

The court of appeals thus was correct in dismissing one of the two requests for declaratory relief—the panel was just not correct *enough*. If one of the requested declarations conflicts with the Eleventh Amendment, the other declaration does as well.

To be sure, while plaintiffs try to draw an indefinite distinction between their two requests for declaratory relief, the distinction is without a difference. Once the Fifth Circuit rightfully rejected plaintiffs' underlying theory of this case—*i.e*, that

federal law incorporated state law and that the 1868 uniformity clause is a federal requirement—only state law remains. In fact, had there been any such school rights granted under *federal* law, the Fifth Circuit panel would not have jettisoned *either* form of the requested relief.

Imagine the federal briefing that would be filed if plaintiffs' "Readmission Act" claim were to go forward. The interpretation of the current and former Mississippi Constitutions, the cases cited in support of the parties' positions and interpretations, and the outcome reached would be only state law.

Relatedly, like Mississippi, the Readmission Acts for Texas and Virginia contain identical "school rights and privileges" language. And, in 1870, all three States had uniformity clauses. But none of these three States have uniformity provisions in their respective education clauses today. *Compare* VA. Const. art. VIII, § 3 (1870) *with* VA. CONST. art. VIII, § 1; *compare* TEX. CONST. art. IX, §§ I, IV (1869) *with* TEX. CONST. art. VII, § 1.

So, in 2016, when the Texas Supreme Court was faced with a state constitutional challenge to its school system, the state court interpreted and applied Texas's current general education clause providing for an "efficient system of public free schools." *Morath v. The Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 886 (Tex. 2016) (Willett, J.). Yet under plaintiffs' theory, the Readmission Acts set a "uniformity guarantee" federal floor for education in the States of Texas, Virginia, and Mississippi.

It surely would come as a surprise to now Fifth Circuit Judge Willett that, while his opinion in *Morath* may have interpreted current state law correctly, the court should not have been interpreting current state law at all. It should have been interpreting and applying Texas state law from 1869.

On page 15 of their response, plaintiffs switch course and contend that the real reason *Pennhurst* is inapplicable is because Mississippi "state law conflicts with a federal statute." Resp. at 15. What federal statute? Certainly not the Readmission Act. Its text references only rights secured by state law, and the Fifth Circuit already held that the school rights in 1868 were state law rights. Further, this is not a preemption case, and there otherwise is nothing to preempt. Consequently, plaintiffs reach a dead end with their new attempted dodge of the Eleventh Amendment.

All in all, the *Pennhurst* issue here can be resolved simply by reading the text of the Readmission Act: "the school rights and privileges *secured by the Constitution of said State*." 16 Stat. 67 (emphasis supplied). Thus, the Eleventh Amendment is not defeated by plaintiffs' inapt sleight of hand in wording their request for relief.

B. Plaintiffs fail to satisfy *Ex parte Young* because they have no federal rights for the federal courts to vindicate.

Ex parte Young allows a federal court to enjoin a state actor's enforcement of a "void" state law. *See* John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989, 990-91 (2008) (discussing origins as anti-suit injunction). That rule is a product of the longstanding principle, rooted in the Supremacy Clause, that state laws that conflict with federal law are unenforceable. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see also* U.S. CONST. art. VI, cl. 2.

This litigation does not involve an anti-suit injunction. Instead, plaintiffs wield *Ex parte Young* as a sword. And while they claim to "allege a violation of a federal statute," *see* Resp. at 2, it is striking that not once in twenty-three pages do plaintiffs actually claim they have a federal *right*. *See Pennhurst*, 465 U.S. at 105 ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

It is true that the Fifth Circuit panel decision did not decide whether the Readmission Acts afford plaintiffs a private cause of action. But that issue was fully briefed in two respects: (i) that plaintiffs have no federal rights for the federal courts to vindicate and thus their claim is barred by the Eleventh Amendment; and (ii) that the claim otherwise fails on its own terms under *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The Fifth Circuit panel decision *rejected* the first argument, *see Williams on Behalf of J.E. v. Reeves*, 954 F.3d 729, 736 n.5 (5th Cir. 2020), and it exercised discretion not to address the second, *see id.* at 735.

But eight Fifth Circuit judges did address the issues at the en banc stage and concluded that "no claim can be brought under *Ex parte Young* unless the Readmission Act can be enforced by private parties." *Williams*, 981 F.3d at 444 (Jones, J., dissenting from denial of rehearing en banc). Judge Jones's dissent echoes the same point articulated by Judge Sutton in *Michigan Corrections Organization v. Michigan Dept. of Corrections*, 774 F.3d 895, 905 (6th Cir. 2014).

In trying to diminish the rationale of *Michigan Corrections*, plaintiffs declare as follows:

> The Sixth Circuit did not hold [1] that in evaluating the threshold issue of sovereign immunity, a federal court must always also decide whether a statute sued upon is privately enforceable. [2] Instead, the court held that the *Ex parte Young* doctrine does not supply a right of action by *itself*.

Resp. at 20 (internal quotations omitted) (brackets supplied) (emphasis in original). The problem with plaintiffs' rationale is that statements [1] and [2] correspond.

As the Sixth Circuit explained, because the *Ex parte Young* doctrine does not supply a right of action by itself, it only "provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else." *Michigan Corrections*, 774 F.3d at 905 (emphasis in original); *id.* at 905 ("[E]ven in a case involving relief sought under *Ex parte Young*, courts *must determine* whether Congress intended private parties to enforce [a] statute by private injunction or for that matter by a declaratory judgment.") (emphasis supplied). This makes sense in the *Ex parte Young* context. If there is no federal right, the *Ex parte Young* exception is not triggered, and the claim remains barred.

Contrary to plaintiffs' argument, determining whether there is a federal right is not an improper "merits" decision. Resp. at 21. Moreover, such a determination certainly is no more of a merits decision than deciding: whether a party seeks prospective versus retrospective relief, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); whether the violation of federal law is "ongoing," *Green v. Mansour*, 474 U.S. 64, 71 (1985); whether "Congress has prescribed a detailed remedial scheme for the enforcement" of the claimed federal right, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44,

74 (1996); or whether "special sovereignty interests" are implicated, *Idaho v. Couer d'Alene Tribe,* 521 U.S. 261, 281 (1997).

Further, while the Fifth Circuit relied on *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland,* 535 U.S. 635 (2002) in rejecting the State's argument, *Verizon* is unlike both this case and *Michigan Corrections*. For example, in *Michigan Corrections*, the plaintiffs sought declaratory relief against a state official for ongoing violation of the FLSA. *Michigan Corrections*, 774 F.3d at 902. The plaintiffs in *Verizon*, by contrast, requested "that state officials be *restrained* from enforcing an order in contravention of controlling federal law." *Verizon*, 535 U.S. at 645 (emphasis supplied). For the court in *Michigan Corrections*, this difference was (and should be) dispositive.

When "the State is not threatening to sue anyone," and "litigants wield *Ex parte Young* as a cause-of-action-creating *sword*," plaintiffs have a remedy only if the statute or Section 1983 provides a cause of action. *Michigan Corrections,* 774 F.3d at 906 (emphasis in original). On the other hand, "[p]rivate parties who act in compliance with federal law may use *Ex parte Young* as a *shield* against the enforcement of contrary (and thus preempted) state laws." *Id.* (emphasis in original). The court explained that the cause of action in such cases is an equitable anti-suit injunction, which arises from the principle that defendants may raise in equity those defenses available at law. *Id.*

While the Sixth Circuit turned to *Seminole Tribe* to explain why the plaintiffs in *Michigan Corrections* could not invoke *Ex parte Young*, *Seminole Tribe* was used

only as an example of a broader principle. In *Seminole Tribe*, the Indian Gaming Regulatory Act contained a "carefully crafted and intricate remedial scheme." *Seminole Tribe*, 517 U.S. at 73-74, 75. Because of that, this Court inferred that Congress did not mean to expose state officials to "the full remedial powers of a federal court" and thus "refused to supplement that scheme" with *Ex parte Young* actions. *Id.*

Here, plaintiffs contend that the State cannot rely on either *Michigan Corrections* or *Seminole Tribe* because the State "do[es] not argue that the Readmission Act itself forecloses equitable relief." Resp. at 21. But not providing for a cause of action is the same as "foreclosing" it. As Judge Sutton explains, "[n]ot unlike the private-right-of-action and § 1983 cases, *Seminole Tribe* refused to evade the statute's private remedy with a remedy not mentioned in the statute. Anyone seeking to enforce the Gaming Act in other words had to use the right of action in the statute." *Michigan Corrections*, 774 F.3d at 905.

This Court "allows litigants to use *Ex parte Young* to sue a state official to enforce a federal statute *when the statute contains a private cause of action*." *Id.* at 906 (citing *VOPA*, 563, U.S. 250-53 and *Verizon*, 535 U.S. at 641) (emphasis supplied). Here, there is no private cause of action, and plaintiffs don't even contend they have any federal "right" to vindicate vis-à-vis *Ex parte Young*.

III. There is a Likelihood that Irreparable Harm will Result from the Denial of a Stay, and the Balance of the Equities Heavily Favors the State.

A. In relegating the Eleventh Amendment to a mere "forum-selection rule," Resp. at 18, plaintiffs severely misrepresent pages 122-123 of *Pennhurst*. The discussion in *Pennhurst* at the cited pages was a *rejection of* the alleged policy arguments asserted *against Pennhurst*'s holding. After rejecting the arguments plaintiffs now try to rely on, this Court explained what is (or should be) a familiar principle:

> In any case, the answer to respondents' assertions is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. *See Missouri* v. *Fiske,* 290 U.S., at 25-26 ("Considerations of convenience open no avenue of escape from the [Amendment's] restriction").

Id. at 123.

Treating the Eleventh Amendment as a forum-selection rule and exchanging immunity for the expediency of policy considerations "would emasculate the Eleventh Amendment." *Id.* And, just as in *Pennhurst*, plaintiffs' arguments here run afoul of this Court's admonition that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.

To be sure, it matters not that plaintiffs superficially "allege a violation of a federal statute." Resp. at 2. *Ex parte Young* is not a pleading device. Instead, evaluating whether a claim is barred by the Eleventh Amendment requires courts to examine the "'*effect* of the relief sought'" *VOPA*, 563 U.S. at 256 (quoting *Pennhurst*, 465 U.S. at 107) (emphasis in original). Here, the effect of the relief sought would be

to resurrect 1868 state law requirements and impose them on state officials today. That is indeed "as wrong as it sounds." Resp. at 14.

B. Mississippi's Constitution, like the constitutions of all other States, is solely the product of its own sovereignty—enacted and amended pursuant to its democratic processes. Thus, in attempting to alter the wording of the State's Constitution via a federal court declaration, plaintiffs seek to override the policy choices of the citizens of the State of Mississippi. Given the interests at stake here, the balance of the equities weighs strongly in favor of the State.

CONCLUSION

A recall and stay of the mandate is essential. This Court should recall and stay the mandate of the court of appeals pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

Dated: January 29, 2021

Respectfully submitted,

LYNN FITCH
Attorney General of Mississippi

BY: Krissy C. Nobile

Krissy C. Nobile
Counsel of Record
Justin L. Matheny
Candice L. Rucker
Drew D. Guyton
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 220
Jackson, Mississippi 39205-002
(601) 359-3680
krissy.nobile@ago.ms.gov

Counsel for Defendants-Applicants