APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 2, 2020

Lyle W. Cayce
Clerk

No. 19-60069

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.,

Plaintiffs - Appellants

v.

TATE REEVES, in his official capacity as Governor of Mississippi; PHILIP GUNN, in his official capacity as Speaker of the Mississippi House of Representatives; TATE REEVES, in his official capacity as Lieutenant Governor of Mississippi; DELBERT HOSEMANN, 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 Chair of the Mississippi State Board of Education; JASON DEAN, in his official capacity as Member of the Mississippi State Board of Education; BUDDY BAILEY, in his official capacity as Member of the Mississippi State Board of Education; KAMI BUMGARNER, in her official capacity as Member of the Mississippi State Board of Education; KAREN ELAM, in her official capacity as Member of the Mississippi State Board of Education; JOHNNY FRANKLIN, in his official capacity as Member of the Mississippi State Board of Education; WILLIAM HAROLD JONES, in his official capacity as Member of the Mississippi State Board of Education; JOHN KELLY, in his official capacity as Member of the Mississippi State Board of Education; CHARLES MCCLELLAND, in his official capacity as Member of the Mississippi State Board of Education,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

Before JOLLY, GRAVES, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Five years after the end of the Civil War, the Mississippi Readmission Act of 1870 reseated Mississippi's representatives in Congress, formally restoring Mississippi's rights as a member of the Union. By the plain terms of the Act, the State's readmission to Congress was subject to several "fundamental conditions," including a restriction prohibiting the State from "amend[ing] or chang[ing]" its Constitution in such a way that it "deprive[s] 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. 67 (1870).

The plaintiffs in this lawsuit are low-income African-American women whose children attend public schools in Mississippi. They filed suit against multiple state officials in 2017, alleging that the current version of the Mississippi Constitution violates the "school rights and privileges" condition of the Mississippi Readmission Act. The district court held that plaintiffs' suit was barred by the Eleventh Amendment and dismissed the case. Though we agree that a portion of the relief plaintiffs seek is prohibited by the Eleventh Amendment, we hold that the lawsuit also partially seeks relief that satisfies the *Ex parte Young* exception to sovereign immunity. Accordingly, we AFFIRM in part and VACATE and REMAND in part.

I.

When the Confederate states seceded from the Union, their congressional seats became vacant, leaving them without representation in the Senate and the House of Representatives. *See* Joint Committee on

Reconstruction, 39th Cong., 1st Sess., 1866 S. Rept. 112, x–xxi. In order to regain representation in Congress at the end of the war, the former Confederate states were required to adopt a Constitution that guaranteed a republican form of government to all state residents. 14 Stat. 429 (1867). Mississippi adopted a new Constitution on May 15, 1868, which was subsequently ratified on December 1, 1869 (the "1868 Constitution"). *See* Miss. Const. of 1868. Article Eight of the 1868 Constitution contained a series of provisions related to education and the establishment and maintenance of schools in the State. Section 1 provided as follows:

> 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, 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.

Id., art. VIII § 1.

Shortly after the 1868 Constitution was ratified, Congress enacted the Mississippi Readmission Act, which declared that the State was now "entitled to representation in the Congress of the United States." 16 Stat. 67, 68 (1870). Despite this broad proclamation, Congress conditioned Mississippi's newly-restored rights on three "fundamental" restrictions:

> First, That 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 right to vote who are entitled to vote . . . .
>
> Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office . . . .
>
> Third, That 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.

Id. Since 1868, the Mississippi Constitution's education clause has been amended four times: in 1890, 1934, 1960, and, most recently, in 1987. The current version of the Constitution contains the following education clause, codified in Section 201 of Article 8:

> 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.

Plaintiffs argue that Section 201, as most recently amended in 1987, violates the "school rights and privileges" condition of the Mississippi Readmission Act. They highlight one specific difference between the 1868 and 1987 education clauses: While the 1868 version of the education clause required the Legislature to establish "a *uniform* system of free public schools," the 1987 version has no reference to "uniform[ity]," mandating only that the Legislature provide for the establishment of a system of "free public schools."[1] Plaintiffs allege that the removal of the uniformity clause has caused significant disparities in the educational resources, opportunities, and outcomes afforded to children in Mississippi based on their race and the race of their classmates. They assert that the schools attended by plaintiffs' children—Raines Elementary and Webster Street Elementary—"are emblematic" of the problems caused by the lack of a uniformity guarantee. The student body at both schools is over 95% African American, and over 95% of all

[1] Plaintiffs identify other differences between the two education clauses as well, including the elimination of "an obligation for the Legislature to 'encourage' the promotion of public education 'by all suitable means'" and the elimination of the duty "to establish a core curriculum of 'intellectual, scientific, moral, and agricultural improvement.'" Throughout their briefing, however, they focus primarily on the absence of the uniformity guarantee.

students are eligible to receive free-or-reduced-price lunch, an indicator of poverty. Fewer than 11% of the students at these schools are proficient in reading and math, and the schools are currently rated "D" by the Mississippi Department of Education. In contrast, plaintiffs point to three "A"-rated schools—in Madison County, DeSoto County, and Gulfport—where the student populations are predominantly white and higher-income and over 65% of students are proficient in reading and math.

These disparities extend well beyond academic performance. Plaintiffs allege that their children attend schools where "[t]he ceilings are covered in wet spots, . . . the paint is chipping off the walls," students are taught by inexperienced teachers, and extracurricular activities are limited or non-existent. At schools that are predominantly white, children benefit from experienced teachers, low student-teacher ratios, and extensive resources, including "an iPad e-Reader library," musical programming, and robust physical education.

According to plaintiffs, Mississippi's removal of the word "uniform" from its Constitution resulted in a violation of the Readmission Act that has caused them to suffer a number of injuries, including illiteracy, a diminished likelihood of high school graduation, low rates of college attendance and college completion, and an increased likelihood of future poverty. In their first complaint, filed in May 2017, they sought a three-part declaratory judgment against fourteen state officials—all of whom play a role in managing and overseeing educational services in Mississippi. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). The district court granted defendants' motion for dismissal under 12(b)(1), holding that plaintiffs' complaint was barred by sovereign immunity. Although plaintiffs sued state officials rather than Mississippi itself, the court concluded that the relief plaintiffs seek would impermissibly "result in the issuing of an order that

would, and could, operate only against the State." The district court also held that plaintiffs' claim for declaratory relief was not covered by the *Ex parte Young* exception to the Eleventh Amendment because it sought to "rectify prior violations of the Mississippi Readmission Act" rather than prospectively dictate future conduct.

Plaintiffs timely moved for reconsideration of the district court's order. The district court denied the motion on the merits, but amended the judgment to reflect the fact that the dismissal was without prejudice—a mandatory condition for a dismissal under Federal Rule of Civil Procedure 12(b)(1). *See Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996) ("Because sovereign immunity deprives the court of jurisdiction, . . . claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice."). On appeal, plaintiffs largely abandon the relief requested in their original complaint, relying instead on the proposed amended complaint attached to their motion for reconsideration. In that complaint, plaintiffs request a "prospective declaratory judgment" that makes two distinct findings: first, "that Section 201 of the Mississippi Constitution is violating the Readmission Act," and second, "that the requirements of Article VIII, Section 1 of the Constitution of 1868 remain legally binding on the Defendants, their employees, their agents, and their successors."[2]

This appeal requires us to consider the "substance rather than . . . the form of the relief" plaintiffs seek, identifying the often "indistinct" line between permissible and prohibited claims under the Eleventh Amendment. *See Papasan v. Allain*, 478 U.S. 265, 278–79 (1986). As we explain below, this

[2] Plaintiffs initially sought a third declaration that the "1987, 1960, 1934, and 1890 versions of Section 201 were void *ab initio*." They removed this request from their amended complaint and acknowledge on appeal that the remaining two parts of their requested declaration "would suffice for present purposes."

careful analysis leads us to a split conclusion on plaintiffs' request for a two-part declaratory judgment: while the first part of their requested declaration seeks prospective relief that is permissible under *Ex parte Young*, the second part seeks a declaration of *state* law and is therefore barred by the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

II.

We review a district court's dismissal under Federal Rule of Civil Procedure 12(b)(1) de novo. *AT&T Commc'ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 643 (5th Cir. 2001) (citations omitted). In conducting this analysis, we "take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). A dismissal for lack of jurisdiction will not be affirmed unless "it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Gilbert v. Donahoe*, 751 F.3d 303, 307 (5th Cir. 2014).

III.

The district court dismissed the complaint because it concluded that plaintiffs' claims were barred by the Eleventh Amendment. On appeal, the state officials defend the district court's judgment while also making several alternative arguments in support of affirmance, contending that plaintiffs lack standing, the suit is barred by the political question doctrine, and there is no private right of action under the Mississippi Readmission Act. These arguments were raised in defendants' briefing before the district court, but they were not addressed in the district court's order. Though "[a] successful party in the District Court may sustain its judgment on any ground that finds support in the record," *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), the decision whether to consider an argument for the first time on appeal is "one left

primarily to the discretion of the courts of appeals," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

We conclude that there are no "special circumstances" that would justify review of these issues at this stage of the litigation, *Man Roland, Inc. v. Kreitz Motor Express*, 438 F.3d 476, 483 (5th Cir. 2006), and we therefore remand so that the district court may reach them in the first instance. We thus confine the remainder of our analysis to the Eleventh Amendment question. We express no opinion on the merits of this lawsuit or defendants' alternative jurisdictional arguments. *See PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("[T]he cardinal principle of judicial restraint [is] if it is not necessary to decide more, it is necessary not to decide more." (Roberts, J., concurring)).

A.

As a sovereign entity, a state may not be sued without its consent. The Eleventh Amendment, which protects the states' sovereign immunity, "deprives a federal court of jurisdiction to hear a suit against a state." *Warnock*, 88 F.3d at 343 (citing *Pennhurst*, 465 U.S. at 100). Read literally, the text of the Eleventh Amendment prevents only *non-citizens* of a state from suing that state. U.S. Const. amend. XI. Since *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890), however, courts have understood that the Amendment provides protections beyond its text, shielding states from suits brought by their own citizens as well as citizens of other states.[3] *See Va. Office for Prot. & Advocacy*

[3] Because this broad reading of the Eleventh Amendment is not supported by its text, we have dubbed "Eleventh Amendment immunity" a "misnomer . . . [since] that immunity is really an aspect of the Supreme Court's concept of state sovereign immunity and is neither derived from nor limited by the Eleventh Amendment." *Meyers ex. rel. Benzing v. Texas*, 410 F.3d 236, 240–41 (5th Cir. 2005) (citing *Alden v. Maine*, 527 U.S. 706, 712–13 (1999)). "Nevertheless, the term 'Eleventh Amendment immunity' has been used loosely and interchangeably with 'state sovereign immunity' to refer to a state's immunity from suit without its consent in federal courts." *Id.* (citing cases).

v. Stewart, 563 U.S. 247, 253 (2011) (*VOPA*). The doctrine of sovereign immunity is derived from the fundamental principle that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign's] consent." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 634 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996)).

Sovereign immunity is not limitless, and this case involves an important caveat—the *Ex parte Young* exception. Under *Ex parte Young*, 209 U.S. 123, 167–68 (1908), a litigant may sue a state official in his official capacity if the suit seeks prospective relief to redress an ongoing violation of federal law. *Id.* at 167–68; *Air Evac EMS v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017). The exception rests on a legal fiction, the premise that a state official is "not the State for sovereign-immunity purposes" when "a federal court commands [him or her] to do nothing more than refrain from violating federal law." *VOPA*, 563 U.S. at 255. Though an *Ex parte Young* suit has an "obvious impact on the State itself," it is an essential mechanism for affirming the supremacy of federal law.[4] *Pennhurst*, 465 U.S. at 104–05; *see also VOPA*, 563 U.S. at 254–55 (observing that the *Ex parte Young* exception "has existed alongside our sovereign-immunity jurisprudence for more than a century, accepted as necessary to permit the federal courts to vindicate federal rights." (internal quotation marks omitted)).

[4] As a general rule, "a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 102. But *Ex parte Young* is "an important exception to th[at] general rule." *Id.* Thus, if a case meets the requirements of *Ex parte Young*, it is permissible—despite the fact that, in reality, a judgment in the case would ultimately operate against the state. *Id.*; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("*Young* and its progeny render the [Eleventh] Amendment wholly inapplicable to a certain class of suits.").

There are three basic elements of an *Ex parte Young* lawsuit. The suit must: (1) be brought against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal, not state, law. *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 394 (5th Cir. 2015). An *Ex parte Young* suit must also seek equitable relief—relief that is "declaratory or injunctive in nature and prospective in effect." *Aguilar v. Tex. Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998); s*ee also Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 500–01 (5th Cir. 2001) (holding that *Ex parte Young* applied to a suit for declaratory relief because the "requested relief is indistinguishable from a suit to enjoin the [state official] from declining to [enforce the law]"). "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002).[5] Therefore, in order to determine whether a suit complies with the requirements of *Ex parte Young*, the "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.'" *Id.* (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in judgment)).

Plaintiffs clearly comply with the first requirement for an *Ex parte Young* suit: the named defendants are state officers, and they are sued in their official capacities. Plaintiffs' two-part request for a declaratory judgment requires a more nuanced analysis of the "prospective" and "federal law" prongs

[5] Defendants argue that the availability of a private right of action to enforce the Mississippi Readmission Act is a question that goes "hand in hand" with the sovereign immunity question. In *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407 (5th Cir. 2004), however, we held that there is "no support" for the notion 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." *Id.* at 415.

of an *Ex parte Young* lawsuit. Two Supreme Court cases primarily guide our inquiry: *Papasan v. Allain* and *Pennhurst State School & Hospital v. Halderman*.

i.

Defendants argue that plaintiffs' lawsuit seeks retroactive relief that cannot be pursued under *Ex parte Young*. The *Ex parte Young* exception is "focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Papasan*, 478 U.S. at 277–78. This limitation is consistent with the purpose of the *Ex parte Young* exception: While "'[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law," *id.* at 278 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)), the same rationale does not apply to remediation of a *prior* violation of federal law. Thus, to comply with the dictates of *Ex parte Young*, plaintiffs' lawsuit must allege that the defendants' actions are *currently* violating federal law. *See NiGen Biotech*, 804 F.3d at 394 (citing *Green*, 474 U.S. at 71–73).

According to defendants, the first part of plaintiffs' two-part requested declaration—a finding "that Section 201 of the Mississippi Constitution is violating the Readmission Act"—fails this test. Defendants characterize this portion of plaintiffs' requested relief as a challenge to the Mississippi legislature's actions to *amend* the Constitution's education clause—an act that occurred thirty-two years ago, and which is not expected to occur again in the imminent future. Defendants also note that the Mississippi Readmission Act itself places limitations on the *amendment* of the Constitution, not on the text of the laws that result from that amendment process. *See* 16 Stat. 68 (prohibiting the State from "amend[ing] or chang[ing]" its Constitution if the amendment has the particular effect of "depriv[ing] any citizen or class of

citizens of the United States of the school rights and privileges secured by the constitution of said State"). They therefore argue that plaintiffs unlawfully seek retroactive relief—a declaration that the constitutional amendment violated federal law at the time that it occurred.

We disagree with this characterization of plaintiffs' requested relief. The Supreme Court's decision in *Papasan* is particularly instructive, compelling the conclusion that this portion of plaintiffs' requested relief is permissible under *Ex parte Young*. In *Papasan*, a group of Mississippi public-school children alleged that the State *had* breached its obligation to hold federally-granted land in a perpetual trust for the benefit of schoolchildren in the State's northern twenty-three counties—an area previously held by the Chickasaw Indian Nation. 478 U.S. at 272–73. Mississippi sold the land in 1856, investing the proceeds in railroads that were later destroyed. *Id.* at 272. The *Papasan* plaintiffs alleged that those decisions amounted to a breach of trust and an equal protection violation. *Id.* at 274.

The Court allowed plaintiffs to pursue their equal-protection claim but rejected the second claim for a breach of trust. *Id.* at 280–82. Though phrased as a claim for equitable relief, the breach-of-trust claim asked the State to provide monetary relief for the State's imprudent investment activities, a harm that occurred when the State sold the land over 100 years before the plaintiffs brought their claims. *Id.* at 280–81. Because the plaintiffs sought to remedy the breach itself, any relief linked to the past breach would have been retrospective, not prospective. *Id.* In contrast, the Court held that the equal-protection claim was prospective and thus permitted that claim to go forward. *Id.* at 281–82. Plaintiffs alleged that the State's past actions had present and persistent consequences, denying them "their rights to an interest in a minimally adequate level of education, or reasonable opportunity therefor." *Id.* at 282. The Court held that "[t]his alleged ongoing constitutional violation—

the unequal distribution by the State of the benefits of the State's school lands—is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Id.* Though "the current disparity result[ed] directly from . . . actions in the past," the "essence" of the claim alleged a current and persisting disparity in the State's distribution of funds. *Id.*

Like the equal-protection claim in *Papasan*, plaintiffs' claim that Section 201 currently violates the Mississippi Readmission Act seeks relief for an ongoing violation. Plaintiffs argue that Mississippi schoolchildren *today* are deprived of their school rights, and they allege that the current version of Section 201—presently enforced and maintained by the defendants—is the cause of that harm. *Papasan* instructs that the historical origins of the continuing violation are not determinative of the viability of an *Ex parte Young* suit. As long as the claim seeks prospective relief for ongoing harm, the fact that a current violation can be traced to a past action does not bar relief under *Ex parte Young*. *Id.* at 282. Plaintiffs must allege that "the defendant *is violating* federal law, not simply that the defendant has done so" at some point in the past, *NiGen Biotech*, 804 F.3d at 394. Once they meet that requirement, however, the complaint's straightforward, present-tense allegations "are sufficient to demonstrate the ongoing nature of the alleged un[lawful] conduct." *Id.* at 395.

Plaintiffs' allegations are sufficiently forward-looking, and thus permissible under *Papasan*. They seek relief for what they allege to be defendants' ongoing violation of federal law—the enforcement of a state constitutional provision that conflicts with the federal Readmission Act. This is the type of relief permitted under *Ex parte Young*, which "rests on the need to promote the vindication of federal rights." *Cox v. City of Dallas*, 256 F.3d 281, 307 (5th Cir. 2001); *Verizon*, 535 U.S. at 645. Contrary to defendants'

characterization, plaintiffs do not challenge the act of amending the Mississippi Constitution; instead, they challenge the ongoing harm they allegedly suffer as a result of its current text. An invalid law produces consequences long after the date of its enactment—that is the very essence of a legal dictate. "In discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought, and will be guided by the policies underlying the decision in *Ex parte Young*." *In re Tejas Testing Tech. One*, 149 F.3d 1177, at *4 (5th Cir. 1998) (unpublished) (quoting *Papasan*, 478 U.S. at 279) (holding that several of plaintiffs' causes of action sought, "at least on their face, prospective declaratory or injunctive relief for a continuing violation of federal law," and were therefore permissible under *Ex parte Young*). Thus, because plaintiffs claim to be presently harmed by these consequences, they may pursue prospective relief under *Ex parte Young*.

Defendants also argue that plaintiffs' request for a declaration that Section 201 conflicts with the Readmission Act impermissibly interferes with "special sovereignty interests." We do not find this argument persuasive. Though the Supreme Court held in *Coeur d'Alene* that "special sovereignty interests" may invalidate an otherwise appropriate *Ex parte Young* suit, that case involved a lawsuit that was the "functional equivalent of a quiet title action"—a specific infringement on state land rights. 521 U.S. at 281. We have never before applied the holding of *Coueur d'Alene* in a context outside of the unique land rights challenge in that case. *See, e.g.*, *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009) (declining to extend the *Coeur d'Alene* limitation to a case that did not involve a quiet title action and would thus not impede on the state's right to its own lands); *Lipscomb*, 269 F.3d at 502 (holding that a lawsuit that did not seek to quiet title was not barred by *Coeur d'Alene* since it would not result in relief that "strip[ped] the State of any of its jurisdiction or authority to regulate the land"). To the contrary, "this circuit has rejected the

idea that *Coeur d'Alene* affects the traditional application of *Ex parte Young*." *AT&T Comm'ns*, 238 F.3d at 648; *Air Evac EMS*, 851 F.3d at 517; *see also* 17 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2019) ("Lower courts have been reluctant to use the special state sovereignty interest rationale to limit Ex Parte Young relief."). Moreover, plaintiffs' requested relief would not interfere with the State's general ability to manage and operate its own schools. It would simply lead to a declaration that one constitutional provision defining the terms of that management structure violates federal law.

For these reasons, we conclude that the first part of plaintiffs' two-part requested relief—a declaration that Section 201 of the Mississippi Constitution conflicts with the Readmission Act—may be pursued under *Ex parte Young*, and we reverse the district court's Eleventh Amendment-only dismissal as to this part.

ii.

We reach the opposite conclusion with respect to the second part of plaintiffs' requested declaratory judgment: a finding that "the requirements of Article VIII, Section 1 of the Constitution of 1868 remain legally binding on the Defendants, their employees, their agents, and their successors." Because this request impermissibly asks a federal court to "instruct[] state officials on how to conform their conduct to state law," it is barred by the Supreme Court's decision in *Pennhurst*, 465 U.S. at 106.

In *Pennhurst*, the Court explained that the rule announced in *Ex parte Young* cannot be used to redress a state official's violation of state law. *Id.* The plaintiffs in *Pennhurst* sought to invoke the federal court's supplemental jurisdiction to bring a claim under a Pennsylvania state law. *Id.* at 92. The Court found that this practice did not comply with the purpose or requirements of an *Ex parte Young* suit. "A federal court's grant of relief against state officials

on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* at 106. "Such a result [would] conflict[] directly with the principles of federalism that underlie the Eleventh Amendment." *Id.*

Plaintiffs' first requested declaration—a judicial finding that Section 201 violates the Mississippi Readmission Act—will necessarily require the court to determine the meaning of "school rights and privileges," a term that will require analysis of the 1868 Constitution. This judicial exercise, however, does not run afoul of *Pennhurst* because it does not ask the court to compel compliance with "state law *qua* state law." *Ibarra v. Tex. Emp't Comm'n*, 823 F.2d 873, 877 (5th Cir. 1987). Instead, it asks the court to interpret the meaning of a *federal* law—the Mississippi Readmission Act—by reference to a related state law. *See World of Faith World Outreach Ctr. Church, Inc. v. Morales*, 986 F.2d 962, 965 (5th Cir. 1993) ("Under existing law, federal courts must necessarily construe local law and administrative regulations to ascertain if there is a[n] interest protected by [a federal statute]." (quoting *Patchette v. Nix*, 952 F.2d 158, 162 (8th Cir. 1991))); *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985) ("[A]scertaining state law is a far cry from compelling state officials to comply with it.").

In contrast, the second part of plaintiffs' claim asks the court to do something more than merely "determine . . . what the [state] statute means." *World of Faith*, 986 F.2d at 966. It asks the court to identify *which* state law is binding upon state officials, making a judicial declaration that a state law enacted over 150 years ago remains valid and enforceable, despite many years of amendments and alterations. Because the *Ex parte Young* exception "is not a way to enforce state law through the back door," *Wozniak v. Adesida*, 932 F.3d 1008, 1011 (7th Cir. 2019), *Pennhurst* requires us to hold that this is an invalid basis for an *Ex parte Young* suit.

Plaintiffs argue that the second part of their requested declaration is permissible under *Pennhurst* because it merely asks the court to enforce a state law that is incorporated within the federal Readmission Act. They cite cases in which a federal law *explicitly* incorporated a particular provision of a state law or otherwise transformed an individual state requirement into a binding federal mandate. *See Kapps v. Wing*, 404 F.3d 105, 120 n.21 (2d Cir. 2005) (compelling defendants to comply with state law because "compliance with state law [was] required as a matter of *federal* law"); *Ibarra*, 823 F.2d at 877 (finding no *Pennhurst* violation where a Texas statute "expressly incorporates" certain standards from a federal statute, "and indeed, provides that any change in the [federal] standard is automatically incorporated into Texas law"); *Everett*, 772 F.2d at 1119 (allowing a federal claim to proceed under *Pennhurst* where the federal law required states to abide by standards of need provided in state law). Likewise, plaintiffs cite cases where state laws required compliance with a federal rule, transforming the state laws into federal mandates that could be enforced without "run[ning] afoul of *Pennhurst*'s admonition regarding state law claims." *Cox*, 256 F.3d at 308.

Plaintiffs' claim does not fit either of these situations. Plaintiffs sue defendants under the Mississippi Readmission Act, which does not explicitly incorporate any of the language, requirements, or provisions of the 1868 Constitution. Nor does the Readmission Act require Mississippi to abide indefinitely by the 1868 Constitution's education clause. Indeed, it explicitly permits the State to amend its Constitution, placing only a general limitation upon the State to retain the "school rights and privileges" that were protected under the 1868 Constitution. The Readmission Act does not use the phrase "uniformity" or any of the specific language contained in the 1868 education clause. By asking a federal court to declare that *all* of these state requirements remain binding and valid upon state officials, plaintiffs seek to import a

specific "uniformity" requirement into the more general federal act. Yet while 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 Mississippi to retain fixed, 200-year-old language in its education clause.

Other circuits have similarly held that the federal government's approval of a state law does not automatically transform that law into a federal mandate. In *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 2002), and *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001), the plaintiffs sued to enforce federally-approved state mining plans, arguing that the Surface Mining Control and Reclamation Act ("SMCRA") made those state plans enforceable by federal courts. The Third and Fourth Circuits both held that these claims were barred by *Pennhurst*. *Hess*, 297 F.3d at 323–30; *Bragg*, 248 F.3d at 296. Though the state plans had been approved by the federal government, this approval did not mean that the state plans had somehow been "incorporated or 'codified' into federal law." *Hess*, 297 F.3d at 326; *Bragg*, 248 F.3d at 297. As a result, the *Bragg* and *Hess* courts held that a federal court could not order state officials to abide by their own plans. *Id.*[6]

Plaintiffs' second request for relief is analogous to the impermissible claims in *Bragg* and *Hess*. Plaintiffs ask the court to make a declaration about *state* law, arguing that the Mississippi Constitution became enforceable against the State in federal court when it was approved by Congress in the Readmission Act.[7] Yet while a federal court can interpret the meaning of

[6] The court in *Hess* allowed two of plaintiffs' claims to move forward because those claims alleged violations of specific federal, not state, regulations, which "ha[d] no counterpart in state law." *Hess*, 297 F.3d at 331.

[7] The requested relief is not identical to *Hess* and *Bragg* in all respects. Plaintiffs ask the court to identify binding state law, but they do not seek a declaration that state officials

"school rights and privileges," it cannot transform century-old state law into a binding federal mandate. *See Bragg*, 248 F.3d at 297 (holding that a state's "dignity interest" in setting and enforcing its own law "does not fade into oblivion merely because a State's law is enacted to comport with a federal invitation to regulate within certain parameters and with federal agency approval").

"[T]he determinative question [under *Pennhurst*] is not the relief ordered, but whether the relief was ordered pursuant to state or federal law." *Brown v. Ga. Dep't of Revenue*, 881 F.2d 1018, 1023 (11th Cir 1989). Because plaintiffs' second requested declaration seeks an order compelling state officials to comply with a specific state law, we conclude that it is barred by *Pennhurst* and is thus invalid under *Ex parte Young*.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and VACATED and REMANDED in part.

have violated state law. We are not persuaded that this distinction is meaningful. As defendants note, "the requested relief would first tell state officials what state law is, and then have those officials conform their conduct to state law." This would constitute a major intrusion into state sovereignty, the primary justification for the Eleventh Amendment. The Readmission Act did not strip the state of its power to amend the Constitution; instead, it identified certain conditions that must guide the amendment process.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 19-60069

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.,

Plaintiffs—Appellants,

versus

TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI; PHILIP GUNN, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; TATE REEVES, IN HIS OFFICIAL CAPACITY AS LIEUTENANT GOVERNOR OF MISSISSIPPI; DELBERT HOSEMANN, 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 CHAIR OF THE MISSISSIPPI STATE BOARD OF EDUCATION; JASON DEAN, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; BUDDY BAILEY, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; KAMI BUMGARNER, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; KAREN ELAM, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; JOHNNY FRANKLIN, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; WILLIAM HAROLD JONES, IN HIS OFFICIAL CAPACITY AS MEMBER OF

THE MISSISSIPPI STATE BOARD OF EDUCATION; JOHN KELLY, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; CHARLES MCCLELLAND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-404

ON PETITION FOR REHEARING EN BANC

(Opinion April 2, 2020, 5 CIR., _____, _____ F.3D _____)

Before JOLLY, GRAVES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Circ. R. 35), the petition for rehearing en banc is **DENIED.**

In the en banc poll, 8 judges voted in favor of rehearing (Judges Jones, Smith, Elrod, Willett, Ho, Duncan, Oldham, and Wilson), and 9 judges voted against rehearing (Chief Judge Owen and Judges Stewart, Dennis, Southwick, Haynes, Graves, Higginson, Costa, and Engelhardt).

ENTERED FOR THE COURT:

STEPHEN A. HIGGINSON
United States Circuit Judge

EDITH H. JONES, Circuit Judge, joined by SMITH, ELROD, WILLETT,* HO,* DUNCAN, OLDHAM, and WILSON, Circuit Judges, dissenting from the denial of rehearing *en banc*

This strange case seeks a declaratory judgment that Mississippi's 1868 Constitution, which satisfied the terms of the post-Civil War Readmission Act of Congress, granted more educational rights to African-American children than an amendment to the state's Constitution in 1987. The sought-for judgment, in essence, would tell Mississippi what its state Constitution meant then and means now and would pave the way for federal court orders to effect a major restructuring of state school funding. Federal courts, however, have no business interpreting and enforcing state law against state government. Federalism, the principle of dual sovereignties, is a bedrock principle of our Founding and a bulwark of individual liberty because it diffuses the exercise of power by governments. Not only the Eleventh Amendment, but "the fundamental rule [of dual sovereignty] of which the Amendment is but an exemplification,"[1] protects states from abuse by federal courts. The Supreme Court expressed the basic roadblock to maintaining this suit in federal court:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, 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. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984).

Pennhurst clearly forbids federal courts from adjudicating claims of state law against nonconsenting sovereign states in federal court. The panel here

* Judges Willett and Ho concur only in Parts I and IIB.

[1] *Ex Parte State of New York,* 256 U.S. 490, 497, 41 S. Ct. 588, 589 (1921).

nonetheless issued a Janus-faced opinion, finding one of the plaintiffs' claims barred according to *Pennhurst*, while permitting another, virtually identical claim, to move forward in the district court.

This court refused to order en banc reconsideration. I respectfully dissent. State sovereign immunity should bar this suit in its entirety based on *Pennhurst*. Moreover, such sovereign immunity includes immunity from suit, not simply adverse judgments; we should alternatively have dismissed the suit because the Mississippi Readmission Act created no implied private right of action on behalf of these plaintiffs.

I. Background

Following the Civil War, Mississippi's readmission to full statehood required it to adopt a constitutional guarantee of a republican form of government to all state residents.[2] Mississippi adopted a constitution in 1868 that did just that. Article Eight of Mississippi's 1868 Constitution contained a series of provisions related to education and the establishment and maintenance of public schools. Section 1 of Article Eight, relevant to this case, provides:

> 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, 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 grades.

MISS. CONST. of 1868, art. VIII § 1 (emphasis added).

Shortly after the 1868 Constitution was ratified, Congress enacted the Mississippi Readmission Act, which premised the state's restored rights on certain "fundamental conditions," including: "That the constitution of

[2] Ten states formerly in rebellion were readmitted to Congress pursuant to similar federal laws.

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. 67, 68 (1870) (emphasis added).[3] Since 1868, the quoted state constitutional provision has been amended four times. The current version, adopted in 1987, states: "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.

The plaintiffs comprise a group of low-income African-American women whose children attend Mississippi public schools. They allege "that the current version of the Mississippi Constitution violates the 'school rights and privileges' condition of the Mississippi Readmission Act." *Williams v. Reeves,* 954 F.3d 729, 732 (5th Cir. 2020). "They highlight one specific difference between the 1868 and 1987 education clauses: While the 1868 version of the education clause required the Legislature to establish 'a *uniform* system of free public schools,' the 1987 version has no reference to 'uniform[ity],' mandating only that the Legislature provide for the establishment of a system of 'free public schools.'" *Id.* at 733 (emphasis and alteration in original). The plaintiffs contend that the removal of the word "uniform" from Mississippi's Constitution violates the Readmission Act, resulting in *disuniform* schools and a number of injuries, including illiteracy, a diminished likelihood of high school graduation, low rates of college attendance, and an increased likelihood of future poverty.

The named defendants, sued in their official capacities, include Mississippi's Governor, Lieutenant Governor, Speaker of the House, Secretary of State, and the entire State Board of Education. They moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district

[3] Identical language appears regarding the readmission of Virginia and Texas, consequently, the same case could be filed in those states if plaintiffs prevail here.

court granted the defendants' 12(b)(1) motion, holding that it lacked jurisdiction based on Eleventh Amendment sovereign immunity. On reconsideration, the court dismissed without prejudice.

On appeal, the plaintiffs defended their "request [for] a 'prospective declaratory judgment' that makes two distinct findings: first 'that Section 201 of the Mississippi Constitution is violating the Readmission Act,' and second, 'that the requirements of Article VIII, Section 1 of the Constitution of 1868 remain legally binding on the [d]efendants, their employees, their agents, and their successors.'" *Id.* at 734. The panel affirmed the district court's dismissal concerning the second of plaintiffs' requests because it "seeks a declaration of *state* law and is therefore barred by the Supreme Court's decision in *Pennhurst* . . . ." *Id.* (emphasis in original).

Contrarily, the panel reasoned that the plaintiffs' first request for declaratory relief fits within *Ex parte Young*'s exception to sovereign immunity for cases in which a state officer is charged with acting in violation of federal law. *Id.* at 735–36. Plaintiffs allege that Section 201 of the current Mississippi constitution violates federal law, specifically, the Mississippi Readmission Act's confirmation of "school rights and privileges." That the "school rights and privileges" language depends on the state's 1868 constitution, the panel declared, did not potentially "run afoul of *Pennhurst* because it does not ask the court to compel compliance with 'state law *qua* state law,'" the panel explained. *Id.* at 740 (quoting *Ibarra v. Tex. Emp't Comm'n*, 823 F.2d 873, 877 (5th Cir. 1987)). "Instead, it asks the court to interpret the meaning of a *federal* law—the Mississippi Readmission Act—by reference to a related state law." *Id.* (emphasis in original).

II. Analysis

A. State Sovereign Immunity

Respectfully, there is no way to avoid the conclusion that the panel's decision on the first request for declaratory relief requires the federal court to

impermissibly adjudicate a question of state law. The first decision the court must make on remand pits the meaning of "a uniform system" of public schools in Mississippi's 1868 constitution against "the establishment, maintenance and support" of public schools enunciated in the state's 1987 constitutional amendment. Only after finding that the provisions conflict and that the newer provision is less protective of plaintiffs' children than the 1868 provision could a court conclude that the "school rights and privileges" referenced in the federal Readmission Act have not been "secured by the constitution" of Mississippi.

The doctrine of *Ex parte Young* constitutes an exception to the states' constitutional immunity whereby a federal court has jurisdiction over a suit against a state officer to enjoin an ongoing violation of federal law, even though the state itself would be immune from suit in federal court. *Pennhurst,* 465 U.S. at 102–03, 104 S. Ct. at 909. In preserving the delicate balance between rights created under the Constitution and the states' Eleventh Amendment and sovereign right not to be hailed into federal court, "we must ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269, 117 S. Ct. 2028, 2034 (1997). Accordingly, the Supreme Court has carefully limited the application of *Ex parte Young* to circumstances in which injunctive relief is necessary to "give[] life to the Supremacy Clause." *Green v. Mansour,* 474 U.S. 64, 68, 106 S. Ct. 423, 426 (1985). One of the most important limitations is that *Ex parte Young* does not apply where private parties seek relief amounting to a federal court order instructing "state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106, 104 S. Ct. at 911. To determine whether the *Ex parte Young* doctrine avoids an immunity bar, federal courts conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as

prospective." *Verizon Maryland, Inc. v. Public Serv. Comm'n. of Md.,* 535 U.S. 635, 645, 122 S. Ct. 1753, 1760 (2002) (quoting *Coeur d'Alene,* 521 U.S. at 296, 117 U.S. at 2047 (O'Connor, J., concurring)).

As all these decisions indicate, the touchstone for applying *Ex parte Young* is an allegation that *federal law* is being violated. Without the imperative of vindicating federal law, federal courts have no warrant to adjudicate suits against nonconsenting states. What the plaintiffs seek in this case is plainly an interpretation and enforcement of Mississippi law, which is not a declaration cognizable through the *Ex parte Young* exception. The panel mistook what is, in substance, a state law claim as a federal claim interpreting the Readmission Act.

The Readmission Act specifies that the State shall not amend *state* law so as to violate *state* law: ". . . the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens . . . of the school rights and privileges secured by the constitution of said State." 16 Stat. 67, 68 (1870). The plaintiffs can only prevail on their purported federal claim if they persuade a court to find that Mississippi violated school rights granted exclusively by its own 1868 Constitution when it amended its Constitution in 1987.

The panel rejected plaintiffs' claim that the Readmission Act incorporated 1868 state constitutional law. *Williams,* 954 F.3d at 740. It stated, correctly, that the Mississippi Readmission Act "does not explicitly incorporate any of the language, requirements, or provisions of the 1868 Constitution. Nor does the Readmission Act require Mississippi to abide indefinitely by the 1868 Constitution's education clause." *Id.* Having recognized these salient facts, it is a mystery how the panel could avoid the conclusion that plaintiffs are not entitled to relief unless a federal court decides an explicitly state law issue: whether Section 201 of Mississippi's 1890 Constitution, as amended in 1987, abrogated rights secured by Mississippi's

1868 Constitution.[4] The plaintiffs' argument proves the point. They contend that Section 201 is invalid because it "no longer contains a uniformity guarantee." But the uniformity guarantee is (or was) a right granted only by state law. The Readmission Act says no more than this, as it references only "the school rights and privileges *secured by the Constitution of said State*." 16 Stat. 67, 68 (1870). In the absence of the Readmission Act's explicit incorporation of state law or a prohibition on future amendments of the state constitution, the only way for Section 201 to be declared invalid is to say it abrogated the previous state constitutional provision. For a federal court to adjudicate that proposition would violate the sovereignty and federalism principles undergirding the *Pennhurst* decision.

Here, the plaintiffs are not asking the federal court merely to consult or ascertain state law on the way to adjudicating a federal claim, but to (1) interpret two state constitutional provisions, the 1868 uniformity guarantee and Section 201; (2) determine whether they are compatible or in conflict; and then (3) declare whether officers of state government are in

[4] Many of these same concerns animate the separate doctrine of *Pullman* abstention. *See Harris County Com'rs Court v. Moore*, 420 U.S. 77, 84 n.8, 95 S. Ct. 870, 876 n.8 (1975) ("[W]here the challenged statute is part of an integrated scheme of related constitutional provisions, statutes, and regulations, and where the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district courts to abstain."); *Reetz v. Bozanich*, 397 U.S. 82, 87, 90 S. Ct. 788, 790 (1970) ("The Pullman doctrine was based on the avoidance of needless friction between federal pronouncements and state policies. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution." (internal quotation and citation omitted)); *Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, 499, 61 S. Ct. 643, 645 (1941) ("The last word on the meaning of [a Texas statute], and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas."); *see also* 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4242 (3d ed. 2020) ("Pullman-type abstention is based in large part on considerations of federalism, and the desire to preserve harmonious federal-state relations."); MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 14.02 (4th ed. 2020) ("When there is lack of clarity in a state constitutional provision that is unique in the sense that it has no counterpart in the federal Constitution, invocation of *Pullman* abstention may be justified.")

violation of the state constitution. That is all the Readmission Act provides, and that adjudication is quintessentially a task for Mississippi's courts.[5]

Further demonstrating the abuse of state sovereign immunity, it is plain that, if successful, plaintiffs' request for a declaratory judgment would surely be followed by a plea for injunctive relief against the state defendants. The only relief compatible with plaintiffs' claim as to the Readmission Act would order the defendants to comply with Article VIII, Section 1 of the 1868 constitution. As the panel understood (regarding plaintiffs' claim for a direct declaration of state law), such an order would run afoul of *Pennhurst*. *Williams,* 954 F.3d at 741. The affront to the state's enforcement of its constitution and management of its educational system is manifest.

What's sauce for the goose is sauce for the gander. The panel's conclusion that *Pennhurst* bars a direct declaration of state law must extend to the declaration of alleged federal law that turns solely and exclusively on a declaration of state law. The Readmission Act required Mississippi to enforce "the school rights and privileges *secured by the Constitution of said State*." 16 Stat. 67, 68 (1870). These "school rights" are rights secured by state law. Any claim resting on an "ongoing violation" is not one of federal law, but of state law. Just as the Supreme Court concluded in *Pennhurst* and the Fourth Circuit in *Bragg,* "a State's sovereign dignity reserves to its own institutions the task of keeping its officers in line with [state] law." *Bragg v. West Virginia Coal Ass'n.,* 248 F.3d 275, 297 (4th Cir. 2001); *see Pennhurst*, 456 U.S. at 106, 104 S. Ct. at 911.

[5] In a similar vein, two sister circuits concluded that pursuant to *Pennhurst* and fundamental Federalism principles, lawsuits challenging states' regulation of mining practices that were established under a federal environmental statute did not fall within the *Ex parte Young* exception. *Bragg v. West Va. Coal Ass'n.,* 248 F.3d 275, 298 (4th Cir. 2001); *Pennsylvania Federation Sportsmen's Club v. Hess,* 297 F.3d 310, 330 (3d Cir. 2002). As the *Bragg* court held, where the federal statute did not incorporate state law, and intended to craft a floor for state regulation, "any injunction against State officials to enforce this provision would command them to comport with the State's own law[.]" 248 F.3d at 295–96.

B. No Readmission Act Implied Right of Action.

Because state sovereign immunity, as interpreted by the Supreme Court, confers immunity from suit, not just liability,[6] this court has the discretion to consider whether the Readmission Act creates a private right of action. *Singleton v. Wulff,* 428 U.S. 106, 121, 96 S. Ct. 2868, 2877 (1976). Consistent with principles of federalism, we should have decided this important and intertwined question of law to avert the state's continued subjection to this litigation. No claim can be brought under *Ex parte Young* unless the Readmission Act can be enforced by private parties. That any such implied cause of action exists is, however, untenable.

The problem here is straightforward: "[P]rivate rights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 121 S. Ct. 1511, 1519 (2001) (citation omitted), and the readmission acts did not create such a right or even impose federal statutory obligations on States. The readmission acts simply offered the states a choice to comply with certain congressional conditions or run the risk that their representatives will not be seated. That much is obvious from the text and structure of the Readmission Act. It was passed "to admit the State of Mississippi to Representation in the Congress of the United States" upon certain conditions. 16 Stat. 67 (1870). The Act explicitly describes "the performance of these several acts" as a "condition precedent to the representation of the State in Congress." *Id.* Later in the Act, it explicitly

[6] *Federal Maritime Com'n v. South Carolina State Ports*, 535 U.S. 743, 766 122 S. Ct. 1864, 1877 (2002) ("Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."); *see Alden v. Maine*, 527 U.S. 706, 731, 119 S. Ct. 2240, 2246–47 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."); *Pennhurst*, 465 U.S. at 100, 104 S. Ct. at 908 ("This Court's decisions thus establish that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." (quotation and citation omitted)).

qualifies Mississippi's admittance "to representation in Congress" upon three "fundamental conditions," one of which is the school rights and privileges condition at issue here.[7] *Id.* at 68. In short, the Readmission Act does not create a private right of action, express or implied. Thus, even assuming *arguendo* that Mississippi's current education clause does not comport with the "fundamental conditions" of the Mississippi Readmission Act, all that can be said is that Mississippi has chosen to run the risk that its representatives may be unseated *by Congress*.

Finding an implied private right of action based on the language of the Readmission Act would depart drastically from decisions of the Supreme Court and this court's recent en banc decision in *Planned Parenthood v. Kauffman*, No. 17-50282, 2020 WL 6867212 (5th Cir. Nov. 23, 2020). The Readmission Act states that as a condition of readmitting the state's representatives to Congress, the "constitution of Mississippi shall never be [] amended" to deprive any citizen or class of citizens of "school rights and privileges secured by the [state's] constitution." 16 Stat. 67, 68 (1870). The Act simply does not confer judicially enforceable personal "rights." Instead, the Act instructs Mississippi as to what it shall not do. The Act's only enforcement mechanism lies in direct recourse to Congress.

As our en banc court recently recognized, where "the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Kauffman*, 2020 WL 6867212, at *7

[7] The other two conditions are that (1) "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 right to vote" except with respect to certain felonies and prospective changes concerning "the time and place of residence of voters," and (2) that "it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens." 16 Stat. 67, 68 (1870).

(quoting *Gonzaga University v. Doe*, 536 U.S. 273, 286 (2002)). Furthermore, the Supreme Court has made clear that "to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[8] *Id.* at *17 (quoting *Gonzaga*, 536 U.S. at 282, 122 S. Ct. at 2274) (emphasis and alteration in original). It is not enough for plaintiffs to argue that Mississippi violated the Readmission Act—violation of that federal law does not create a private right to sue.

The Supreme Court has been clear that it will not find an unenumerated right of action unless the text and structure of a statute show an unambiguous intent to create one. *Gonzaga*, 536 U.S. at 283, 122 S. Ct. at 2275 ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."); *see Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 332, 135 S. Ct. 1378, 1387–88 (2015) (plurality op.) (same); *Kauffman*, 2020 WL 6867212, at *7 (same). This should end the analysis. There is nothing in the text, structure, or history[9] of the Readmission Act that suggests any congressional intent to create a private right of action—much less an unambiguous one.

Even if the factors in *Wilder* and *Blessing* are still good law post-*Gonzaga* and *Armstrong*, the result is the same.[10] That test asks whether Congress

[8] The plaintiffs brought their claim under § 1983.

[9] There is no doubt that Congress did not intend for the Readmission Act to provide a private right of suit through § 1983 when it was adopted for the obvious reason that the Readmission Act was enacted before Congress adopted § 1983 as part of the Civil Rights Act. *See* Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Originally, § 1983 only provided a remedy for rights secured by the U.S. Constitution. It was not until after the language was amended and the Supreme Court clarified its scope in the mid-to-late 1900s that federal statutes could confer rights enforceable by § 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 4–8, 100 S. Ct. 2504–2506 (1980) (describing the legislative history and confirming that the term "and laws" in § 1983 "means what it says").

[10] The Supreme Court has made clear that at least some aspects of these cases are not good law. As this court recently observed, the Supreme Court in *Armstrong* and *Gonzaga* "repudiate[d]" and "disavowed, in part, its decision in *Wilder*" "that [its] cases permit anything short of an unambiguously conferred right to support a cause of action

intended a statutory provision to benefit the plaintiff; whether the "right" is not so vague or amorphous as to strain judicial competence; and whether the provision giving rise to the "right" is mandatory rather than precatory. *Blessing v. Freestone*, 520 U.S. 329, 341–42, 117 S. Ct. 1353, 1359 (1997). Even if we accept that the phrase "school rights and privileges" confers some educational right on these plaintiffs, the latter two inquiries are unavailing for the plaintiffs.

Regarding the second *Blessing* factor, with or without considering "uniformity," the concept of "school rights and privileges" is outside of judicial competence and far beyond what a federal court should be telling states to do. The Readmission Act, for its part, does not provide any guidance on the term "school rights and privileges" or provide objective benchmarks for evaluating such rights. Making such determinations on its own is well beyond the provenance of the federal judiciary. This is especially true considering the Supreme Court's refusal, under the comparatively more precise Equal Protection Clause, to adjudicate school children's rights to "equal funding" of public education. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 40–43, 93 S. Ct. 1278, 1300–02 (1973). The Court eloquently explained that judicial restraint was required in the face of challenging issues of fiscal policy with which judges lack familiarity and competence. In addition to fiscal matters, the Court noted, "this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."

brought under § 1983." *Kauffman*, 2020 WL 6867212, at *7–8 (quoting *Gonzaga*, 536 U.S. at 283, 122 S. Ct. at 2275 and *Armstrong,* 535 U.S. at 330, 135 S. Ct. at 1386); *see id.* at *19 (Elrod, J. concurring) (rejecting the argument that *Gonzaga* and *Armstrong* merely clarified one of the *Wilder*/*Blessing* factors because it "ignores *Armstrong*'s recognition—one made by a majority of the Court, not just a plurality—that *Gonzaga* 'plainly repudiate[d]' *Wilder*" (alterations in original)).

Id. Since funding is the likely endgame of this litigation, we should be bound by that case to acknowledge the strain on judicial competence were plaintiffs to prevail.

Not only are any "rights" granted by the Readmission Act too vague and amorphous for judicial resolution, but the statute's language is not "mandatory" toward any goal and thus fails the third *Blessing* factor. The Act places conditions on Mississippi that are enforced through congressional action, but in no way does it contemplate granting plaintiffs a right enforceable against the state.[11] And as previously explained, if we view the statute from the perspective of the *Gonzaga/Armstrong* framework, there is little doubt Congress did not "unambiguously" confer judicially enforceable rights on the plaintiffs.

In short, the plaintiffs' case is doomed irrespective of constitutional sovereign immunity because they are not empowered to enforce the Readmission Act. For this additional reason, we may not subject the State to further litigation and travail. The panel decision is an affront to the principles of Federalism embodied in *Pennhurst.* I respectfully dissent from the court's denial of en banc rehearing.

[11] We would not be the only court to reach this conclusion with respect to interpreting one of the readmission acts. For example, a panel interpreting the act "admitting Virginia to representation in Congress" reasoned as follows: "It is extremely doubtful, even if Virginia has violated the conditions of this Act . . . whether this presents a question justiciable in the courts. Such a matter is one peculiarly within the domain of Congress itself, since it only purports to set up a condition governing Virginia's right to admission to representation in Congress." *Butler v. Thompson*, 97 F. Supp. 17, 20 (E.D. Va. 1951).

APPENDIX C

United States Court of Appeals for the Fifth Circuit

No. 19-60069

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.,

Plaintiffs—Appellants,

versus

TATE REEVES, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF MISSISSIPPI; PHILIP GUNN, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; TATE REEVES, IN HIS OFFICIAL CAPACITY AS LIEUTENANT GOVERNOR OF MISSISSIPPI; DELBERT HOSEMANN, 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 CHAIR OF THE MISSISSIPPI STATE BOARD OF EDUCATION; JASON DEAN, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; BUDDY BAILEY, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; KAMI BUMGARNER, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; KAREN ELAM, IN HER OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; JOHNNY FRANKLIN, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; WILLIAM HAROLD JONES, IN HIS OFFICIAL CAPACITY AS MEMBER OF

THE MISSISSIPPI STATE BOARD OF EDUCATION; JOHN KELLY, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; CHARLES MCCLELLAND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-404

ORDER:

( ) The motion of appellees for a further stay of issuance of the mandate is GRANTED to and including _____ , under the same conditions as set forth in the preceding order of this court.

(X) The motion of appellees for a further stay of issuance of the mandate is DENIED.

STEPHEN A. HIGGINSON
United States Circuit Judge

APPENDIX D

United States Court of Appeals for the Fifth Circuit

No. 19-60069

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.,

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No. 19-60069

BOARD OF EDUCATION; JOHN KELLY, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION; CHARLES MCCLELLAND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE MISSISSIPPI STATE BOARD OF EDUCATION,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-404

Before JOLLY, GRAVES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED Appellees' motion to stay issuance of the mandate. The panel has considered Appellees' opposed motion for reconsideration.

IT IS ORDERED that the motion is DENIED.