No. 19-60069

In the United States Court of Appeals for the Fifth Circuit

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.

On Appeal from the United States District Court
for the Southern District of Mississippi, Jackson Division

BRIEF FOR THE STATES OF TEXAS AND LOUISIANA AS AMICI CURIAE SUPPORTING APPELLEES' PETITION FOR REHEARING EN BANC

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Supplemental Certificate of Interested Persons

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.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, amici curiae, as governmental parties, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
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STATEMENT OF INTEREST OF AMICI CURIAE

The panel's decision in this case will have an impact beyond the State of Mississippi. Congress readmitted ten States to the Union under acts like the one at issue here. *See* Mississippi Readmission Act, 41st Cong., ch. 19, 16 Stat. 67, 68 (1870). The impact will be felt most immediately in Texas and Virginia. Both States were admitted under acts that contain identical language relating to "school rights and privileges." *See* Texas Readmission Act, 41st Cong., ch. 39, 16 Stat. 80, 81 (1870); Virginia Readmission Act, 41st Cong., ch. 10, 16 Stat. 62, 63 (1870). And both States have since amended provisions in their Constitutions relating to education. *See* TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, §§ 1-2.

Other States will be affected too—because the panel's reasoning not only assumes that conditions to admission are lawful but also holds that such conditions impose a federal statutory *obligation*. That will impact other States readmitted to the Union after the Civil War, and every State conditionally admitted after the thirteen original colonies. Utah's admission, for example, was conditioned on outlawing polygamy. Utah Enabling Act, 53d Cong., ch. 138, § 3, 28 Stat. 107, 108 (1894). And New Mexico's was conditioned on requiring fluency in English to serve in public office. New Mexico Enabling Act, 61st Cong., ch. 310, § 2, 36 Stat. 557, 559 (1910).

This case will affect every State in this Circuit and potentially others in future suits across the Country. Amici therefore have a strong interest in urging this Court to rehear the case en banc. *See* FED R. APP. P. 29(b)(2).

SUMMARY OF THE ARGUMENT

The basic premise of *Ex parte Young* is that a state official has no authority to enforce a "void" state law. But officials who allegedly implement Mississippi's present-day constitutional provisions regarding public education do not come within that rule for a simple reason: Mississippi cannot "violate" the Readmission Act by electing to do something the Readmission Act permits. Because the Readmission Act permits Mississippi to choose to amend its Constitution, Mississippi's constitutional amendments are not void and do not strip state officials of their official authority. The *Ex parte Young* exception therefore cannot apply. The panel's contrary reading not only ignores the Act's text, but also creates a commandeering problem that infringes the Tenth Amendment.

This argument applies even if the Court disagrees with Mississippi's argument that the Readmission Act did not federalize that State's education guarantees, circa 1870. *See* En Banc Br. 10-13. In other words, even *if* the condition for admission incorporates state law as federal law, choosing to amend state law still does not "violate" the Readmission Act. It thus cannot supply any basis for invoking *Ex parte Young*.

ARGUMENT

I. Sovereign Immunity Bars this Suit and *Ex Parte Young* Provides No Workaround.

Everyone agrees that sovereign immunity bars this suit unless the plaintiffs can invoke *Ex parte Young*'s exception. *See Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 735-36 (5th Cir. 2020). The starting point for any *Ex parte Young* inquiry is to ask

whether a state official seeks to enforce a state law that conflicts with federal law. The panel ignored that step entirely. It therefore failed to recognize that Mississippi did not (and cannot) violate the Readmission Act by choosing an option that Act permits. Because the constitutional amendments plaintiffs point to here cannot violate federal law, *Ex parte Young* has no role to play.

A. *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. When such a conflict arises, the "void" state law provides no lawful authority to act. *Ex parte Young*, 209 U.S. 123, 159 (1908). Therefore, a state official who endeavors to implement that void law performs "an illegal act" that "strip[s]" him "of his official or representative character." *Id.* at 159-60; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984) ("The theory of [*Ex parte Young*] was that an unconstitutional enactment is 'void.'").

So, in asking whether a plaintiff may invoke the *Ex parte Young* exception to sovereign immunity, the starting question must be whether the relevant state actor seeks to enforce a state law that is "void" as contrary to federal law. *See id.* That is where the panel erred. As plaintiffs have pled their claim, no defendant in this case seeks to enforce a "void" state law.

B. Mississippi's constitutional amendments are not "void" because they cannot "violate" the Readmission Act.

1. Readmission acts do not impose federal statutory obligations on States. They simply offer States a choice between two options: Comply with congressional conditions and your federal representatives will be reseated as members of Congress, or don't comply and run the risk they won't be reseated.

The text of Mississippi's Readmission Act is straightforward. It provides "[t]hat the State of Mississippi is admitted to representation in Congress as one of the States of the Union, *upon the following fundamental conditions.*" 41st Cong., ch. 19, 16 Stat. at 68 (emphasis added). The Act then enumerates three such "conditions." The third condition is 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" guaranteed by the state constitution. *Ibid.* If the State does not meet this condition, it may not be "admitted to representation in Congress." *Ibid.*

Making a choice that federal law permits is not a violation of federal law. Consider two friends going out for lunch. One says to the other, "I'll pay, on the condition that you don't talk about work while we're eating." No one would say the other friend *must* refrain from talking about work. Talking about work would not "violate" any command because there was no command. There was only a conditional offer. Failing to fulfill the condition may carry consequences (like who pays the bill), but that does not mean it was not a permissible choice.

The same goes for the Readmission Act. Choosing to take one route rather than the other is not a "violation" of federal law. Mississippi may choose to amend its

constitution and see whether Congress will attempt to unseat its representatives. 41st Cong., ch. 19, 16 Stat. at 68. That choice is not a "violation" of federal law, and the resulting State law is not "void."[1] Therefore, *Ex parte Young* does not apply.

The text is clear, but even if it were not, the canon of constitutional avoidance would foreclose any other interpretation. On plaintiffs' (and the panel's) theory, Mississippi violated the Readmission Act by amending its Constitution. That is true only if what Congress said in the Act is that Mississippi may not alter its Constitution. But Congress has no power to force States to pass new laws, *New York v. United States*, 505 U.S. 144, 166, 175-76 (1992), or to bar them from altering old ones, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018). *See also* U.S. CONST. amend. X. Regardless of whether Congress can impose a condition that Mississippi refrain from amending its constitution, it cannot flatly prohibit such amendments. Even if the panel believed the Act's language is ambiguous (it is not), it should have avoided reading it to violate the anti-commandeering doctrine.

To be sure, Mississippi's choice may have consequences. Perhaps Congress will try to unseat Mississippi's representatives. But that is an issue for another day—and another branch of government.

2. There is another reason Mississippi did not violate the Readmission Act: The conditions in the Readmission Acts are themselves unlawful. The "equal footing" doctrine prohibits Congress from requiring States to enter the Union on different

[1] The U.S. Constitution does not require state-law education guarantees. After all, education is not a fundamental right. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

terms than existing States. *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 689 (1883) (holding Illinois "was admitted, and could be admitted, only on the same footing" as fellow States). For that reason, the Supreme Court has consistently refused to enforce such conditions. *See, e.g.*, *Coyle v. Smith*, 221 U.S. 559, 563-64 (1911) (condition fixing location of the Oklahoma state capitol); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845) (condition stripping Alabama of possession over submerged lands).

The Readmission Acts have an equal-footing defect: They seek to impose unique conditions on States rejoining the Union. *See* David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 429-30 (2008). That is why President Johnson thought they were unconstitutional. *See* Andrew Johnson, *Veto Message to the House of Representatives* (June 20, 1868), *in* 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, 648-50 (1900). Unsurprisingly, lower federal courts "dismissed the [Reconstruction-era] conditions as unenforceable infringements of state sovereignty." Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 190 (2004). Because Mississippi's Readmission Act is unconstitutional, it obviously is not "supreme law" that renders state officials' actions unlawful.

But the Court need not reach this question because Mississippi's Readmission Act does not impose an obligation that Mississippi could have "violated."

Conclusion

Sovereign immunity bars this suit. The Court should grant rehearing en banc, vacate the panel's decision, and affirm the district court's judgment dismissing this suit.

Respectfully submitted.

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Certificate of Service

On May 26, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,644 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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