No. 24-964

IN THE

Supreme Court of the United States

JOHN O'BANNON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE STATE BOARD OF ELECTIONS, *et al.*,
Petitioners,

v.

TATI ABU KING, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether, in this interlocutory appeal limited to the denial of state sovereign immunity, this Court should address the merits question of whether respondents possess a federal cause of action.

2. Whether the Eleventh Amendment bars a lawsuit in equity to enjoin or declare unlawful state officials' enforcement of Virginia's prohibition on voting by citizens with any felony conviction, where the Virginia Readmission Act protects that voting right.

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INTRODUCTION

Virginia has one of the nation's most restrictive felony disenfranchisement laws, permanently disenfranchising individuals who have been convicted of any felony unless the governor chooses to restore their right to vote. Respondents sued petitioners to enjoin them from enforcing Virginia's felony disenfranchisement law because, as applied to respondents, the state law violates the Virginia Readmission Act of 1870, under which the state's representatives were readmitted to Congress after the Civil War. By its plain terms, the Readmission Act prohibits the state from amending its constitution to disenfranchise citizens based on a criminal conviction unless the offense existed at common law in 1870. The Act's purpose was to prevent Virginia from manipulating statutory criminal law to disenfranchise Black voters—specifically, from convicting and disenfranchising newly freed Black residents based on statutory crimes that were not felonies at the time Virginia entered the Union. Respondents were disenfranchised in violation of the Readmission Act, as they will prove in the ongoing district court proceedings.

But the merits of respondents' claims are not at issue in this petition, which arises from an interlocutory appeal from the denial of sovereign immunity and is limited to that threshold question. The parties are still conducting discovery, and no court has yet determined that any petitioner has violated the Act, much less ordered any remedy.

The only question fairly presented by the petition is whether the *Ex parte Young* exception to states' Eleventh Amendment immunity from suit applies here. On that question, petitioners essentially concede the issue because they do not dispute that, at minimum, *Ex parte*

Young sidesteps immunity in suits seeking to block civil or criminal enforcement of a federally preempted state law. The Fourth Circuit correctly held that this is such a case. To the extent petitioners dispute that determination, such dispute turns on the facts of Virginia's felony disenfranchisement scheme—which are neither appropriate nor fully developed for this Court's consideration.

Lacking any reason for this Court's review on the *Ex parte Young* issue, petitioners instead ask the Court to answer a different question: whether plaintiffs-respondents have a cause of action. But that question, which the Fourth Circuit did not decide below, goes to the merits of respondents' claims. It does not warrant this Court's review in this interlocutory posture.

This case also presents no split of authority—either on the only question properly before the Court or on the cause-of-action question which dominates the petition. The splits petitioners allege are illusory.

The Court should not take up any of petitioners' many other unpreserved or underdeveloped claims, all of which are premature because no court has issued any remedy for a violation of the Act, and wrong because Congress intended that the fundamental condition it placed on Virginia be enforced through the courts.

STATEMENT

A. The Virginia Readmission Act And Virginia's Response

Before the Civil War, Virginia's criminal code served as a means of enslaving or disenfranchising its Black residents. As early as 1824, for example, Virginia condemned any free Black person convicted of a crime punishable by imprisonment for over two years to,

among other punishments, enslavement. *See* Oliver, *A Constitutional History of Virginia 1776-1860* at 343-344 (May 11, 1959). As the Civil War concluded, Virginia enacted "Black Codes" that criminalized new categories of conduct and were designed to convict—and in some cases, effectively re-enslave—its Black residents. For example, Virginia punished any person who appeared unemployed or homeless as a "vagran[t]" subject to servile "employment." Va. Vagrancy Law, Ch. 28., *An ACT providing for the punishment of Vagrants* (Jan. 15, 1866).

The Civil War and the subsequent ratification of the Fourteenth Amendment formally put an end to Virginia's race-based disenfranchisement. But to ensure that Virginia honored the nation's new and long-overdue promise of equal rights in practice, Congress required Virginia (along with other former Confederate states) to rewrite its constitution to guarantee the franchise to all adult men except those guilty of "participation in the rebellion" or "felony at common law." *First Reconstruction Act*, §5 (Mar. 2, 1967). Virginia did so, and Congress then enacted a statute that reinstated Virginia's congressional representation in recognition of its new constitution. Pub. L. No. 41-10, 16 Stat. 62 (1870).

That law—the Virginia Readmission Act—also prohibited Virginia from expanding its constitution's felony disenfranchisement provision in a manner that might allow its legislature to disproportionately strip freed men of their right to vote. The Act states:

> [T]he State of Virginia is admitted to the representation in Congress as one of the States of the Union upon the following fundamental condition: First, That the Constitution of Virginia 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 by the Constitution herein recognized, *except as a punishment for such crimes as are now felonies at common law*, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State.

16 Stat. at 63 (emphasis added).

Despite the Act's plain text, Virginia has gradually expanded its felony disenfranchisement provision, amending its constitution to disenfranchise not just those convicted of felonies that were recognized as such at common law in 1870, but also anyone convicted of any modern statutory felony—including those criminalizing conduct that did not constitute a felony at common law in 1870. In its current form, Virginia's disenfranchisement provision states that "[n]o person who has been convicted of *a felony* shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." Va. Const. art. II, §1 (emphasis added).

This is one of the most expansive felony disenfranchisement provisions in the nation. Virginia is one of only three states which, by its state constitution, permanently and indiscriminately disenfranchises citizens convicted of *any* felony—including those having nothing to do with the individual's integrity or civic commitment—unless the state's governor chooses to restore their voting rights. *See* Iowa Const. art. II, §5; Ky. Const. §145.

The state strictly enforces its felony voting restriction, placing all individuals convicted of a felony on a "prohibited table" of individuals no state official may register to vote unless the Governor pardons them or

restores their right to vote. C.A.J.A.77-78. It also criminally punishes those who violate its disenfranchisement provision. *See* Va. Code §24.2-653. Respondents estimate that over 300,000 Virginians are currently disenfranchised under this regime, and that a disproportionate number of those voters are Black. C.A.J.A.30. Unlike their predecessors or officials in other states, petitioners have also established no objective criteria or timelines for restoring any of these individuals' voting rights. *See id.*

B. This Lawsuit

Respondents Tati Abu King and Toni Heath Johnson are Virginia residents whom petitioners have disenfranchised. As a result, if Mr. King or Ms. Johnson cast a ballot, the state could criminally prosecute them under Va. Code §24.2-653. They sued several Virginia state officials (in their respective official capacities) for implementing and enforcing an unlawful prohibition on voting that targets a broader class of felonies than the Virginia Readmission Act permits.

Mr. King was registered to vote before the state convicted him of felony possession of marijuana with intent to distribute. Pet.App.24a. That conviction is over six years old, and Mr. King served an eleven-month sentence for it. Pet.App.24a; C.A.J.A.50, 74. Yet the state has prohibited him from voting in at least five elections since then. C.A.J.A.50. The state disenfranchised Ms. Johnson in 2021, after she was convicted of certain drug-related crimes and for child-endangerment related to them. Pet.App.24a. She was released from incarceration in 2022 and was on probation as of the filing of the complaint. *Id.*

Respondents and a since-dismissed organizational plaintiff filed this class action lawsuit on behalf of

Virginia citizens who were disenfranchised in violation of the federal Readmission Act. Pet.App.24a. Absent Virginia's felony disenfranchisement provision and the threat of criminal prosecution that accompanies it, Mr. King and Ms. Johnson would have voted in several past elections and would vote in upcoming elections. *Id.* Their lawsuit sought a declaration that Virginia's felony disenfranchisement provision violates the Virginia Readmission Act and an injunction prohibiting state officials from enforcing the felony disenfranchisement provision against any individuals convicted of crimes that were not felonies at common law in 1870. Pet.App.19a. It also sought a declaration that the felony disenfranchisement provision violates the Eighth Amendment, and corresponding injunctive relief. Pet.App.40a. The complaint invoked causes of action pursuant to 42 U.S.C. §1983 and at equity. Pet.App.32a, 37a.

Petitioners filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Pet.App.20a. In their 12(b)(1) motion—the only request for relief on appeal in this case—petitioners argued (1) that an organizational plaintiff who is no longer in the case lacked standing to sue, (2) that sovereign immunity protected them against respondents' claim that Virginia's felony disenfranchisement provision violates the Virigina Readmission Act, and (3) that the claims presented a non-justiciable political question. Pet.App.25a-31a. The district court dismissed the organizational plaintiff, but it rejected petitioners' other jurisdictional arguments. In particular, the district court held that the case did not present a non-justiciable political question and that the suit could proceed under *Ex parte Young*'s "exception to … Eleventh Amendment immunity." Pet.App.27a-30a.

In their Rule 12(b)(6) motion—which is not part of the interlocutory appeal at issue here—petitioners argued that respondents' claim that Virginia's felony disenfranchisement provision violates the Virginia Readmission Act should be dismissed because Section 1983 provides no cause of action for that claim, respondents' request for equitable relief "ultimately collapse[d]" with their Section 1983 claim and so provided no independent cause of action, and Virginia's felony disenfranchisement provision did not violate the Virginia Readmission Act. Pet.App.33a, 37a. Petitioners also argued that respondents failed to adequately state a violation of the Eighth Amendment. Pet.App.40a. The district court granted petitioners' Rule 12(b)(6) motion in part. It dismissed the Eighth Amendment claim and held that respondents could not enforce the Virginia Readmission Act through Section 1983. Pet.App.48a. But the district court held that respondents' "equitable preemption" claim is distinct from their Section 1983 claim and could proceed because Congress has not otherwise precluded it. Pet.App.37a, 40a.

C. Petitioners' Interlocutory Appeal

Petitioners filed an immediate interlocutory appeal from the district court's denial of their Rule 12(b)(1) motion to dismiss based on sovereign immunity. As the Fourth Circuit described it, this appeal challenges only the district court's decision "declining to dismiss" respondents' equitable claim that Virginia's felony disenfranchisement provision violates the Virginia Readmission Act "on sovereign immunity grounds." Pet.App.5a.

The Fourth Circuit held that "the portion of plaintiff's complaint that is before us"—*i.e.*, respondents' remaining count for equitable relief based on petitioners' violation of the Virginia Readmission Act—"meets the

requirements of the *Ex parte Young* doctrine and that the district court correctly declined to dismiss it based on sovereign immunity." Pet.App.3a. (In a decision not on appeal here, the Fourth Circuit also ordered the dismissal of Virginia's Governor and Secretary as additional defendants because those two individuals lacked the power to enforce the state's felony disenfranchisement regime. Pet.App.4a.)

As to the only question before it, the Fourth Circuit conducted the "straightforward inquiry" established by this Court for "determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit," asking "whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Pet.App.6a (quoting *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002)). Because the "relevant count alleges that the defendants are violating federal law by preventing King and Johnson from registering to vote and seeks an injunction to prevent the defendants from continuing to do so," the court found that it satisfied that test. Pet.App.6a.

The Court then went on to reject three arguments raised by petitioners. First, it rejected petitioners' argument that the *Ex parte Young* doctrine was limited to "two circumstances:" (1) cases "to enjoin state officials from violating their individual federal rights," and (2) "an anti-suit injunction to prevent state officials from bringing an action to enforce a preempted state law against them." Pet.App.7a (quoting petitioners). The court rejected this reading after even "defendants conceded at oral argument" that the "Supreme Court … has never held" that *Ex parte Young* is so limited. Pet.App.7a.

In the alternative, the Fourth Circuit reasoned, "[e]ven if the defendants were right about the limits of *Ex parte Young*, King and Johnson *also* seek protection from a threatened enforcement action," because they "wish to" and would "register and vote in future elections if permitted to do so." Pet.App.8a. Specifically, the court found that state officials must, under state law, "deny any voter registration applications that King and Johnson submit," and that King and Johnson "would—absent the relief they seek in this lawsuit—be subject to criminal prosecution for illegal voting." Pet.App.9a (citing Va. Code §24.2-1004(B)(iii)).

Second, the court rejected petitioners' (since abandoned) argument that respondents are seeking to federally enforce state law in violation of *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984). Pet.App.10a.

Third, the Fourth Circuit turned to the argument that "Congress has foreclosed equitable enforcement of the Virginia Readmission Act and thus relief under the *Ex parte Young* doctrine." Pet.App.12a. In a footnote, the court rejected respondents' argument that this question—which the district court resolved as part of a Rule 12(b)(6) motion—was beyond its limited interlocutory jurisdiction. The court noted that it and the Supreme Court had each "considered" the question "in previous interlocutory appeals from denials of sovereign immunity." Pet.App.12a n.2 (citing circuit precedent and *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 52, 73-76 (1996)).

Applying *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), the Fourth Circuit held that Congress had not foreclosed the default equitable remedy here by creating a comprehensive remedial scheme.

The court first held that unlike in *Armstrong*, the Virginia Readmission Act contained "no clear enforcement mechanism," let alone one that excluded judicial enforcement. Pet.App.13a. It then found "no basis for concluding the Virginia Readmission Act lacks judicially manageable standards," because the case presented questions "within the heartland of what federal courts do every day." Pet.App.15a. The court also rejected petitioners' more general argument that "Congress has reserved for itself the primary (or even sole) power to monitor" Virginia's "ongoing compliance with the Virginia Readmission Act." *Id.*

The district court later denied petitioners' motion to stay the case pending the resolution of this petition. *See* Order (Mar. 24, 2025), Dist.Ct.Dkt.125.

REASONS FOR DENYING THE PETITION

I. PETITIONERS DO NOT DISPUTE THAT *EX PARTE YOUNG* ALLOWS THE ASSERTION OF A PREEMPTIVE DEFENSE TO A STATE ENFORCEMENT ACTION

The petition should be denied for several reasons. First, and most simply, petitioners make the dispositive concession that *Ex parte Young* is available, at minimum, when plaintiffs seek to "use *Ex parte Young* as a *shield* against the enforcement of" unlawful state law, *Michigan Corrections Organization* v. *Michigan Department of Corrections*, 774 F.3d 895, 906 (6th Cir. 2014), or "assert what would otherwise be a *defense* to a suit by the State in the form of an affirmative claim against the State." Pet.28-29. That is what respondents seek here. Indeed, the Fourth Circuit held that "[e]ven if the defendants were right about the limits of *Ex parte Young*, King and Johnson *also* seek protection from a threatened enforcement action." Pet.App.8a.

If respondents "register[ed] and cast a ballot, they would—absent the relief they seek in this lawsuit—be subject to criminal prosecution for illegal voting." Pet.App.9a. Nothing further is needed to defeat sovereign immunity at this pre-discovery stage, including any showing that the prosecution would occur sufficiently immediately. So long as respondents "claim[] federal law immunizes" them "from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320, 326 (2015).[1]

There is therefore no disagreement between the parties on the only issue properly before this Court in this interlocutory appeal: whether the *Ex parte Young* exception to state sovereign immunity precludes a sovereign-immunity defense here. Respondents' request for prospective injunctive relief will proceed on that effectively undisputed basis no matter what, *see* Pet.App.7a-8a, and there is no reason for this Court to spend its limited time addressing the outer bounds of the *Ex parte Young* doctrine in this case, where doing so will not impact the outcome.

II. THE PETITION RAISES ISSUES THIS COURT SHOULD NOT RESOLVE IN AN INTERLOCUTORY APPEAL

Petitioners invite this Court to weigh in on two questions: (1) whether there exists a private right of

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[1] Petitioners agreed at oral argument before the Fourth Circuit panel that respondents would be acting "against the law" if they voted. *See* Oral Argument Audio at 4:50 (Sept. 24, 2024), www.ca4.uscourts.gov/OAarchive/mp3/24-1265-20240924.mp3. Moreover, even without registering in advance of election day, they could face immediate prosecution if, for example, they were to cast same-day provisional ballots (even if those ballots were not ultimately counted). *See* Va. Code §§24.2-653, 24.2-1004.

action to enforce the Virginia Readmission Act, and (2) whether the *Ex parte Young* exception to sovereign immunity applies where the plaintiffs "lack a right to sue in the first place." Pet.9-10. In light of petitioners' fatal concession as to the applicability of *Ex parte Young*, however, the answer to these questions will not affect whether petitioners are entitled to sovereign immunity—the only question properly presented by this interlocutory appeal.

Regardless, neither of these questions warrants this Court's review in this posture. For over a century, this Court has disfavored review of interlocutory appeals, and often the interlocutory nature of the petition has "alone furnished sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *see also Swint* v. *Chambers County Commission*, 514 U.S. 35, 41 (1995) (holding Eleventh Circuit lacked jurisdiction to review denial of summary judgment motion unrelated to qualified immunity issue); *United States* v. *MacDonald*, 435 U.S. 850, 863 (1978) (denying interlocutory appellate review of denial of a speedy trial motion). This petition demonstrates why that is sound practice and should govern here.

A. This Court Has Already Addressed Whether *Ex parte Young* Turns On The Existence Of A Cause Of Action And Should Not Revisit That Question In This Interlocutory Posture

Petitioners' second question presented attempts to dress up their first question as an *Ex parte Young* issue within the bounds of this interlocutory appeal by asking "[w]hether plaintiffs may invoke *Ex parte Young* to bypass a State's sovereign immunity when they lack a cause of action." But the predicate for this second

question—*i.e.*, whether there is a cause of action—is a merits question that cannot be squeezed into an interlocutory appeal on the scope of *Ex parte Young*. Indeed, this Court has already rejected petitioners' approach which would collapse the distinction between sovereign immunity and the merits.

In *Verizon*, this Court indicated that the *Ex parte Young* sovereign immunity issue is separate from, and does not depend on, the existence of a private cause of action. The state defendants in *Verizon* advanced two arguments: first, that no private right of action existed to support the plaintiffs' claims, and second, that the *Ex parte Young* exception to state sovereign immunity was unavailable. *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635, 642-643, 645-646 (2002). Addressing those contentions, the Court was careful to distinguish between the two lines of inquiry. It directly weighed in on the threshold *Ex parte Young* question, concluding the state defendants were not entitled to sovereign immunity because the plaintiffs had asserted a violation of federal law and sought prospective relief. *Id.* at 648. And it expressly declined to address whether the plaintiffs would ultimately be able to establish a private right of action. *Id.* at 642-643; *see also id.* at 646 ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim"); *cf. McCarthy ex rel. Travis* v. *Hawkins*, 381 F.3d 407, 416 (5th Cir. 2004) ("simple" *Ex parte Young* inquiry "excludes questions regarding the validity of the plaintiff's cause of action").

The Court's approach in *Verizon* is consistent with earlier decisions. For example, in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the Court considered only the immunity ruling on an interlocutory appeal where the district court had held both that plaintiff-respondent "had

stated triable causes of action … [and] also ruled that petitioner was not entitled to claim absolute Presidential immunity," *id.* at 740-741, 748 & n.27; *see also id.* at 785 (agreeing with majority that "[a]t this point in the litigation, the availability of the[] causes of action is not before us") (White, J., dissenting). In other words, it recognized that cause-of-action questions, which go to the merits, are independent from questions properly presented for interlocutory appeal by immunity denials.

Thus, this Court long ago decided that the threshold question of whether a plaintiff can invoke *Ex parte Young*'s exception to sovereign immunity does not turn on the merits question of whether the plaintiff has a cause of action. Those inquiries are distinct.

The Court should not reconsider the approach it took in *Verizon*, particularly where petitioners have identified no circuit split (*see* Part III below). Even if there were good reason to revisit *Verizon*, this interlocutory petition is a particularly poor vehicle for doing so and threatens serious jurisdictional difficulties. Recall that respondents asserted a claim under 42 U.S.C. §1983 *and* a claim for equitable relief. The district court dismissed the §1983 claim under Rule 12(b)(6)—an order not subject to interlocutory appeal. *See* Pet.App.5a. As a result, respondents have not yet had an opportunity to appeal from the order dismissing that claim.

The court of appeals could decide in due course, on an appeal from a final judgment, that respondents had a Section 1983 cause of action after all, mooting petitioners' argument that *Ex parte Young* must be accompanied by an independent cause of action. In that event, a ruling by this Court at this stage on petitioners' second question presented would, in addition to becoming advisory, also create "added work" for all courts and all

parties "with no assurance that there would ultimately be a saving of district court time." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 173 (1972). Thus, even if the question were otherwise certworthy (it is not), this Court should not take it up in this posture.

B. The Fourth Circuit Did Not Decide The Cause-Of-Action Question Petitioners Attempt To Raise

In light of this settled understanding that the availability of sovereign immunity is distinct from the merits question of whether a cause of action exists, the Fourth Circuit did not decide petitioners' first question presented—whether a private party may judicially enforce the Virginia Readmission Act.

Petitioners are therefore wrong to focus on whether Congress affirmatively intended to *create* an enforcement mechanism. *See* Pet.10 ("Congress did not intend to create a judicial enforcement mechanism."); Pet.11-12 ("The Readmission Acts do not mention judicial enforcement, and Congress did not silently commit that politically fraught question to the judicial branch."); Pet.12 (questioning "[w]hether Congress may delegate its power under the Guarantee Clause"); Pet.16 (citing a dissent arguing that "the Readmission Act does not create a private right of action, express or implied"); Pet.17-18 ("The Acts provide no cause of action, no federal individual right, no private remedy, and no enforcement role whatsoever for private individuals."). The amici states similarly conflate the cause-of-action question with the sovereign immunity question, arguing (at 8) that "the Fourth Circuit's ruling is that state officials can be sued under *Ex parte Young* when all other defendants would be dismissed for lack of an enforceable right or cause of action."

The only question this interlocutory appeal presents is whether petitioners are immune, under the Eleventh Amendment, from respondents' request that they be enjoined from enforcing the state's blanket felony disenfranchisement rule in violation of federal law. Pet.App.4a, 18a. Again, that limited question turns on settled law.

As this Court has held for over a century now, the *Ex parte Young* exemption means that "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong*, 575 U.S. at 326. And to determine whether this exemption applies, "a court need only conduct a straightforward inquiry" that asks (1) "whether the complaint alleges an ongoing violation of federal law" and (2) whether the plaintiff "seeks relief properly characterized as prospective." *Verizon*, 535 U.S. at 645 (cleaned up).

Petitioners have never seriously contested respondents' ability to satisfy both of those criteria. Instead, in an effort to resist the straightforward conclusion that sovereign immunity does not shield them from suit, petitioners argued before the Fourth Circuit that Readmission Act claims fall within the narrow exception-to-the-exception this Court articulated in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). Under the *Seminole Tribe* carveout, an *Ex parte Young* action will not lie where Congress has supplied a "detailed and exclusive remedial scheme" so comprehensive that the inescapable conclusion is that Congress "implicitly exclud[ed] *Ex parte Young* actions." *Verizon*, 535 U.S. at 647.

But the threshold sovereign immunity question addressed in *Seminole Tribe* is analytically distinct from

the further-reaching merits question of whether a statute can be enforced through private-party litigation in federal court, be it through some statutory vehicle or a suit in equity. Regardless, the Readmission Act does not fall into the category of statutes covered by *Seminole Tribe*. The Court has applied this exception-to-the-exception for claims brought under a statute that provides a detailed mediation plan and federal regulatory oversight as a remedy for state violations. *Seminole Tribe*, 517 U.S. at 74-75. And it has done the same for claims brought under a statute that provides the remedy of withholding federal funds for state violations of open-ended statutory language. *Armstrong*, 575 U.S. at 328.[2]

The Readmission Act is not remotely similar to those detailed remedial schemes, as the Fourth Circuit recognized. Because the Readmission Act on its face provides no remedy at all (and certainly does not state, as petitioners improperly imply, that Congress will eject Virginia's delegates for any violations), the Fourth Circuit concluded that it obviously does not supply a remedial scheme so "detailed and exclusive" as to implicitly reinstate state sovereign immunity. At no point in this inquiry did the Fourth Circuit purport to make a merits determination regarding respondents' right to sue in equity to enforce the Readmission Act. That question was left for another day and is not before the Court.

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[2] Although *Seminole Tribe* suggested that the Eleventh Amendment precludes *Ex parte Young* actions where Congress has created such an alternative remedial scheme, the Court did not squarely hold as much, and the logic of the opinion suggests that such a claim should "be dismissed for failure to state a cause of action, not for want of jurisdiction." Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. Rev. 495, 521 (1997).

At bottom, petitioners get the question backwards by focusing on whether Congress created a cause of action. The issue at this point in the case is not whether Congress created a cause of action, but at most whether it *foreclosed* reliance on the longstanding background principle that "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong*, 575 U.S. at 326. The answer to that question is no, and any issue beyond that narrow question is not properly before this Court in an interlocutory appeal challenging the denial of sovereign immunity.

III. THERE IS NO SPLIT OF AUTHORITY

1. There is, of course, no split of authority on the only issue in the interlocutory appeal—whether the Eleventh Amendment precludes respondents' suit in equity under *Ex parte Young* for prospective injunctive relief. Just like the parties themselves, the lower courts agree with this Court's clear command: Whatever its outer bounds, *Ex parte Young*'s core allows preemptive defenses to enforcement to proceed. *See Verizon*, 535 U.S. at 645.

The Fourth Circuit's sovereign immunity analysis also does not "conflict[] with" (Pet.26-28) the Sixth Circuit's decision in *Michigan Corrections*. That case—which, notably, predates this Court's decision in *Armstrong*—concerned state employees' lawsuit against a state agency under the federal Fair Labor Standards Act. On the basic sovereign immunity issue, the Sixth Circuit recognized (as both parties do here) that at a minimum, *Ex parte Young* "allow[s] federal courts to enjoin state officers in their official capacity from prospectively violating a federal statute." *Michigan*

Corrections, 774 F.3d at 904. The Sixth Circuit noted that plaintiffs "usually" lose *Ex parte Young* claims when the "relief sought, though styled as prospective injunctive relief against a state official, in reality runs against the State or in reality is retroactive and monetary in nature." *Id.* at 905. And it went on to explain that those "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.* at 906. Again, there is no split as to that basic reading of *Ex parte Young*. *See supra* pp.12-15.[3]

2. Nor is there a split on the two cause-of-action questions that petitioners urge the Court to take. Petitioners again rely on *Michigan Corrections*, but the Sixth Circuit did not hold, as petitioners suggest (at 26), that the availability of sovereign immunity under *Ex parte Young* turns on the existence of an independent cause of action, let alone collapse the distinction between immunity from suit and private rights of action in the manner petitioners do here. Just as the Fourth Circuit recognized below (at Pet.App.8a n.1), the Sixth Circuit held merely that *Ex parte Young* only provides the exception to the state's sovereign immunity and "does not supply a right of action by *itself*." *Michigan Corrections*,

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[3] The Sixth Circuit went on to note that a "classic[]" cause of action in such circumstances is "an equitable anti-suit injunction." *Michigan Corrections*, 774 F.3d at 906. If there can be a suit in equity to enjoin a civil lawsuit, then certainly there can be a suit in equity to prevent enforcement of a law that would result in criminal prosecution; indeed, *Ex parte Young* itself discusses "state action, *either criminal or civil*, to enforce obedience to the statutes of the state," 209 U.S. at 149 (emphasis added). Moreover, the Sixth Circuit did not rule out the possibility of securing relief through some other cause of action, such as a Section 1983 claim or an invocation of courts' general equitable power.

774 F.3d at 906. In other words, the Sixth Circuit took the same approach as the Fourth Circuit here (and as this Court took in *Verizon*): It considered the threshold question of the availability of sovereign immunity separate from the distinct merits question of whether the plaintiffs alleged a valid cause of action. *Michigan Corrections* thus creates no split of authority on *Ex parte Young*'s implications for state sovereign immunity.

If *Michigan Corrections* has any relevance to this petition, it is only to further illustrate why the Court should not reach petitioners' cause-of-action question in this posture. Unlike this interlocutory appeal from a denial of sovereign immunity, *Michigan Corrections* reviewed a final judgment in which a district court had dismissed the plaintiffs' claims on *both* cause-of-action and sovereign immunity grounds. 774 F.3d at 899. The Sixth Circuit then affirmed the dismissal not based on whether *Ex parte Young* abrogated sovereign immunity against the plaintiffs' labor law claims, but on the ground that "neither the [Fair Labor Standards Act] nor §1983 nor *Ex parte Young* provide[d] the private right of action the officers need to obtain declaratory relief." *Id.* at 899, 907. "No private right of action," the court explained, "means no underlying lawsuit." *Id.* at 907. In the absence of a cause of action, the plaintiffs could not proceed against *any* defendants, immune or not.

Here, by contrast, much remains to be decided even now that the Fourth Circuit has passed down its sovereign immunity decision. In addition to the question of whether principles of equity supply a cause of action to respondents here, there is also the separate question of whether respondents have a cause of action under Section 1983—which they fully expect to appeal in the normal course of things should they fail to prevail under some alternative basis for relief. Because the sovereign-

immunity issue may not even prove outcome-determinative when all is said and done, and because the parties here *agree* on the principal questions about the scope of *Ex parte Young*, this Court should not unnecessarily wade into the thicket of sovereign immunity.

3. The petition's reference (Pet.15) to a fifty-year-old Arkansas Supreme Court decision ostensibly addressing private enforcement of the Readmission Acts identifies no conflict, either. Most fundamentally, a *state* court's decision on the state's sovereign immunity is not relevant to any of the questions presented, which concern state sovereign immunity from suit in *federal* court under the Eleventh Amendment. Indeed, the Arkansas Supreme Court's opinion did not even involve *Ex parte Young*. *Merritt* v. *Jones*, 533 S.W.2d 497, 502 (Ark. 1976).

In all events, the Arkansas Supreme Court addressed the argument about the Arkansas Readmission Act only in dicta, because "the point was not presented" in the lower court. 533 S.W.2d at 502. Reflecting the drive-by nature of its consideration, *Merritt*'s discussion of the Readmission Act's enforceability contains no real analysis. The court first stated that the Readmission Act's purpose of ensuring "former slaves['] … right to vote" was "no longer a consideration," without any explanation. *Id.* It then concluded—again without analysis—that assuming "the Act has some force and effect, its enforcement is the exclusive domain of Congress." *Id.* The court cited for this conclusion a 1951 district-court decision which found that Virginia's poll tax did not violate the Virginia Readmission Act, noting in the alternative that the Act may not be enforceable. *See Butler* v. *Thompson*, 97 F. Supp. 17 (E.D. Va. 1951), *aff'd*, 341 U.S. 937 (1951). Put simply, conclusory dicta from a single fifty-year-old state court opinion

addressing the Act's enforceability in state court does not add up to a circuit split.

4. Petitioners do not identify a single federal court of appeals which has held that private plaintiffs may not enforce the Readmission Acts. Only one appellate court has addressed that question, and it found that the Readmission Acts are judicially enforceable. The Fifth Circuit has made clear that pursuant to *Ex parte Young*, plaintiffs may sue (and obtain declaratory relief against) state officials who have violated the Mississippi Readmission Act. *See Williams ex rel. J.E.* v. *Reeves*, 954 F.3d 729, 739 (5th Cir. 2023).

This Court denied an application to recall and stay the mandate issued in *Williams*. *See* No. 20A126 (Apr. 8, 2021). And it recognized that doing so did not preclude "a renewed application after the remaining grounds for dismissal … on remand to the district court have been fully resolved." *Id.* The same is true here.

* * *

The Court should deny the petition based on this lack of conflict alone. "A principal purpose" of "certiorari jurisdiction is … to resolve conflicts," *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991), and the Court generally refrains from reaching issues on which "courts have not reached conflicting results," *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992). It routinely denies or dismisses as improvidently granted petitions which present no split of authority on any question presented. *See, e.g.*, *PHI Inc.* v. *Rolls-Royce Corp.*, 577 U.S. 817 (2015); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 392-393 (1923).

Furthermore, the existing consensus has created no confusion or flood of litigation in state or federal courts.

Despite the lack of cases foreclosing Readmission Act claims, *Williams*' half-decade on the books, and the acts' nearly two-century history, plaintiffs have not flooded federal courts with such lawsuits, *contra* Pet.14. The petition's (and amici's) only evidence of such a "flood[]" are *Williams* and the fifty-year-old Arkansas case. That is hardly cause for granting certiorari in the absence of a circuit split.

IV. THE FOURTH CIRCUIT'S DECISION IS CORRECT

The petition also presents no error to correct, because the Fourth Circuit properly disposed of all the arguments the petition raises, including those it did not need to reach.

1. The unanimous panel conducted the "straightforward" *Verizon* inquiry and found that respondents (1) "allege an ongoing violation of federal law" and (2) "seek[] relief properly characterized as prospective." Pet.App.6a (quoting *Verizon*, 535 U.S. at 645). Petitioners do not dispute that those two requirements have been met; indeed, they openly admit that their actions are "prospective." Pet.29.

Petitioners' argument (at 28-29) that *Ex parte Young* applies in only two narrow scenarios would replace this "'straightforward inquiry,'" *Verizon*, 535 U.S. at 645, with a strained conception which even petitioners "conceded at oral argument, neither the Supreme Court nor th[e Fourth Circuit] has ever" adopted. Pet.App.7a. In case after case, the Court has affirmed that *Ex parte Young* is an available exception to sovereign immunity whenever a plaintiff sues state officials to prevent them from enforcing a preempted state law. "[F]or more than a century," this doctrine has made clear that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not

the State for sovereign-immunity purposes." *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247, 254-255 (2011). The Court has "long recognized" as much. *See Armstrong*, 575 U.S. at 326-327 (collecting cases); *Verizon*, 535 U.S. at 645 (same); *see also Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 491 n.2 (2010) ("[E]quitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." (quotation marks omitted)).

2. Even if *Armstrong*'s inquiry into whether a congressional scheme has foreclosed an equitable cause of action was relevant to sovereign immunity, 575 U.S. at 328, the decision below correctly concluded that Congress has neither foreclosed reliance on an equitable remedy nor established a judicially unmanageable standard here, Pet.App.12a-15a.

On appeal from a final judgment, *Armstrong* addressed whether a regulated Medicaid provider had a right of action to sue state healthcare officials "under the Supremacy Clause." 575 U.S. at 324 (quoting Ninth Circuit). The Court explained that, although there is no right of action to sue directly under the Supremacy Clause, plaintiffs can still vindicate federal law via equity because "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action." *Id.* at 327. *Armstrong* recognized a narrow *exception* to this rule where a statute's text forecloses a court from exercising its equitable power. *Id.* at 328. The Medicaid statute at issue had foreclosed the courts *both* because it contained an express regulatory enforcement mechanism *and* because its text was "judicially unadministrable" (because the standard was whether payments were "consistent

with efficiency, economy, and quality of care" while avoiding "'unnecessary utilization of … services'"). *Id.* at 328-329.[4]

Neither petitioners nor the state amici (at 5-6) can identify a single sentence in the Virginia Readmission Act which, like the Medicaid statute at issue in *Armstrong*, is an "'express provision of one method of enforcing'" it which might "'suggest that Congress intended to preclude others.'" 575 U.S. at 328. Petitioners insist (Pet.19-20) that the Virginia Readmission Act places in Congress the exclusive right to "unseat the State's delegation" as the sole remedy for violations of the Act. But this speculation is unmoored from the Act's text, which proclaims "[t]hat the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions." Pet.19 (quoting the Act). Petitioners point to no provision stating who must enforce those conditions or how they are to be enforced, let alone whether any congressional enforcement power is exclusive. This, as the Fourth Circuit explained, "is a far cry from the sort of 'express provision of one method of enforcing a substantive rule' that 'suggests that Congress intended to preclude others.'" Pet.App.14a (quoting *Armstrong*, 575 U.S. at 328). Instead, as petitioners acknowledge (at 21), "the

[4] Indeed, it is far from clear that plaintiffs need a separate "cause of action" to seek injunctive relief in a federal court sitting in equity. "It is a mistake, or at least conducive of a mistake, to refer to 'causes of action' in equity. To do so is to assimilate complaints brought in equity—which require petitioners to show that an equity has arisen in their favor, relative to and notwithstanding the law—with actions brought at law, which require plaintiffs to allege a civil wrong or other actual or threatened violation of norms or enabling doctrines of general application." Bray & Miller, *Getting Into Equity*, 97 Notre Dame L. Rev. 1763, 1776 (2022).

Readmission Acts are silent on other enforcement mechanisms." That is where the inquiry should end; no resort to common-law contract doctrine (Pet.11, 19-20) can insert into the statute a limitation Congress never placed there.

The Virginia Readmission Act also, unlike the statute in *Armstrong* and contrary to the arguments of the amici states (at 10-21), contains a judicially manageable standard. 575 U.S. at 328. As relevant here, the Act requires courts to determine whether the state is disenfranchising for an offense that was not a felony "at common law" in 1870. *See* 16 Stat. 62. Courts are uniquely equipped to conduct such comparative historical analysis, which "'is an essential component of judicial decisionmaking.'" *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1, 31 (2022) (quoting *Heller* v. *District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). In light of the Act's text, it is the failure to enforce the Virginia Readmission Act which would diminish the "respect due" to Congress. Pet.11.

V. NONE OF PETITIONERS' REMAINING ARGUMENTS MERITS THIS COURT'S REVIEW

Petitioners (at 10-13) and amici (at 10-21) raise the specter of various constitutional questions—including arguments regarding the Guarantee Clause, the equal footing doctrine, and anticommandeering principles—that they allege could be avoided if the Court departs from traditional principles and rules that *Ex parte Young* does not apply.

But "[t]he canon of constitutional avoidance" and "the specter of a statute's unconstitutionality cannot be permitted to distort the antecedent question of jurisdiction," because "[t]o decline to adjudicate a federal right

for fear of its potential unconstitutionality is in effect to invalidate the right in the quest to save it." *Virginia Office for Protection & Advocacy*, 563 U.S. at 265-266 (Kennedy, J., concurring). "The Court should not permit the commission of acts that violate a federal right on the mere suspicion that Congress acted beyond its authority." *Id.* at 266. Petitioners' Guarantee Clause, equal-footing, and anticommandeering arguments are at bottom concerns about the appropriate scope of any remedy for a violation, not whether petitioners are immune from suit. And the Court cannot address questions about remedy in this interlocutory appeal before any judgment has been issued.

Petitioners' arguments also fail on their own terms. Petitioners' Guarantee Clause argument assumes that Congress enacted the Virginia Readmission Act pursuant to the Guarantee Clause and that this precludes judicial enforcement. But petitioners identify no clear support for either position. And petitioners' equal-footing and anticommandeering arguments are not before the Court—not only because of the interlocutory posture of this case, but also because petitioners *never raised them* in the Fourth Circuit. In any event, these arguments also lack sufficient support.

1. Petitioners' Guarantee Clause argument assumes (at 12-13) that the Virginia Readmission Act was enacted exclusively pursuant to the Guarantee Clause and that enforcing it would violate Congress's judgment made pursuant to that Clause. But the authority petitioners cite merely describes the Guarantee Clause as one source of the broader nation's obligations during the Reconstruction Era. *See Texas* v. *White*, 74 U.S. 700, 727-728 (1868), *overruled by Morgan* v. *United States*, 113 U.S. 476 (1885).

Nor do petitioners cite any authority for the proposition that statutes enacted pursuant to the Guarantee Clause (assuming they have been so enacted) may not be privately enforced. This inverts the Court's Guarantee Clause doctrine. The clause states only that "[t]he *United States* shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. art. IV, §4 (emphasis added). Only when confronted with competing claims of sovereignty does Congress hold the exclusive power to "decide what government is established in the State before it can determine whether it is republican or not." *Luther* v. *Borden*, 48 U.S. 1, 42 (1849), *quoted in Baker* v. *Carr*, 369 U.S. 186, 220 (1962). The Court has therefore not "resort[ed] to the Guaranty Clause … as the *source* of a constitutional standard for invalidating state action." *Baker*, 369 U.S. at 223 (emphasis added). But the Court has never held that the Guarantee Clause may *bar* a lawsuit that does not seek relief pursuant to the Guarantee Clause itself and does not even ask the courts to adjudicate a dispute about sovereignty or borders.

Petitioners' demand that courts defer to "Congress's judgment" (at 10-11, 21) by refusing to enforce the Virginia Readmission Act inverts the Act's very purpose and defies Congress's judgment. That judgment is codified in the Act's prophylactic bar on Virginia expanding its felony disenfranchisement provision. To the extent there is any question of whether courts remedy violations of laws enacted pursuant to the Guarantee Clause, that question should be raised on appeal from a final judgment, after a court has ordered a remedy this Court can review.

Congress passed the Act as a reaction to the real risk that Virginia could backslide in its commitment to equal voting rights and re-engage in the subterfuges it

carried out in the years leading up to the Act's passage. The Act was Congress's response to a strategy to systematically disenfranchise Black citizens by expanding the range of disqualifying crimes and manipulating criminal legal processes for the purpose of targeting Black citizens. For example, states enabled disenfranchisement for crimes punishable by public whipping and then made petty crimes punishable by public whipping. C.A.J.A.40 & n.20 (citing *Letter from Major Rob't Avery to Brevet Major General Jno. C. Robinson* (Dec. 17, 1866)). Virginians not only enacted new laws to disenfranchise Black residents by convicting them of petty vagrancy crimes, *see supra* p.3, but also considered it "well known" that the state's Black residents were being convicted of such expanded crimes by sham trials and procedures. C.A.J.A.40 & n.23 (quoting *Journal of the Constitutional Convention of the State of Virginia* 99-100 (Richmond: Office of the New Nation 1867)).

The Act states in no uncertain terms that its bar on such conduct is a "fundamental condition" of Virginia's readmission. 16 Stat. at 63. It codifies Congress's decision not to rely solely on the ad hoc (and extreme) future remedy of expelling congressional delegations only *after* a condition of readmission is violated and citizens are unlawfully disenfranchised. Courts may enforce it now, and absent clear indication otherwise, they have a "'virtually unflagging'" obligation to do so, *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976), whatever the political consequences, *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986). If courts are to respect the

conditions Congress placed on Virginia's readmission to Congress, they must enforce them.[5]

2. The Court also should not consider petitioners' equal-footing or anticommandeering "questions." *See* Pet.12-13. As with the others, these arguments are only properly addressed on appeal from a final judgment, not in an interlocutory posture. *See, e.g.*, *Haaland* v. *Brackeen*, 599 U.S. 255, 271-272 (2023) (anti-commandeering); *Shelby County* v. *Holder*, 570 U.S. 529, 541 (2013) (equal footing).

Moreover, petitioners did not even *raise* these questions in the briefs they presented to the Fourth Circuit, let alone develop any arguments addressing them which respondents could answer. *See* Pet.App.3a-18a; C.A. Appellants' Br. 14-39. As a Court "'of review, not of first view,'" this Court considers it "generally unwise to consider arguments in the first instance," *Byrd* v. *United States*, 584 U.S. 395, 404 (2018), and it should not reach these two arguments on that basis.

Even if the Court considered it, petitioners' "equal footing" argument makes the astonishing claim that the Readmission Acts are *per se* unlawful because not all states are "covered by Readmission Acts." *See* Pet.12-13. This misses the point. It is no secret that Congress enacted the Readmission Acts not on some arbitrary or malicious basis, but as a direct response to Virginia's (and other former Confederate states') unique and

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[5] Legislative history confirms that Congress intended for the Readmission Act to be judicially enforceable. As one Congressional proponent explained: "The 'fundamental condition' fixes the rights of citizens, and the *courts will furnish redress for their violation* … if Virginia should change her constitution so as to deny to citizens the right secured by this 'fundamental condition.'" Cong. Globe, 41st Cong., 2d Sess. 432 (1870) (emphasis added).

disproportionate efforts to disenfranchise Black residents. And unlike the only case in modern history in which the Court has found an equal-footing violation, there is no indication that the Virginia Readmission Act was "intended to be temporary" (or that the state has "dramatically" shifted in its treatment of Black citizens convicted of felonies). *See Shelby County*, 570 U.S. at 546-547. Black citizens in Virginia are more than twice as likely as Black citizens across the nation, and two-and-a-half times more likely than the average Virginian, to be disenfranchised due to a felony conviction. C.A.J.A.49.

Petitioners' reference (at 13) to anticommandeering "questions" possibly "raise[d]" also presents no issue worthy of review. Again, because no remedy has been ordered, no court has "force[d]" a state to do anything that this Court could review. Pet.13. And petitioners' anticommandeering argument is at loggerheads with their Guarantee Clause argument, which proposes that the Clause "gives Congress authority" to set conditions on Virginia's admission to the union, Pet.12.

The anticommandeering principle "prevents Congress from shifting the costs of regulation to the States" by "dictat[ing] what a state legislature may and may not do." *Murphy* v. *National Collegiate Athletic Association*, 584 U.S. 453, 474 (2018). But this case does not involve regulatory costs, or a requirement that Virginia's legislature "enact and enforce" some congressional program. *Id.* Respondents seek only an injunction requiring state officials to stop enforcing the unlawful felony disenfranchisement provision against them (so that they may vote) and a judicial declaration that the provision is unlawful. *See* Pet.App.3a, 19a. The state legislature need not take any action, or refrain from taking any action, for respondents to obtain complete relief.

3. Amici mostly repeat these arguments, but also raise (at 10-11, 16-17) additional arguments pursuant to the political question doctrine and the Elections Clause. Such claims, too, are reviewed on appeal from final judgments. *See, e.g.*, *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7 (2013) (Elections Clause); *Rucho* v. *Common Cause*, 588 U.S. 684, 695 (2019) (political-question doctrine). And petitioners never raised them in the Fourth Circuit. *See* Pet.App.4a-18a; *see also Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014) (declining to address an argument raised only by amici). In any event, these arguments largely repeat petitioners' Guarantee Clause argument, and they fail for the reasons already given.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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