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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

Respondents do not dispute that the questions presented are exceptionally important. Nor could they—Respondents seek an injunction to force Virginia to add over 300,000 convicted felons to its voter rolls, in violation of Virginia's Constitution. Opp.5-6. They rely on an obscure Reconstruction-era statute, the Virginia Readmission Act. But neither this Act nor the similar Readmission Acts for nine other States have *ever* been judicially enforced in their 150-year histories. Until recently, these statutes were rarely litigated because enforcement was universally understood to be "in the exclusive domain of Congress." *Merritt* v. *Jones*, 533 S.W.2d 497, 502 (Ark. 1976). But enterprising plaintiffs are now attempting to use them to bypass the political process in these States.

The Fourth Circuit's ruling that Readmission Acts are judicially enforceable under the *Ex parte Young* doctrine raises critically important issues of the separation of powers, state sovereignty, and federalism. Absent this Court's intervention, statutes meant to restore the congressional representation of the rebel States following the Civil War will be weaponized to overhaul state electoral and educational systems. And Virginia and nine other States will be treated as second-class members of the Union.

The questions presented seek to vindicate Virginia's sovereign immunity from suit. Respondents' contentions that the interlocutory posture creates vehicle issues are thus misplaced. This Court has long held that sovereign immunity can be raised in an interlocutory appeal, and it has not hesitated to resolve immunity questions, including the scope of *Ex parte Young*, in this interlocutory posture. See, *e.g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996).

Both questions presented are exceptionally important issues of federal law, are the subject of splits of authority, and are properly before the Court in an ideal vehicle to resolve them. This Court should grant the petition.

ARGUMENT

I. Whether Congress foreclosed judicial enforcement of the Readmission Acts is an important question that has divided courts, and this case presents an excellent vehicle to resolve it

A. The Fourth Circuit's ruling on this important question is contrary to this Court's precedent, and deepens a split in authority

This Court should grant the petition to resolve the question whether private parties may judicially enforce the Readmission Acts through *Ex parte Young*, 209 U.S. 123 (1908). The Fourth Circuit's ruling that they may is contrary both to this Court's precedent, and the ruling of a state court of last resort. Pet.15-23.

Congress imposed a statutory limitation on judicial enforcement by providing that the Acts' restrictions were "conditions" of restoring the States' representation in Congress. 16 Stat. 62 (1870). As this Court has consistently held, "the typical remedy for state noncompliance with federally imposed conditions" is "action by the Federal Government," not a private enforcement suit. *Health & Hosp. Ass'n of Marion Cnty.* v. *Talevski*, 599 U.S. 166, 183 (2022) (quotation marks omitted). When Congress grants a benefit in exchange for the acceptance of a condition, federal courts must respect the bargain it struck. This principle is all the more important when the condition relates to congressional representation after the Civil

War, an inherently political topic suitable for the halls of Congress and not the federal courts.[1]

Respondents contend that asking whether Congress provided for judicial enforcement of the Readmission Acts "get[s] the question backwards," and that the Court should ask "at most whether [Congress] foreclosed reliance on the longstanding background principle" of *Ex parte Young*. Opp.18. But Respondents' framing gets history backwards: Congress passed the Readmission Acts decades *before Ex parte Young* was decided. Congress could not have "explicit[ly]" "foreclosed reliance" on a doctrine that did not yet exist. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327-28 (2015); see, *e.g.*, *Kaspersky Lab, Inc.* v. *DHS*, 909 F.3d 446, 457 (D.C. Cir. 2018) (Congress is "unable to predict the future"). Thus, the question is whether Congress intended judicial enforcement through private suits, or whether it "implicit[ly]" foreclosed such private relief, as in *Seminole Tribe*, 517 U.S. 44, and *Armstrong*, 575 U.S. 320.

The Fourth Circuit's ruling that Congress failed to implicitly foreclose *Ex parte Young* deepens a clear split in authority. The Arkansas Supreme Court came to the opposite conclusion on the same question,

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[1] Respondents' argument that legislative history demonstrates that "Congress intended for the Readmission Act to be judicially enforceable," Opp.30.n.5, has the typical failing of "looking over a crowd and picking out your friends," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Multiple other representatives expressed the contrary view that only Congress could enforce the Readmission Acts. See, *e.g.*, Cong. Glob., 41st Cong., 2d Sess. 479 (Rep. Fitch) ("Suppose [Virginia] shall hereafter violate any or all of these 'fundamental conditions,' what is to be done about it? . . . It would be necessary in such event to come to Congress for a remedy."); *id.* at 569 (Sen. Morton) (similar).

holding that enforcement of the Readmission Acts was "in the exclusive domain of Congress." *Merritt*, 533 S.W.2d at 502. Respondents contend that this ruling is somehow "not relevant" because *Merritt* did not involve "state sovereign immunity from suit in *federal* court." Opp.21. But *Merritt* held that Congress did not authorize judicial enforcement of the Readmission Acts *at all,* a conclusion equally relevant to *Ex parte Young* suits in federal court. Respondents' argument that this discussion was dictum, Opp.21, is also incorrect. While *Merritt* noted that the Readmission Act question "was not presented" to the lower court, the Arkansas Supreme Court nonetheless chose to "consider it so that the point may be laid to rest." 533 S.W.2d at 502. That court rejected the Readmission Act claim on the ground that the Act was enforceable only by Congress, clearly in conflict with the Fourth Circuit's ruling here and the Fifth Circuit's ruling in *Williams* v. *Reeves*, 954 F.3d 729 (5th Cir. 2020).

Respondents' criticism of *Merritt* as "conclusory," Opp.21, does nothing to reconcile the rulings. In any event, *Merritt* explicitly adopted the reasoning of *Butler* v. *Thompson*, 97 F. Supp. 17 (E.D. Va. 1951), which explained that enforcement of the Act is "peculiarly within the domain of Congress itself, since [the Act] only purports to set up a condition governing Virginia's right to admission to representation in Congress." *Id.* at 20. Judge Jones, joined by seven other Fifth Circuit judges, also analyzed the issue recently, rejecting a panel's holding that "a declaration that [a public education provision] of the Mississippi Constitution conflicts with" the Mississippi Readmission Act "may be pursued under *Ex parte Young*." *Williams*, 954 F.3d at 739. Judge Jones explained that it is "obvious from the text and structure of the Readmission Act" that only Congress can enforce it, for it "explicitly

qualif[ies] . . . admittance 'to representation in Congress' upon" the "fundamental conditions" it contains, and thus "simply offered the states a choice to comply with certain congressional conditions or run the risk that their representatives will not be seated." *Williams* v. *Reeves*, 981 F.3d 437, 444 (5th Cir. 2020) (quoting 16 Stat. 67 (1870)) (Jones, J., dissenting from the denial of rehearing en banc).

Thus, there is a square split of authority, and both sides of the issue have been thoroughly analyzed in the lower courts. There is little reason to await further "percolation" here, given that the ten States subject to the Readmission Acts are geographically concentrated in four circuits, and two of them (and the state supreme court of the only State in a third) have already addressed the issue.

B. This case presents an ideal vehicle to decide the question

The petition should also be granted because this case presents an ideal vehicle for resolving the question presented. Respondents contend that the interlocutory posture creates vehicle problems. Opp.12-15. But this Court frequently decides sovereign immunity issues such as this one on interlocutory appeal. See, *e.g.*, *Seminole Tribe,* 517 U.S. at 53; *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141, 143-45 (1993); *Whole Women's Health* v. *Jackson*, 595 U.S. 30, 38 (2021); *Allen* v. *Cooper*, 589 U.S. 248, 253 (2020); *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 787 (2014). Indeed, because sovereign immunity is an immunity *from suit*, not only from liability, it "is effectively lost if a case is erroneously permitted to go to trial." *Puerto Rico Aqueduct*, 506 U.S. at 144 (quotation marks omitted).

Respondents further argue that the question whether a statute implicitly forecloses *Ex parte Young* as a route around sovereign immunity cannot be raised on interlocutory appeal, claiming it is really a merits question. Opp.16-17. But that argument is flatly contrary to *Seminole Tribe*, which decided—on an interlocutory appeal—"whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer" when Congress had provided a different enforcement scheme. 517 U.S. at 74. This Court held that when Congress displaces *Ex parte Young*, the "suit is barred by the Eleventh Amendment and must be dismissed for a *lack of jurisdiction*." *Id.* at 76 (emphasis added). Respondents' sole authority for their contention that the question is not cognizable in this posture is a law-review article that claims *Seminole Tribe* was wrongly decided. Opp.17.n.2 (quoting Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U. L. Rev. 495, 521 (1997)).

The Fourth Circuit itself flatly rejected Respondents' contention that "this question is not within the scope of this interlocutory appeal." Pet.App.12a.n.2 (citing *Seminole Tribe*, 517 U.S. at 52, 73-76). Respondents' argument that "the Fourth Circuit did not decide petitioners' first question presented," Opp.15, is thus incorrect. The Fourth Circuit reached the question and held that Congress did not "foreclose[] equitable enforcement of the Virginia Readmission Act and thus relief under the *Ex parte Young* doctrine." Pet.App.12a. To the extent Respondents contend that Petitioners are asking this Court to decide whether the Virginia Readmission Act forecloses suit through routes other than *Ex parte Young*, such as 42 U.S.C. § 1983, see Opp.15-18, they are mistaken. A

holding that Congress foreclosed private enforcement of the Readmission Act under *Ex parte Young* might well strongly suggest that § 1983 is unavailable. But Petitioners are not asking this Court to consider that question; they are simply asking this Court to review the Fourth Circuit's ruling that Respondents can invoke the *Ex parte Young* exception to Virginia's sovereign immunity. The Fourth Circuit undeniably decided that issue. See Pet.App.12a.

Respondents' remaining vehicle arguments fare no better. Their lead argument is built upon Petitioners' purported "concession" that *Ex parte Young* can be used to seek an anti-suit injunction—that is, an injunction against a state suit to enforce a federally preempted statute. Opp.10-11. But Congress can choose *not* to make a statute judicially enforceable, preserving sovereign immunity and foreclosing reliance on *Ex parte Young*. See Pet.18-19. Where, as here, Congress has chosen an alternate enforcement mechanism, then a court cannot "supplement that scheme with one created by the judiciary," including anti-suit injunctions. *Seminole Tribe*, 517 U.S. at 74. In any event, Respondents are not seeking an anti-suit injunction here. See p.10, *infra*.

To the extent that Respondents argue that this Court's review may be frustrated by the inability to entertain certain constitutional-avoidance "questions," Opp.30, they are mistaken once again. Constitutional avoidance is a "maxim of statutory construction," not a separate claim. *Clark* v. *Martinez*, 543 U.S. 371, 381-82 (2005). Petitioners argued below that Congress foreclosed equitable enforcement of the Readmission Act, and the Fourth Circuit ruled on that question. Pet.App.12a-15a. This Court can therefore properly consider any argument in support of that

claim, including arguments that Respondents' construction of the Readmission Acts would render them unconstitutional. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.").

And it is Respondents' positions as to those constitutional avoidance issues that are "astonishing" and "miss[] the point," Opp.30: because all States are coequal sovereigns, Congress cannot constitutionally subject a subset of States to highly intrusive federal litigation in perpetuity. See Pet.12-13. Respondents point to *Shelby County* v. *Holder*, 570 U.S. 529 (2013), see Opp.30-31, but that case only highlights the serious constitutional problems raised by the Fourth Circuit's interpretation of the Readmission Acts. *Shelby County* makes clear that there is no exception to the "fundamental principle of equal sovereignty among the States," 570 U.S. at 544 (cleaned up), for "former Confederate states," Opp.30. Rather, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions," and "cannot rely simply on the past." *Shelby County,* 570 U.S. at 553. And *Shelby County*'s finding that the nation has "changed dramatically" since Congress passed the Voting Rights Act in 1965, *id*. at 547, applies with even more force to the Readmission Acts that Congress passed a century earlier.

Finally, Respondents' argument that this petition is no different than the emergency application in *Williams*, Opp.22, is also incorrect. This Court denied the request to stay the Fifth Circuit's mandate without prejudice because Mississippi had remaining threshold grounds "for *dismissal*" in the district court. *Reeves*

v. *Williams*, 141 S. Ct. 2480, 2480 (2021) (emphasis added). Thus, it was not clear that Mississippi would ever be subject to suit in violation of its sovereign immunity. See *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). Here, however, the district court has already denied all of Virginia's grounds for dismissal on the remaining claims, and discovery is ongoing. See Opp.1. This petition is therefore not only a good vehicle to vindicate Virginia's sovereign immunity from suit—it is the only available vehicle.

II. Whether *Ex parte Young* requires a private right of action is also an important question on which there is a split of authority

The second question presented likewise warrants this Court's review: it is an important question of federal law, and the Fourth Circuit's decision expands a circuit split. Pet.23-28. Again, Respondents do not contest the importance of the question, and their arguments that there is no conflict and that vehicle problems exist are incorrect.

The Fourth Circuit held below that *Ex parte Young* lifts a State's sovereign immunity even without an independent private cause of action. Pet.App.7a-9a. All that is required to enjoin state officials, the court held, is an alleged ongoing violation of federal law and a request for prospective relief. Pet.App.8a; see also *Green Valley Special Util. Dist.* v. *City of Schertz*, 969 F.3d 460, 475 (5th Cir. 2020) (en banc) (same). This ruling conflicts with both this Court's precedents and the Sixth Circuit's ruling in *Michigan Corrections Organization* v. *Michigan Department of Corrections*, 774 F.3d 895 (6th Cir. 2014). This Court recently reiterated that *Ex parte Young* is a "narrow exception" to sovereign immunity "grounded in traditional equity

practice." *Whole Women's Health*, 595 U.S. at 39. Respondents' attempt to "wield *Ex parte Young*" as a "sword" goes well beyond traditional equity practice. *Michigan Corr.*, 774 F.3d at 906. As Chief Judge Sutton explained, "*Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else," such as 42 U.S.C. § 1983 or traditional equity practice. *Michigan Corr.*, 774 F.3d at 905; see *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). "No private right of action means no underlying lawsuit. No underlying lawsuit means no jurisdiction." *Michigan Corr.*, 774 F.3d at 907; see *Seminole Tribe*, 517 U.S. at 74. The Fourth Circuit's decision that *Ex parte Young* is available without an independent statutory or equitable private cause of action, Pet.App.7a-9a, thus conflicts with the Sixth Circuit's ruling in *Michigan Corrections*.

Respondents' argument that this issue is not squarely presented here, Opp.12-13, is erroneous. Respondents argue that *Ex parte Young* is available when an individual seeks an anti-suit injunction, using *Ex parte Young* as a *shield* against state law. Opp.10. But Respondents never sought an anti-suit injunction here. Pet.29-30. Instead, they seek to be permitted to register to vote. Pet.App.6a. The Fourth Circuit *sua sponte* suggested Respondents "seek protection from a threatened enforcement action," Pet.App.8a, but that is wrong. No Petitioner has threatened Respondents with any enforcement action; declining to register convicted felons requires no state enforcement suit. According to the Fourth Circuit, if Respondents somehow managed to register and then vote, they could be prosecuted, thus establishing the necessary suit to raise their Readmission Act defense. Pet.App.8a-9a. But "the State is not threatening to

sue anyone." *Michigan Corr.*, 774 F.3d at 906. Indeed, neither of the Respondents contend that they plan to vote illegally, and none of the Petitioners are even prosecutors. The "threatened enforcement action" is thus entirely hypothetical and could not be brought by any Petitioner.

Respondents also argue, Opp.13-14, that this Court lacks jurisdiction to determine whether a statutory or equitable right of action is required for "the Eleventh Amendment bar" to be "lifted, as it was in *Ex parte Young*," *Seminole Tribe*, 517 U.S. at 74. But whether *Ex parte Young* lifts the Eleventh Amendment bar depends on whether the requirements of *Ex parte Young* are satisfied. Again, *Ex parte Young* is not available unless "the plaintiff already has a cause of action from somewhere else." *Michigan Corr.*, 774 F.3d at 905. Thus, the question is not whether a private right of action is jurisdictional, but whether a private right of action is *required* to trigger the *Ex parte Young* fiction. *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635 (2002), is not to the contrary. Unlike this case, *Verizon* involved a classic anti-suit injunction: the agency had "ordered payment" of "compensation," and plaintiffs sought "relief" from the order "'on the ground that such regulation is pre-empted.'" *Id.* at 642. Nor was the argument that *Ex parte Young* requires a cause of action even briefed in that case.

CONCLUSION

The Court should grant the petition.

June 6, 2025

Respectfully submitted,

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