No. 24-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the aftermath of the Civil War, Congress enacted a series of "Readmission Acts"—largely identical statutes that imposed restrictions on former Confederate States as conditions of regaining representation in Congress. These conditions included constraints on the States' ability to amend their own constitutions on topics such as voting rights and public education. For nearly 150 years, these statutes were never judicially enforced, as Congress retained sole enforcement power over the conditions it created. The court below held that the Readmission Acts are judicially enforceable by private parties under *Ex parte Young*, 209 U.S. 123 (1908).

The questions presented are:

1. Whether private parties may seek judicial enforcement of the Readmission Acts.

2. Whether plaintiffs may invoke *Ex parte Young* to bypass a State's sovereign immunity when they lack a cause of action.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) are John O'Bannon, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia; Rosalyn R. Dance, in her official capacity as Vice Chair of the State Board of Elections for the Commonwealth of Virginia; Georgia Alvis-Long, in her official capacity as Secretary of the State Board of Elections for the Commonwealth of Virginia; Donald W. Merricks, in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia; Matthew Weinstein, in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia; Susan Beals, in her official capacity as Commissioner of the Department of Elections for the Commonwealth of Virginia; Eric Spicer, in his official capacity as the General Registrar of Fairfax County, Virginia; and Sandy C. Elswick, in her official capacity as the General Registrar of Smyth County, Virginia. Ms. Elswick was automatically substituted as a defendant-appellant after the former General Registrar of Smyth County, Virginia (Shannon Williams) left office. See Fed. R. Civ. P. 25(d).[1]

Respondents (plaintiffs-appellees below) are Tati Abu King and Toni Heath Johnson.

[1] Governor Glenn Youngkin and Secretary of the Commonwealth Kelly Gee were parties below but are not Petitioners because the court below ruled that the claims against them must be dismissed.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *King* v. *Youngkin*, No. 24-1265 (4th Cir.), judgment entered on December 5, 2024;
- *King* v. *Youngkin*, No. 3:23-cv-00408-JAG (E.D. Va.), order denying Defendants' assertion of sovereign immunity entered on March 18, 2024.

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JURISDICTION

The court of appeals entered its judgment on December 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Virginia Readmission Act, 16 Stat. 62 (1870), provides in relevant part:

> WHEREAS the people of Virginia have framed and adopted a constitution of State government which is republican; and whereas the legislature of Virginia elected under said constitution have ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith was a condition precedent to the representation of the State in Congress: Therefore,
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the said State of Virginia is entitled to representation in the Congress of the United States[.]
>
> * * *
>
> *And provided further*, That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions:
>
> 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: *Provided*, That any alteration of said Constitution, prospective in its effects, may be made in regard to the time and place of residence of voters. . . .

INTRODUCTION

The Fourth Circuit's ruling that the Readmission Acts are judicially enforceable by private parties transforms these obscure Civil War era statutes into sweeping intrusions on state sovereignty. The ruling conflicts with another court of appeals and a state court of last resort on the questions presented and will open the floodgates on Readmission Act litigation, severely restricting state authority in core areas of traditional state sovereignty. The petition should be granted to consider these exceptionally important questions of federal law.

After the Civil War, Congress passed five largely identical Readmission Acts. Exercising its power under the Guarantee Clause, U.S. Const. art. IV, § 4, Congress imposed conditions on ten States formerly in rebellion in return for restoring their representation in Congress. These conditions included, among other things, constraints on the States' ability to amend their own constitutions on topics such as voting rights and public education. In the nearly 150 years since the Acts were passed, they were never judicially enforced; enforcement power was correctly presumed to lie solely with Congress. Congress has never found any State to be in violation of a Readmission Act, and the delegations of the ten States have remained seated.

This century-and-a-half status quo has been upended by the decision below. The Fourth Circuit held that the Readmission Acts are judicially enforceable by private parties under *Ex parte Young*, 209 U.S. 123 (1908). It thus concluded that federal courts have the power to nullify a provision of Virginia's Constitution that disenfranchises felons on the theory that it violates a condition of Virginia's Readmission Act. This ruling will have massive repercussions for the ten States that are subject to Readmission Acts, as well as for state sovereignty more generally. States will be subjected to highly intrusive federal litigation either constraining them from changing their own constitutions or (as here) invalidating provisions in existing constitutions—not because those constitutions conflict with any provision of the U.S. Constitution, but solely under the conditions in the Readmission Acts. Indeed, such Readmission Act litigation is already taking place in two circuits.

The Fourth Circuit's ruling that the Readmission Acts are judicially enforceable invites courts to wade into the political decisions that restored the rebel States to federal representation more than 150 years ago, calling into question Congress's continuing determination that the States have republican governments and are entitled to representation. See *Baker* v. *Carr*, 369 U.S. 186, 216 (1962). This alarming consequence flows from the lower court's misinterpretation of the Readmission Acts, which Congress never intended private parties to enforce. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

The Fourth Circuit's ruling not only raises questions of exceptional importance, but also contributes to a split of authority on both questions presented. On the first question, the Fourth Circuit's decision

squarely conflicts with a decision of the Supreme Court of Arkansas rejecting a nearly identical claim under the Arkansas Readmission Act by holding that the Act's "enforcement is in the exclusive domain of Congress." *Merritt* v. *Jones*, 533 S.W.2d 497, 502 (Ark. 1976). On the second question presented, the Fourth Circuit's decision deepens an existing split by siding with the Fifth Circuit over the Sixth Circuit on the question of when *Ex parte Young* is available. See *Michigan Corr. Org.* v. *Michigan Dep't of Corr.*, 774 F.3d 895 (6th Cir. 2014); *Green Valley Special Util. Dist.* v. *City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc). The petition for a writ of certiorari should be granted.

STATEMENT

The Fourteenth Amendment permits States to disenfranchise felons, and the vast majority of States have longstanding provisions doing so. *Richardson* v. *Ramirez*, 418 U.S. 24, 52 (1974); see, *e.g.*, *Jones* v. *Governor of Fla.*, 950 F.3d 795, 801 n.3 (11th Cir. 2020) (noting that 48 States and the District of Columbia "impose some restrictions on felons' access to the franchise"). The Commonwealth of Virginia has excluded convicted felons from its franchise since at least 1830. See Va. Const. art. III, § 14 (1830).

"Following the Confederacy's unsuccessful attempt to secede from the Union," the congressional seats of the States formerly in rebellion were vacant, leaving those States without representation in Congress. *Perry* v. *Beamer*, 933 F. Supp. 556, 559 (E.D. Va. 1996). As a legal matter, the attempts of the rebel States to secede "were absolutely null" and "utterly without operation in law." *Texas* v. *White*, 74 U.S. 700, 701–02 (1868), *overruled on other grounds by Morgan* v. *United States*, 113 U.S. 476 (1885). Thus, during the

Civil War, Virginia "did not cease to be a State, nor her citizens to be citizens of the Union." *Id.* at 726. Virginia, however, lacked a "State government, competent to represent the State in its relations with the National government." *Id.* at 701. Immediately after the Civil War, the former rebel States "were divided into military districts and subject to strict military authority," "all under the supervision and control of commanding [federal] generals." *United States* v. *States of La., Tex., Miss., Ala., & Fla.*, 363 U.S. 1, 124 (1960).

Congress then sought to "re-establish[] the broken relations" of the rebel States with the Union through legislation "derived from the obligation of the United States to guarantee to every State in the Union a republican form of government." *Texas*, 74 U.S. at 727. Congress thus required the rebel States to submit their newly adopted constitutions "'to Congress for examination and approval,' after which approval by Congress and after ratification of the Fourteenth Amendment by each State, each should be 'declared entitled to representation in Congress.'" *States of La.*, 363 U.S. at 124.

In 1869, the Commonwealth of Virginia adopted its post-war constitution. Like its previous constitutions, the 1869 Virginia Constitution excluded from the franchise all "[p]ersons convicted of . . . felony." Va. Const. art. III, § 1 (1869). Shortly thereafter, Congress enacted the Virginia Readmission Act, which approved the 1869 Virginia Constitution as "republican" and declared that Virginia was again "entitled to representation in the Congress of the United States." 16 Stat. 62 (1870). As one of the "fundamental conditions" of readmission, the Act provides 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"—*i.e.*, the 1869 Virginia Constitution—"except as a punishment for such crimes as are now felonies at common law." *Id.* at 63.

The Virginia Readmission Act was one of a series of Readmission Acts, requiring ten States formerly in rebellion (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia) to adopt certain provisions in their state constitutions before Congress would seat their congressional delegations.[1] See *Richardson*, 418 at 52. These statutes imposed the same "fundamental condition" concerning voting on all ten States, "with only slight variations in language." *Ibid.*

Since the Virginia Readmission Act, Virginia has amended its constitution several times. It adopted its current constitution in 1971. Under this constitution, "[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 (1971).

Respondents are two convicted felons who are ineligible to vote in Virginia. Tati Abu King was convicted of felony robbery in 1988. CAJA74.[2] In 2016, the Governor restored King's voting rights. CAJA74. Two years later, King was convicted of felony

[1] 15 Stat. 72 (1868) (Arkansas); 15 Stat. 73 (1868) (North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida); 16 Stat. 67 (1870) (Mississippi); 16 Stat. 80 (1870) (Texas). Tennessee was unconditionally readmitted to representation in Congress through a joint declaration instead of a statute. See 14 Stat. 364 (1866).

[2] References to CAJA__ are to pages in the Joint Appendix, *King* v. *Youngkin*, No. 24-1265 (4th Cir. May 22, 2024), ECF No. 18.

possession of marijuana with intent to distribute. CAJA75. Respondent Toni Heath Johnson has numerous felony convictions over the course of several decades: she was convicted of felony uttering in 1984, felony forgery in 1988, felony attempt to utter a forged check in 1988, felony credit card theft in 1991, felony bigamy in 1999, felony identity fraud in 2002, and felony grand larceny in 2003. CAJA75. At some point after these convictions, the Governor restored her voting rights. CAJA32. Subsequently, in 2021, she was convicted of felony drug possession and felony abuse and neglect of a child. CAJA75.

In 2023, Respondents King and Johnson sued Virginia officials, alleging that Article II, § 1 of Virginia's 1971 Constitution violates the Virginia Readmission Act. App. 19a–22a. Specifically, they contended that the Virginia Readmission Act permits the Commonwealth to disenfranchise *only* felons who committed a crime that would have been a felony "at common law" in 1870. App. 29a. According to Respondents, the "nine 'common law' felonies were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny." CAJA48. On their theory, convictions for felonies that did not exist at common law in 1870—for instance, child abuse, attempted murder, or possession of fentanyl with intent to distribute—could not result in disenfranchisement. App. 21a.

Respondents seek, as putative class representatives, to enjoin Petitioners "from enforcing Article II, Section 1 of the [current] Virginia Constitution" against all Virginians "convicted of crimes that were not felonies at common law" in 1870. App. 33a, 37a. They brought claims under both 42 U.S.C. § 1983 and *Ex parte Young*. *Ibid.*

The district court dismissed Respondents' Virginia Readmission Act count brought under Section 1983. The court held that the Virginia Readmission Act "does not create a private right enforceable by an individual civil litigant under § 1983," because the Act "functions to impose conditions upon which Virginia legislators could participate in Congress, and it lacks language that explicitly confers any individual rights." App. 37a. Conversely, the district court held that the count brought under *Ex parte Young* could proceed. App. 39a. The court rejected Petitioners' argument that the two Virginia Readmission Act counts "ultimately collapse into one theory . . . as a single cause of action under § 1983 that must meet the requirements of § 1983 and *Ex parte Young*." App. 37a. Instead, the court held that *Ex parte Young* creates a distinct cause of action that does not require any individual federal right. *Ibid.* After holding that no separate cause of action was required, the court concluded that the Readmission Act also "lack[ed] language suggest[ing] Congress' intent to foreclose" judicial enforcement under *Ex parte Young*. App. 39a n.6. "Because *Ex parte Young* permits the plaintiffs to pursue their sought-after relief," the court held, "none of the defendants may successfully assert their Eleventh Amendment Immunity." App. 20a.

Petitioners timely sought interlocutory review of the denial of their sovereign immunity. App. 5a. They explained that *Ex parte Young*'s exception to sovereign immunity did not apply because Congress had foreclosed private judicial enforcement of the Act, and because the suit neither vindicated an individual federal right nor constituted an anti-suit injunction. App. 7a, 12a. The Fourth Circuit rejected these arguments. First, the court concluded that the Virginia Readmission Act does not demonstrate an intent to foreclose

private judicial enforcement, because it contains "no clear enforcement mechanism" and does not "lack[] judicially manageable standards." App. 13a, 14a.

Second, the court concluded that *Ex parte Young* permits Respondents to sidestep sovereign immunity even though the Virginia Readmission Act does not create an individual right and Respondents are not seeking an anti-suit injunction to prevent state officials from bringing an action against them. App. 7a. The court recognized that its decision was in tension with the Sixth Circuit's ruling in *Michigan Corrections Organization* v. *Michigan Department of Corrections*, 774 F.3d 895 (6th Cir. 2014). App. 8a n.1.

This petition follows.

REASONS FOR GRANTING THE PETITION

First, the petition should be granted because whether Readmission Acts are judicially enforceable through private suits is both an exceptionally important question of federal law and one on which the decision below creates a sharp division of authority. The Fourth Circuit's decision raises critical issues of federalism, state sovereignty, and the separation of powers between Congress and the federal judiciary. No court has enforced a Readmission Act against a State in the 150 years since Congress adopted them. Respondents' interpretation would be a radical change in the law and would raise a gravely serious question whether the Readmission Acts are unconstitutional. The Fourth Circuit's decision also conflicts with the ruling of a state court of last resort. The Supreme Court of Arkansas rejected a nearly identical claim, holding that a Readmission Act's "enforcement is in the exclusive domain of Congress." *Merritt*, 533 S.W.2d at 502. It also conflicts with this Court's ruling in *Armstrong*, 575 U.S. at 327, that *Ex parte Young* is

inapplicable when Congress did not intend to create a judicial enforcement mechanism.

Second, the Court should also grant the petition to resolve whether plaintiffs may use *Ex parte Young* to bypass a State's sovereign immunity when they lack a right to sue in the first place. This question is also highly important. The decision below risks transforming *Ex parte Young* from a narrow exception to States' sovereign immunity into a mere pleading exercise. Further, the Fourth Circuit's decision also deepened an existing circuit split, siding with the Fifth Circuit over the Sixth Circuit. Compare *Michigan Corr.*, 774 F.3d at 904–06, with *Green Valley*, 969 F.3d at 475. And the Fourth Circuit has joined the wrong side of the split: *Ex parte Young* applies only if a federal statute creates a right to sue, or the plaintiff has an equitable entitlement to an anti-suit injunction.

I. Whether private parties may judicially enforce the Readmission Acts is an exceptionally important question that has divided courts

A. Whether the Readmission Acts are judicially enforceable involves highly important issues of state sovereignty and the separation of powers

The importance of the first question presented is difficult to overstate. Absent review by this Court, private parties may hale the Commonwealth of Virginia and nine other States into federal court to invalidate provisions of, and block amendments to, their state constitutions as contrary to "fundamental conditions" on their representation in Congress. This result poses severe separation-of-powers problems by allowing a federal district court to reject Congress's judgment

that these States are entitled to representation. It creates equally serious problems of federalism and state sovereignty.

First, the Fourth Circuit's ruling that Readmission Acts are judicially enforceable by private parties invites courts to supplant Congress's judgment with their own—to hold that a State no longer satisfies the Act's conditions for readmission to representation in Congress. A court holding that a State has violated one of these fundamental conditions will unavoidably conflict with Congress's determination that the State's government remains "republican." See p.5, *supra*. Not only will courts risk upsetting the political decisions that ended the Civil War, but it would also be impossible for courts to resolve such claims without "expressing lack of respect due" to Congress's continuing determination that the State has a republican government. *Baker* v. *Carr*, 369 U.S. 186, 216 (1962).

The immense problems resulting from judicial enforcement in private actions are not difficult to foresee. Take Virginia as an example. Virginia's delegates have never been challenged under the Virginia Readmission Act—reflecting Congress's judgment that Virginia is in compliance with the Act. But if the Fourth Circuit's decision stands, it represents an invitation to federal courts to second-guess Congress's judgment and conclude that Virginia's government has not complied with the conditions of its readmission to representation in Congress since at least 1971. See p.6, *supra*. Such a ruling would call into question the legitimacy of Virginia's representation in Congress, and potentially of myriad laws on which those delegates voted. The Readmission Acts do not mention judicial enforcement, and Congress did not silently commit that politically fraught question to the judicial

branch. *AMG Capital Mgmt., LLC* v. *FTC*, 593 U.S. 67, 78 (2021) ("Congress does not hide elephants in mouseholes." (cleaned up)).

Second, the Fourth Circuit's interpretation of the Virginia Readmission Act raises grave federalism concerns. Congress passed the Readmission Acts under the Guarantee Clause. See *Texas*, 74 U.S. at 727. But, under the Fourth Circuit's interpretation of the Acts—that they create a judicially enforceable federal right of felons to vote—they would raise serious questions regarding the scope of Congress's authority under that Clause. The Guarantee Clause, rather than giving rise to judicially enforceable individual rights, provides that the "United States shall guarantee to *every State*" a republican government. U.S. Const. art. IV, § 4 (emphasis added). Accordingly, the Guarantee Clause gives Congress authority "to decide what government is the established one in a State," "whether it is republican or not," and whether it is entitled to representation in Congress. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 42–44 (1849). That is precisely what the Readmission Acts purport to do: they recognized the governments of the rebel States following the Civil War, entitling them to renewed representation in Congress. See pp.4–6, *supra*.

Whether Congress may delegate its power under the Guarantee Clause to private parties to enforce in federal court—and do so against only particular States—is a serious constitutional question. And if the Fourth Circuit's decision stands, it is one that this Court would eventually need to answer. To start, the Fourth Circuit's holding presents serious constitutional questions under the "equal footing" doctrine, because it would subject only those States covered by Readmission Acts to private lawsuits in federal court

seeking to invalidate provisions of their constitutions. See *Coyle* v. *Smith*, 221 U.S. 559, 573 (1911); *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845); *Escanaba Co.* v. *Chicago*, 107 U.S. 678, 689 (1883). In addition, the decision below raises questions under the anticommandeering doctrine because it arguably interprets the Readmission Acts to empower private parties and the federal judiciary to force States to pass new laws, contra *New York* v. *United States*, 505 U.S. 144, 175–76 (1992), or to bar them from altering old ones, contra *New Jersey Thoroughbred Horsemen's Ass'n* v. *National Collegiate Athletic Ass'n*, 584 U.S. 453, 474 (2018). Indeed, courts and commentators have long "dismissed the [Reconstruction-era] conditions as unenforceable infringements of state sovereignty" to the extent they are viewed as an attempt to create judicially enforceable private rights or restrict a State's authority to alter state law. 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); see also James Q. Dealey, *Growth of American State Constitutions* 70 (1915) (discussing the Readmission Acts and reasoning that "once the state becomes a full fledged member of the Union, such conditions and compacts may remain as moral obligations but would hardly be enforcible [sic] at law").

These questions disappear, however, if the Readmission Acts are enforceable only by Congress. If private parties may not seek an injunction from federal courts against enforcement or amendment of a State's constitution, then the States subject to the Readmission Acts are not legally barred from amending or enforcing their own constitutions. Instead, Congress would have sole authority to deem them to be in violation of their duties under the Acts. The avoidance of

the grave constitutional questions posed by the Fourth Circuit's decision is thus another reason for rejecting it. See *Clark* v. *Martinez*, 543 U.S. 371, 380–81 (2005) (explaining that the canon of constitutional avoidance favors rejecting a reading that "raises serious constitutional doubts").

The first question presented is exceptionally important as a practical matter too. Ten States comprised of over 100 million Americans are subject to Readmission Acts: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. And the conditions in these Acts are not limited to the disenfranchisement of felons; for instance, several also cover public education. See *Williams on behalf of J.E.* v. *Reeves*, 954 F.3d 729 (5th Cir. 2020) (lawsuit claiming that Mississippi is in violation of the "school rights and privileges" condition of the Mississippi Readmission Act). All ten of these States disenfranchise felons, and all have public school systems. The Fourth Circuit's ruling is thus likely to create a boom in highly expensive and intrusive Readmission Act litigation in these States. Indeed, after many decades of desuetude, Readmission Act litigation is already spreading in recent years. The Court should end this misadventure now, before the floodgates open and the States are forced to undergo costly discovery and trials when they should be protected by sovereign immunity. See, *e.g.*, *Russell* v. *Jones*, 49 F.4th 507, 514 (5th Cir. 2022) ("[S]overeign immunity is an immunity from *suit* (including discovery), not just liability.").

B. The Fourth Circuit's holding that Readmission Acts are judicially enforceable conflicts with the decision of a state court of last resort

The petition should also be granted because the Fourth Circuit's holding that private parties may judicially enforce Readmission Acts squarely conflicts with a decision of a state court of last resort. Rule 10(a).

The Supreme Court of Arkansas rejected a nearly identical claim under the Arkansas Readmission Act, holding that the Act's "enforcement is in the exclusive domain of Congress." *Merritt*, 533 S.W.2d at 502. The Arkansas Constitution required county registrars to cancel the voting registration of individuals "'[w]ho have been convicted of felonies and have not been pardoned.'" *Id.* at 498 (quoting Ark. Const. amend. 51, § 11(a)(4)). The plaintiff had been disenfranchised due to his federal conviction for filing fraudulent tax returns. *Ibid.* He argued that under the Arkansas Readmission Act, voting rights could be cancelled only "upon conviction of a felony at common law or a felony by laws passed by the General Assembly" of Arkansas. *Id.* at 500–02 (citing 15 Stat. 72). The Arkansas Supreme Court rejected the plaintiff's attempt to seek judicial enforcement of the Arkansas Readmission Act, holding that the Act's "enforcement is in the exclusive domain of Congress." *Id.* at 502. The Fourth Circuit's ruling here squarely conflicts with *Merritt* on the same important question of federal law.

Further, the Arkansas Supreme Court's analysis drew on a three-judge district court decision construing the precise statute at issue here—Virginia's Readmission Act. See *ibid.* (citing *Butler* v. *Thompson*, 97 F. Supp. 17 (E.D. Va. 1951)). In *Butler*, a plaintiff

argued that a provision of the Virginia Constitution violated the Virginia Readmission Act. 97 F. Supp. at 19. The court rejected that argument because, "even if Virginia has violated the conditions of this Act of Congress," it was "extremely doubtful" that "this presents a question justiciable in the courts." *Id.* at 20. "Such a matter," the three-judge panel concluded, "is one peculiarly within the domain of Congress itself, since it only purports to set up a condition governing Virginia's right to admission to representation in Congress." *Ibid.*

More recently, eight judges of the Fifth Circuit also would have held that only Congress may enforce the Readmission Acts. See *Williams on behalf of J.E.* v. *Reeves*, 981 F.3d 437, 443–44 (5th Cir. 2020) (Jones, J., dissenting from denial of rehearing en banc). In *Williams*, the dispute centered on the education provision of Mississippi's Readmission Act (a provision also present in Virginia's Readmission Act). *Id.* at 440 & n.3. Specifically, the plaintiffs sought a declaratory judgment that Mississippi's 1987 Constitution violated the Mississippi Readmission Act because it granted fewer "educational rights" to African American children than had the 1868 Mississippi Constitution which was approved in the Readmission Act. *Id.* at 438–39. A panel of the Fifth Circuit held that private parties could seek a declaration that Mississippi's Constitution violates the Mississippi Readmission Act. Judge Jones, writing for eight judges dissenting from the denial of en banc rehearing, explained that "the Readmission Act does not create a private right of action, express or implied." *Id.* at 444. Therefore, the "Act's only enforcement mechanism lies in direct recourse to Congress." *Ibid.*

Although this Court denied without prejudice an application to recall and stay the mandate of the Fifth Circuit in *Williams*, it expressly noted that there were "remaining grounds for dismissal currently on remand to the district court," such as standing, that were yet to be "fully resolved." *Reeves* v. *Williams*, 141 S. Ct. 2480, 2480 (2021). Because some of these grounds were also jurisdictional, and because the Fifth Circuit litigation focused on whether the suit raised issues of federal law under *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), the question whether congressional intent foreclosed judicial enforcement of the Readmission Acts was not as cleanly presented in that case. *Williams*, 954 F.3d at 735; see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). This case, however, is an excellent vehicle to resolve this important recurring question. The courts below have ruled upon all the jurisdictional questions, and the case has proceeded past the motion-to-dismiss stage in the district court and is heading for discovery (subject to a motion to stay pending resolution of this petition). See pp.8–9, *supra*. The Court should grant the petition to review the important question whether the Readmission Acts are judicially enforceable.

C. The Fourth Circuit's ruling is contrary to this Court's precedent

The petition should also be granted because the Fourth Circuit's holding that the Readmission Acts are judicially enforceable is contrary to this Court's precedent. *Armstrong*, 575 U.S. at 327; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996). For nearly 150 years, the Readmission Acts were never judicially enforced, and enforcement was rightly presumed to reside solely with Congress. The Acts provide no cause of action, no federal individual right, no

private remedy, and no enforcement role whatsoever for private individuals. Congress imposed conditions that it alone would judge. The Acts are therefore not enforceable under *Ex parte Young*.

The scope of *Ex parte Young* "is subject to express and implied statutory limitations," *Armstrong*, 575 U.S. at 327, and a court lacks jurisdiction to hear *Ex parte Young* claims outside the scope of those limitations, *Seminole Tribe*, 517 U.S. at 76. Congress's "intent to foreclose" equitable judicial relief prevents a plaintiff from relying on the *Ex parte Young* exception to sovereign immunity. *Armstrong*, 575 U.S. at 328 (quoting *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)). Like any other question of congressional intent, "[c]ourts must employ traditional tools of statutory construction" to assess whether Congress intended for private parties to enforce the underlying federal law through judicial action. See *Health & Hosp. Ass'n of Marion Cnty.* v. *Talevski*, 599 U.S. 166, 183 (2022).

Specifically, *Armstrong* discussed two indicia of congressional intent to foreclose private parties from breaching sovereign immunity under *Ex parte Young*. The most important indication is whether Congress has created an alternative remedial scheme. "[T]he express provision of" one method of enforcing a statute suggests that Congress intended to preclude others. *Armstrong*, 575 U.S. at 328 (quotation marks omitted); see *Seminole Tribe*, 517 U.S. at 75–76. This conclusion follows from the standard principle of statutory interpretation that the inclusion of one thing implies the exclusion of another. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 107–12 (2012); *Seminole Tribe*, 517 U.S. at 74 ("Where Congress has created a remedial scheme for

the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."). Additionally, *Armstrong* explained that "the judicially unadministrable nature" of a statutory provision also supports an inference that Congress intended to foreclose equitable relief under *Ex parte Young*. 575 U.S. at 328.

The text of the Readmission Acts demonstrates that Congress foreclosed judicial enforcement of the statutes in private *Ex parte Young* suits. First, Congress intended the Readmission Acts to be enforced solely through an alternate mechanism: congressional enforcement, including Congress's determination whether to continue to seat the State's congressional delegation. A Readmission Act is in the nature of a contract between the State and Congress. See, *e.g.*, 16 Stat. 62. The Virginia Readmission Act begins by providing that Virginia "is entitled to representation in the Congress of the United States" if it meets certain "conditions" that are "precedent to the representation of the State in Congress." *Id.* at 63. It later reiterates the contractual nature of the provision, stating "[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." *Ibid.* A "condition" meant the same thing then as it does today: "that which is established . . . as requisite to another act." *Condition*, Webster's Dictionary (1828); *Condition*, Merriam-Webster (2025) ("[A] provision making the effect of a legal instrument contingent upon an uncertain event.").

As the counterparty to the Commonwealth, Congress is the exclusive enforcer of the conditions set forth in the Acts. See 2 Samuel Williston, The Law of

Contracts § 663 (1923) ("A condition in a promise limits the undertaking of the promisor to perform . . . ."); *Merritt*, 533 S.W.2d at 502 (a Readmission Act's "enforcement is in the exclusive domain of Congress"); *Butler*, 97 F. Supp. at 20 ("Such a matter is one peculiarly within the domain of Congress itself, since it only purports to set up a condition governing Virginia's right to admission to representation in Congress."). If a State violates its end of the bargain, then Congress can choose to unseat the State's delegation.[3] As Judge Jones's dissent explained, "[t]he readmission acts simply offered the states a choice to comply with certain congressional conditions or run the risk that their representatives will not be seated." *Williams*, 981 F.3d at 444 (Jones, J., dissenting from denial of rehearing en banc). And as this Court has recognized in similar contexts, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government" to enforce the conditions. *Talevski*, 599 U.S. at 183 (quotation marks omitted).

Armstrong itself is illustrative. There, the Medicaid Act created a "Spending Clause contract" between a State and the federal government. 575 U.S. at 328. This Court held that the exclusive remedy for the State's breach of that contract was non-performance by the federal government—specifically, "withholding of Medicaid funds by the Secretary of Health

[3] If Congress concluded that a State had violated a condition in its Readmission Act, it could also potentially employ other congressional enforcement mechanisms, such as removing committee assignments. See U.S. Const. art. I, § 5, cl. 2. But the Court need not decide the range of valid enforcement mechanisms that Congress possesses because this case only concerns an attempt at private judicial enforcement.

and Human Services." *Ibid*. And even though "intended beneficiaries" may "sue to enforce the obligations of *private* contracting parties" in "modern times," such intended beneficiaries typically have no right to enforce "contracts between two governments." *Id.* at 332. The Court therefore declined to infer from congressional silence that Congress intended such an alternative in the Medicaid Act. *Ibid.*

So too here: the Readmission Acts are silent on other enforcement mechanisms, and private enforcement on the theory that individuals are "incidental beneficiaries" would have been unthinkable to Congress at the time. 1 Samuel Williston, The Law of Contracts § 402 (1923) (describing the general rule that incidental beneficiaries may not sue on a contract); 13 Williston on Contracts § 37:1 (4th ed.) (describing common-law rule that "only parties in privity of contract could sue on a contract"). The alternative remedy of congressional enforcement thus forecloses private judicial enforcement of the Readmission Acts.

Second, the Readmission Acts also lack a rule suitable for judicial administration. See *Armstrong*, 575 U.S. at 328. The Virginia Readmission Act establishes the conditions of Congress's judgment that Virginia's Constitution is "republican." 16 Stat. 62; see also *Texas*, 74 U.S. at 727 (Congress's "authority" to pass the Readmission Acts "was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government"). The provision Respondents seek to enforce is one of those conditions. As this Court recognized in *Pacific States Telephone & Telegraph Co.* v. *Oregon*, a claim that a State has violated a provision of the act admitting it to the Union may be "reduced" to a claim that the State's government is not republican. 223 U.S. 118,

137, 139 (1912). And that is quintessentially a political claim that only Congress can resolve. U.S. Const. art. IV, § 4; see *Luther*, 48 U.S. (7 How.) at 42. The condition is unfit for judicial administration on that basis alone. *Pacific States*, 223 U.S. at 141–42.

Further, Respondents' interpretation of the Virginia Readmission Act would render the Act unconstitutional. See pp.12–14, *supra*. The canon of constitutional avoidance therefore forecloses it. See *Jennings* v. *Rodriguez*, 583 U.S. 281, 286 (2018) (Under the canon, "a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."). Indeed, determining a State's republican status represents the quintessential question that is ill-suited for judicial administration. See *Baker*, 369 U.S. at 223.

The Court's precedents with respect to implied causes of action and Section 1983 provide additional insights into why it is implausible that Congress intended private enforcement of the Acts. In those contexts, the existence or lack of a "private" or individual federal "right" is given significant weight in determining whether Congress intended private judicial enforcement. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286, 288 (2001); *Talevski*, 599 U.S. at 183. Courts "must employ traditional tools of statutory construction to assess whether Congress" passed a statute that "contains rights-creating, individual-centric language with an unmistakable focus on the benefited class." *Talevski*, 599 U.S. at 183 (quotation marks omitted). A similar analysis governs the question whether Congress has foreclosed equitable relief under *Ex parte Young*. In each instance, the court must determine whether Congress intended judicial enforcement of a statute. The question whether Congress intended to

create an individual federal right is equally probative of Congress's intent to foreclose relief under *Ex parte Young* as it is of Congress's intent to create a cause of action. Here, as the district court held, the Readmission Act "functions to impose conditions upon which Virginia legislators could participate in Congress, and it lacks language that explicitly confers any individual rights." App. 37a. That conclusion confirms that Congress foreclosed *Ex parte Young* claims.

This Court should grant review of the first question presented to resolve the highly important question whether the Readmission Acts are judicially enforceable; the Fourth Circuit's ruling below conflicts with both the decision of a state court of last resort and this Court's precedent. Rule 10(a), (c).

II. Whether plaintiffs may invoke *Ex parte Young* when they lack a cause of action is a highly important question upon which courts are in conflict

A. The question is important because the Fourth Circuit's expansion of *Ex parte Young* would eviscerate States' sovereign immunity

The second question presented is also highly important and recurring. It has been a decade since this Court's decision in *Armstrong*, which provided guidance on the operation of *Ex parte Young* as a path around a State's sovereign immunity. Meanwhile, numerous complaints based on *Ex parte Young* are filed in federal courts around the country every day. Whether *Ex parte Young* permits a plaintiff to bypass sovereign immunity even when the plaintiff lacks a cause of action is a highly important question meriting this Court's review. See, *e.g.*, *Green Valley*, 969 F.3d at 475.

"[T]he Constitution's structure, its history, and the authoritative interpretations by [this Court] make clear" that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). The Constitution "specifically recognizes the States as sovereign entities." *Seminole Tribe*, 517 U.S. at 71 n.15; see also *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact."). Indeed, the Constitution affirmatively "reserves" to States "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. Put simply, the States retain "a residuary and inviolable sovereignty." The Federalist No. 39, p.245 (C. Rossiter ed. 1961) (J. Madison).

The "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n* v. *South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002). Accordingly, any time a State is haled into federal court against its will, "the dignity and respect afforded [that] State, which [sovereign] immunity is designed to protect, are placed in jeopardy." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997). A "state may waive its sovereign immunity at its pleasure" and "in some circumstances Congress may abrogate it by appropriate legislation," but "absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State." *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 253–54 (2011).

This Court "has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*, 465 U.S. at 102 (citing *Ex parte Young*, 209 U.S. 123). But this exception is "narrow," *Seminole Tribe*, 517 U.S. at 76, and this Court has not given it "an expansive interpretation," *Pennhurst*, 465 U.S. at 102. Indeed, this Court's *Ex parte Young* jurisprudence has largely focused on ensuring that the exception remains "narrowly construed." *Id.* at 114 n.25. This Court has carefully avoided "stretch[ing] [*Ex parte Young*] too far and . . . upset[ting] the balance of federal and state interests that it embodies." *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986).

The decision below threatens to trample state sovereignty by expanding the doctrine to permit suits against States anytime a plaintiff alleges "an ongoing violation of federal law and seeks relief properly characterized as prospective"—even when the plaintiff has no federal right and no cause of action. App. 6a (quotation marks omitted). As this Court has warned, "[t]o interpret [*Ex parte*] *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene Tribe*, 521 U.S. at 270. The *Ex parte Young* exception "must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Ibid.*

The importance of this question is brought into sharp relief by this Court's recent implied-remedy

jurisprudence. As Judge Oldham has explained, interpreting *Ex parte Young* to authorize suits simply because the plaintiff alleges a violation of federal law creates significant tension with "other lines of Supreme Court precedent," such as *Sandoval*. *Green Valley*, 969 F.3d at 499 (Oldham, J., concurring). In *Sandoval*, this Court held that "private rights of action to enforce federal law must be created by Congress," even though that case also involved a claim for equitable relief. *Sandoval*, 532 U.S. at 286. And, in this case, even the district court recognized that the Virginia Readmission Act does not create a private right enforceable by an individual civil litigant. App. 37a. Construing *Ex parte Young* to allow judicial enforcement of all federal laws, whether or not those laws create individual federal *rights*, transforms a narrow exception to sovereign immunity into a gaping hole in the States' "residuary and inviolable" sovereignty. The Federalist No. 39, p.245. The petition should be granted to resolve this highly important question.

B. The Fourth Circuit's decision below expands a circuit split as to whether plaintiffs may invoke *Ex parte Young* when they lack a cause of action

This Court's review is also warranted because the Fourth Circuit's holding expands a circuit split, siding with the Fifth Circuit over the Sixth. Compare *Green Valley*, 969 F.3d at 475, with *Michigan Corr.*, 774 F.3d at 905.

The Fourth Circuit's holding conflicts with the Sixth Circuit's decision in *Michigan Corrections*. There, Chief Judge Sutton's opinion for the court explained that "*Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else." 774 F.3d at 905.

"Private parties who act in compliance with federal law may use *Ex parte Young* as a *shield* against the enforcement of contrary (and thus) preempted state laws" because "an existing cause of action for that relief exists: an equitable anti-suit injunction." *Id.* at 906. "But matters differ," the Sixth Circuit explained, "when litigants wield *Ex parte Young* as a cause-of-action-creating *sword*." *Ibid.* In that circumstance, "the State is not threatening to sue anyone, precluding an anti-suit injunction from doing the work." *Ibid.* Instead, "[w]hat is required is that Congress created a cause of action for injunctive relief in the statute or otherwise made § 1983 available." *Ibid.*

The Fourth Circuit refused to follow *Michigan Corrections*, noting that the Sixth Circuit's decision was not "binding" upon it, and concluding that it was not good law because it predated this Court's decision in *Armstrong*. App. 8a n.1. But while *Armstrong* indeed "provide[d] important guidance" about *Ex parte Young*, *ibid.*, nothing in that guidance is contrary to *Michigan Corrections*. The Fourth Circuit suggested that *Armstrong*'s statement that *Ex parte Young* "is a 'judge-made remedy,'" *ibid.*, means that *Ex parte Young* is "a cause-of-action creating *sword*," *Michigan Corr.*, 774 F.3d at 906. But a "remedy" is not the same thing as a "cause of action." See, *e.g.*, *Franklin* v. *Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73–74 (1992) (delineating the "difference between a cause of action and a remedy"). Nothing in *Armstrong* suggests that *Ex parte Young* slashes through sovereign immunity even if the plaintiff does not seek to enforce a federal right and lacks any cause of action. The Fourth Circuit's decision here conflicts with the Sixth Circuit's decision in *Michigan Corrections*.

The ruling thus deepens an existing split between the Fifth and Sixth Circuits. In *Green Valley*, the Fifth Circuit agreed with the Fourth that *Ex parte Young* creates "a cause of action . . . at equity, regardless of whether [plaintiff] can invoke § 1983." *Green Valley*, 969 F.3d at 475; *see id.* at 494 (Oldham, J. concurring) (explaining why the Fifth Circuit's understanding of *Ex parte Young* raises "questions about the limits of Article III"). The Court should grant the petition to resolve this conflict on an important question of federal law.

C. Plaintiffs cannot invoke the *Ex parte Young* exception to sovereign immunity when they lack a cause of action

Finally, the Fourth Circuit's ruling here joins the wrong side of the circuit split. *Ex parte Young* is "a narrow exception" to States' sovereign immunity. *Whole Woman's Health* v. *Jackson*, 595 U.S. 30, 39 (2021). The decision below risks turning this exception into a mere pleading exercise. So long as plaintiffs can assert a violation of federal law and characterize their requested relief as prospective, they will bypass sovereign immunity. Sovereign immunity—a principle enshrined in the text and structure of the Constitution—cannot be so easily sidestepped.

Ex parte Young may apply in two basic circumstances. First, plaintiffs that have a federal cause of action can invoke *Ex parte Young* in seeking an injunction to prevent state officials from prospectively violating their judicially enforceable federal constitutional or statutory rights. See *Virginia Office for Prot. & Advocacy*, 563 U.S. at 254–55; *Michigan Corr.*, 774 F.3d at 905–06. Second, a plaintiff may invoke *Ex parte Young* in seeking "an equitable anti-suit injunction"—*i.e.*, a plaintiff may assert what would

otherwise be *a defense* to a suit by the State in the form of an affirmative claim against the State. See John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997–99 (2008); *Michigan Corr.*, 774 F.3d at 906. This second use of *Ex parte Young* accords with traditional principles of equity jurisprudence, which treated an anti-suit injunction as "an existing cause of action" that "permit[s] potential defendants in legal actions to raise in equity a defense available at law." *Michigan Corr.*, 774 F.3d at 906. Thus, "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. But this Court has never held that a plaintiff may sue to enjoin a state official to comply with a federal law that confers no individual rights on the plaintiff when the state official is not threatening the plaintiff with suit. See *Michigan Corr.*, 774 F.3d at 906.

Respondents' claim here fits neither *Ex parte Young* paradigm. First, Respondents are not seeking an injunction that would prevent state officials from prospectively violating their federal constitutional or statutory rights because they have no federal rights to vindicate. Their only claimed violation of federal law is the Virginia Readmission Act. But the Readmission Act "lacks language that explicitly confers any individual rights" and therefore "does not create a private right enforceable by an individual civil litigant under § 1983." App. 37a.

Second, Respondents are not using *Ex parte Young* to seek "an equitable anti-suit injunction" either. See *Michigan Corr.*, 774 F.3d at 906. "[T]he State is not threatening to sue anyone" here. *Ibid.* The only prospective action that Petitioners would take is *declining* to register Respondents as voters, see CAJA35–

36, 78; this action would not involve any suit against Respondents. There is no threatened suit in which Respondents would assert the Readmission Act as a federal *defense* against Petitioners—and thus, Respondents are not seeking an anti-suit injunction. The Fourth Circuit suggested that Respondents were seeking "protection from a threatened enforcement action" if Respondents "somehow managed to register and cast a ballot." App. 8a–9a. But Respondents acknowledged below that their disqualification happened automatically under the Virginia Constitution and prevents them from registering to vote. CAJA29; see also App. 17a, 19a.

The Fourth Circuit's ruling that *Ex parte Young* allows judicial enforcement for all claimed violations of federal law, regardless of whether the plaintiff has a federal right or is threatened with any enforcement action, fundamentally misunderstands the doctrine. See *Michigan Corr.*, 774 F.3d at 906. "[T]o say that a claim against a state officer sidesteps sovereign immunity is not enough; plaintiffs still need a right of action." *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, 603 F.3d 365, 392 (7th Cir. 2010) (Easterbrook, J., dissenting). Expanding the doctrine in this manner would essentially "impos[e] mandatory private enforcement" of federal statutes upon Congress. *Armstrong*, 575 U.S. at 326. Because Respondents' claim here does not match the "precise situation" covered by *Ex parte Young*, that route around sovereign immunity is inapplicable. *Virginia Office for Prot. & Advocacy*, 563 U.S. at 255; *Seminole Tribe*, 517 U.S. at 73 (dismissing for lack of jurisdiction when the posture was "sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine").

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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Respectfully submitted,

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