United States Court of Appeals

FIFTH CIRCUIT OFFICE OF THE CLERK

LYLE W. CAYCE CLERK

TEL. 504-310-7700 600 S. MAESTRI PLACE, Suite 115 NEW ORLEANS, LA 70130

December 07, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-60069 Indigo Williams, et al v. Tate Reeves, et al USDC No. 3:17-CV-404

Enclosed is an order entered in this case.

Sincerely,

Majella A Sutto

LYLE W. CAYCE, Clerk Majella By: _____ Majella Clerk

504-310-7680

Sutton, Deputy

Mr. William B. Bardwell
Ms. Rita Bender
Mr. William Bender
Ms. Christine Bischoff
Mr. Brad Elias
Mr. Kyle Douglas Hawkins
Mr. Arthur S. Johnston III

- Mr. Anton Metlitsky
- Ms. Krissy C. Nobile
- Mr. Jason Zarrow

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United States Court of Appeals for the Fifth Circuit

No. 19-60069

INDIGO WILLIAMS, *on behalf of* her minor child J.E.; DOROTHY HAYMER, *on behalf of* her minor child, D.S.; PRECIOUS HUGHES, *on behalf of* her minor child, A.H.; SARDE GRAHAM, *on behalf of* her minor child, S.T.,

Plaintiffs Appellants,

versus

TATE REEVES, in his official capacity as Governor of Mississippi; PHILIP GUNN, in his official capacity as Speaker of the Mississippi

Case: 19-

barred according to *Pennhurst*, while permitting another, virtually identical claim, to move forward in the district court.

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

: c``ck]b[` h\Y` 7]j]`` K Ufž A]gg]gg]dd]Ŋj fYUXa]gg]cb' hc' Z ``` ghUhY\ccX'' required it to adopt a constitutional guarantee of a republican form of government to all state residents.² Mississippi adopted a constitution in 1868 that did just h\Uh'' 5 fh]WY' 9][\h' cZ' A]gg]gg]dd]Ŋj % *, ' 7 cbgh]hi h]cb' WabhU]bYX'' U' gYf]Yg' cZ' provisions the quoted state constitutional provision has been amended four times. The WffYbh'j Yfg]cbž'UXcdhYX']b'%, +ž'ghUhYg.'ÎH\Y'@Y[]g`Uhi fY'g\U``ž''Vm'[YbYfU```Uk ž' provide for the establishment, maintenance and support of free public schools upon such conditions UbX``]a]hUh]cbg'Ug'h\Y'@Y[]g`Uhi fY'a Um''dfYgWf]VY''Ï'A ISS. CONST., art. VIII § 201.

The plaintiffs comprise a group of low-income African-American women k \cgY'W]`XfYb'UhhYbX'A]gg]gg]dd]'di V`]WgW.cc`g"'H\Ym'U``Y[Y'Îh\Uh'h\Y''W ffYbh' the requirements of Article VIII, Section 1 of the Constitution of 1868 remain legally binding on the [d]efendants, their employees, their agents, and their gi WWggcfg"Ñ⁻ *Id.* Uh' +' ("' H\Y' dUbY` UZZ]fa YX' h\Y' X]ghf]Wh' Wti fhốg⁻⁻ X]ga]ggU`` WtbWfb]b['h\Y'gYWtbX'cZ'd`U]bh]ZZgÑFYei Yghg'VYWi gY']hÎgYY_g'U'`XYWUfUh]cb'cZ'*state* law and is therefore barred by the Supreme 7 ci fhốg'XYWg]cb⁻⁻]b' *Pennhurst* "'"'"""''' *Id.* (emphasis in original).

7 cbhfUf]`mžh\Y'dUbY`fYUgcbYX'h\Uh'h\Y'd`U]bh]ZgÑZ]fghfYei YghZcf`` declaratory relief fits within *Ex parte Young*Ñg`Yl Wdh]cb'hc'gcj YfY][b']a a i b]hm for cases in which a state officer is charged with acting in violation of federal law. *Id.* at 735] 36. Plaintiffs allege that Section 201 of the current Mississippi Vdbgh]hi h]cb'j]c`UhYg'ZYXYfU``Uk ž'gdYVJZ]VU``mžh\Y'A]gg]gg]dd]``F YUXa]gg]cb'5 VMÑg` VdbZ]fa Uh]cb'cZîgWlcc``f][\hg'UbX'df]j]`Y[Yg''I`H\Uh'h\Y'`ÎgWlcc``f][\hg'UbX' df]j]`Y[Ygj``Ub[i U[Y'XYdYbXg'cb'h\Y'ghUhYñg'% *, ``Vdbgh]hi h]cbžh\Y'dUbY`` XYWUfYXžX]X'bch'dchYbh]U``mÎfi b'UZci ``cZ'*Pennhurst* because it does not ask the Vdi fh'hc'Wa dY``Vda d`]UbW'k]h\'`QhUhY``Uk '*qua* ghUhY```Uk *ž*Ñ'h\Y'dUbY`YI d`U]bYX''` *Id.* at 740 (quoting *=VUffU'j '''HYI ''9a dñi7ca a ña*, 823 F.2d 873, 877 (5th Cir. %-, +ŁL'`Î=bghYUXž]h'Ug_g'h\Y'Vdi fh'hc']bhYfdfYh'h\Y'a YUb]b[`cZ'U`*federal* law[the Mississippi Readmission Act[VmfYZYfYbW'hc'U`'fY`UhYX'ghUhY``Uk 'Ĩ`*Id.* (emphasis in original).

F YgdYWZ ``mžh\YfY']g'bc'k Umhc'Uj c]X'h\Y'WzbWi g]cb'h\Uh'h\Y'dUbY`Ñg' decision on the first request for declaratory relief requires the federal court to

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impermissibly adjudicate a question of state law. The first decision the court must a U_Y`cb`fYa UbX`d]hg` ``]X `a a i `Q]] `7

constitutional immunity whereby a federal court has jurisdiction over a suit against a state officer to enjoin an ongoing violation of federal law, even though the state itself would be immune from suit in federal court. *Pennhurst*, 465 U.S. at 102ì 03, 104 S. Ct. at 909. In preserving the delicate balance between rights WfYUhYX' i bXYf' h\Y' 7 cbgh]hi h]cb' UbX' h\Y' ghUhYgÑ 9'Yj Ybh\' 5a YbXa Ybh' UbX' gcj YfY][b'f][\h'bch'hc'YY'\U]'YX']bhc' ZYXYfU' Wei fhz îk Y'a i gh' Ybgi fY' h\Uh'h\Y' doctrine of sovereign immunity remains meaningful, while also giving recognition to the need tc'dfYj Ybh'j]c'Uh]cbg'cZ'ZYXYfU' ``Uk ''î' *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269, 117 S. Ct. 2028, 2034 (1997). Accordingly, the Supreme Court has carefully limited the application of *Ex parte Young* to circumstances in which injunctive rel]YZ]g'bYWggUfmhc'î[]j Y@`]ZYhc'h\Y'Gi dfYa UWh7`Ui gY''î *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 426 (1985). One of the most important limitations is that *Ex parte Young* does not apply where private parties seek relief

f][\hg`UbX`df]j]`Y[Yg`gYW fYX`Vmh\Y`Wbgh]hi h]cb`cZ`gU]X`GhUhY"Ï``%*`GhUh"`*+ž`*, ` (1870). The plaintiffs can only prevail on their purported federal claim if they persuade a court to find that Mississippi violated school rights granted exclusively by its own 1868 Constitution when it amended its Constitution in 1987.

H\Y'dUbY`fYYWYX'd`U]bh]ZgÑWU]a 'h\Uh'h\Y'FYUXa]gg]cb'5Wh`]bWcfdcfUhYX' 1868 state constitutional law. *Williams*, 954 F.3d at 740. It stated, correctly, that h\Y'A]gg]gg]dd]'FYUXa]gg]cb'5Wh'ÎXcYg'bch'YId`]Wh`m']bWcfdcfUhY'Ubm cZ'h\Y' language, requirements, or provisions of the 1868 Constitution. Nor does the Readmission Act require Mississippi to abide indefinitely by the 1868 7 cbgh]hih]cbŴj'YXiWh]cb'WUigY''Î'*Id*. Having recognized these salient facts, it is a mystery how the panel could avoid the conclusion that plaintiffs are not entitled to relief unless a federal court decides an explicitly state law issue: whether GYWI]cb'&%cZ'A]gg]gg]dd]Ŵj'% - \$``7 cbgh]hih]cbžUg'Ua YbXYX']b'%, +žUVfc[UhYX' f][\hg'gYW fYX'VmA]gg]gg]dd]Ŵj''

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Pennhurst, 456 U.S. at 106, 104 S. Ct. at 911.

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structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the rUh]ZJWUh]cb cZ h\Y'7 cbgh]hi h]cbž UbX k \]W\ h\Ym fYhU]b hcXUm "' "' "I'L/" *Pennhurst*Z(*) 'I "G" Uh'%\$\$Z'%\$('G" 7 h" Uh'-\$, 'fÎ H\]g'7 ci fhfg XYVJg]cbg h\i g'YghUV`]g\ h\Uh'Ub '' unconsenting State is immune from suits brought in federal courts by her own citizens as k Y``Ug'VmVJh]nYbg cZ'Ubch\Yf ghUhY"I fei chUh]cb UbX'WJhUh]cb ca]hYXLL"''

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ei U`]Z]Yg`A]gg]gg]dd]Ñg`UXa]hhUbW`îhc`fYdfYgYbhUh]cb`]b`7cb[fYggÏ`i dcb`h\fYY`` ÎZ bXUa YbhU``WtbX]h]cbgŽ`cbY`cZ`k\]W\`]g`h\Y`gW\cc``f][\hg`UbX`df]j]`Y[Yg`` condition at issue here.⁷ *Id.* at 68. In short, the Readmission Act does not create a private right of action, express or implied. Thus, even assuming *arguendo* that A]gg]gg]dd]Ñg`WffYbh`YXi Wh]cb`WUi gY`XcYg`bch`Wta dcfh`k]h\`h\Y``ÎZ bXUa YbhU`` VtbX]h]cbgÏ`cZ`h\Y`A]gg]gg]dd]`FYUXa]gg]cb`5Wbž`U```h\Uh`Wb`VY``gU]X`]g`h\Uh` Mississippi has chosen to run the risk that its representatives may be unseated *by Congress*.

Finding an implied private right of action based on the language of the Readmission Act would depart drastically from decisions of the Supreme Court UbXih\]g'Vdi fhỹ fYWbhYb'VUbWXYVýg]cb']b'*Planned Parenthood v. Kauffman*, No. 17-50282, 2020 WL 6867212 (5th Cir. Nov. 23, 2020). The Readmission Act states h\Uh'Ug'U'VdbX]h]cb'cZ'fYUXa]hh]b['h\Y'ghUhYfŷ fYdfYgYbhUh]j Yg'hc''7 cb[fYggžh\Y' ÎVdbgh]hi h]cb'cZ'A]gg]gg]dd]'g\U``bYj Yf'VY'@Ua YbXYXÏ'hc'XYdf]j Y''UbmVýh]nYb'cf' WUgg'cZ'Výh]nYbg'cZ'ÎgW.cc``f][\hg'UbX'df]j]`Y[Yg'gYW fYX'Vmh\Y''QhUhYfŷQ Wdbgh]hi h]cb''Ĩ'% 'GhUh''* +ž*, 'f% +\$\E''H\Y'5Vhig]a d`mXcYg'bch'VdbZYf''f X]VýU``m YbZcfWUV`Y'dYfgcbU`Îf][\hg'I`=bghYUXž'h\Y'5Vhi]bghfi Vhg'A]gg]gg]dd]'Ug'hc'k \Uh']h' g\U``bch'Xc'''H\Y'5Vhýg'cb`mYbZcfWa Ybh'a YVXUb]ga ``]Yg']b'X]fYVhi'fYVdi fgY'hc' Congress.

5 g'ci f'Yb'VUbWWti fh'fYWtbh'mfYWt[b]nYXž'k \YfY'Îh\Y'hYI h'UbX'ghfi Wti fY''cZ' a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied righh'cZ'UVt]cb'Ï' *Kauffman*, 2020 WL 6867212, at *7

⁷ H\Y'ch\Yf'hk c'WbX]h]cbg'UfY'h\Uh'fW±Îh\Y'Wbgh]hi h]cb'cZ'A]gg]gg]dd] g\U``bYj Yf'VY'' so amended or changed as to deprive any citizen or class of citizens of the United States of h\Y'f][\h'hc'j chYl YI Wfdh'k]h\'fYgdYWf'cZ'j chYfgźl'UbX'f&bYg'UbX'dfcgdYWh]j Y'changes concerning Îh\Y'h]a Y'UbX'd`UW'cZ'fYg]XYbW'cZ'j chYfgźl'UbX'f&bh\Uh'Î]h'g\U``bYj Yf'VY'`Uk Z ``Zcf'h\Y'gU]X'' State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State,

or upon any such ground to require of him any other qualifications for office than such as are fYei]fYX`cZ`U```ch\Yf`Wh]nYbg"ï %* GhUh"*+ž*, `f% +\$t"

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(quoting *Gonzaga University v. Doe*, 536 U.S. 273, 286 (2002)). Furthermore, the Gi dfYa Y'7 ci fh'\Ug'a UXY WYUf'h\Uhîhc'gYY_'fYXfYgg'h\fci [\'Y'%, ' ź""""U'd`U]bh]Z' must assert the violation of a federal *right*, not merely a violation of federal *law*'Î'⁸ *Id.* at *17 (quoting *Gonzaga*, 536 U.S. at 282, 122 S. Ct. at 2274) (emphasis and alteration in original). It is not enough for plaintiffs to argue that Mississippi violated the Readmission Act

prevail.

B chicb mUfY Ubmlf][\hgli[fUbhYX Vmh\YFYUXa]gg]cb 5 Writecij U[i YUbX'' Ua cfd\ci g'Zcf'A X]WU fYgc`i h]cbžVi hih\YghUhi hYlðj Ub[i U[Y]g'bch'la UbXUhcfml' toward any goal and thus fails the third *Blessing* factor. The Act places conditions on Mississippi that are enforced through congressional action, but in no way does it contemplate granting plaintiffs a right enforceable against the state.¹¹ And as previously explained, if we view the statute from the perspective of the *Gonzaga/Armstrong* framework, there is little doubt Congress did not li bUa V][i ci g`mlWcbZYf'A X]WU`mYbZcfWUVYf][\hg`cb'h\Y'd`U]bh]Zg"'

=b`g\cfhž`h\Y`d`U]bh]ZZgÑ WUgY`]g`Xcca YX`]ffYgdYWl]j Y`cZ`Wcbgh]hi h]cbU``` sovereign immunity because they are not empowered to enforce the Readmission Act. For this additional reason, we may not subject the State to further litigation