RECORD NO. 21-20279

In The
United States Court of Appeals
For The Fifth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.; JOHN ROE,

***Plaintiffs – Appellees*,**

v.

WAYNE MACK, Individual Capacity,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, NO. 4:19-CV-1934, HONORABLE KENNETH M. HOYT, PRESIDING

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFFS-APPELLEES

Aaron K. Block
THE BLOCK FIRM LLC
309 East Paces Ferry Road NE, Suite 400
Atlanta, Georgia 30305
(404) 497-8419
aaron@blockfirmllc.com

Counsel for Amici Curiae

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.

Amici Curiae
Institute for Justice

Foundation for Individual Rights in Education

Counsel for *Amici Curiae*
Aaron K. Block

The Block Firm LLC

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amici* Institute for Justice and Foundation for Individual Rights in Education are not publicly held corporations, do not have any parent corporations, and that no publicly held corporation owns 10 percent or more of their stock.

Dated: November 24, 2021

/s/ Aaron K. Block
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. To protect these essential liberties, IJ files lawsuits challenging unconstitutional government actions, frequently suing state officials in their official capacity under 42 U.S.C. § 1983 to seek forward-looking relief. *See*, *e.g.*, *Hines v. Qullivan*, 982 F.3d 266 (5th Cir. 2020); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting the civil liberties of students and faculty members at our nation's institutions of higher education. These rights include freedom of speech, freedom of press, freedom of assembly, due process, academic freedom, legal equality, and freedom of conscience. FIRE litigates on a *pro bono* basis to protect these rights in the federal courts under 42 U.S.C. § 1983. In

[1] Pursuant to FRAP 29(a)(2), counsel for amici states that counsel for all parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus or their counsel—contributed money that was intended to fund preparing or submitting this brief.

addition to its own litigation, FIRE maintains a volunteer Legal Network and operates a Faculty Legal Defense Fund, providing *pro bono* representation to students and faculty from participating attorneys. FIRE and its allied attorneys rely on Section 1983 to sue state officials in both their individual and official capacities to vindicate student and faculty rights and to deter and remedy unconstitutional government actions on public campuses nationwide.

Amici therefore have a shared interest in maintaining this Court's longstanding, legally correct approach to § 1983 suits against state officials in their official capacities. That approach is threatened by the alternate holding of the initial panel opinion granting a stay in this matter. Because that alternate holding was issued without the benefit of briefing from the parties, is inconsistent with longstanding case law, and would hamper civil rights enforcement, *Amici* submit this brief to urge the merits panel to reevaluate and reject the new rule proposed by the stay opinion.

ARGUMENT

In granting a stay of the district court's injunction, a panel of this Court held (in the alternative) that plaintiffs' claims are likely to fail because equitable suits against state officials *cannot* arise under 42 U.S.C. § 1983 and "the *only* way to bring an official-capacity claim against an officer of the State is to do so under the equitable cause of action recognized in *Ex parte Young*, 209 U.S. 123 (1908)." *Freedom from Religion Found., Inc. v. Mack*, 4 F.4th 306, 311 (2021) (emphasis added).

The parties did not brief or invite that issue, which was unnecessary for the motions panel to reach. Moreover, the stay opinion's treatment of § 1983 is novel and wrong. The merits panel should expressly reject it before it disrupts constitutional rights enforcement in this Circuit.

First, the panel should expressly address the stay opinion's alternate holding. That holding is not binding on the merits panel in this case, but it would be binding on future panels of this Court if left in place.

Second, the panel should reject the motion panels holding because it wrongly conflates § 1983, which creates a cause of action for constitutional violations, with *Ex parte Young*, which holds that

sovereign immunity does not prevent courts from issuing equitable remedies against state officials who violate the Constitution. Congress, the courts, and litigants have long recognized that the two work in tandem—the statute supplies a cause of action, while *Ex parte Young* provides an exception to the general sovereign-immunity bar. The stay opinion's conclusion to the contrary incorrectly departs from that precedent.

Third, it is important to reject the stay opinion's alternate holding because leaving it in place would upend § 1983 litigation in this Court and undermine the longstanding Congressional policy choice to enable and incentivize the enforcement of constitutional rights.

I. The Court should address the stay opinion's alternate holding because it was issued without the benefit of briefing and would otherwise become binding on future panels.

Left unexamined, the stay opinion's holding will become Fifth Circuit law, which will allow an error to propagate. The merits panel need not follow the stay opinion's legal conclusions. *Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998). But future panels must treat it as binding.

Ramos-Portillo v. Barr, 919 F.3d 955, 962 n.5 (5th Cir. 2019). Thus, if left in place, the stay opinion's ruling would be the law in the Fifth Circuit.

Jurisprudential considerations favor reviewing (and rejecting) the alternative holding because the issue was not pressed or briefed by either party. *See Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 493 (5th Cir. 2020) (en banc) (Elrod, J., concurring) ("[W]e must be careful when, without the benefit of adversarial briefing from the parties, we worry over hundred-year-old Supreme Court precedent that the parties have not challenged."). Moreover, as a secondary or tertiary reason for rejecting a stay, it was unnecessary for the motions panel to reach that issue. And since it was "not necessary to decide" that issue, it was "necessary not to decide" it. *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

Now, however, because of the motions panel's published opinion, it *is* necessary to reach that issue. Otherwise, an un-litigated but high-stakes rule could become binding law in this Circuit and chill the enforcement of constitutional rights.

II. The stay panel's alternate holding is wrong.

The various § 1983 stakeholders, from the courts to Congress to litigants, have long recognized that suits against state officials in their official capacities may be brought under § 1983.

In *Will v. Michigan Department of State Police*, for example, the Supreme Court held that "a state official in his or her official capacity, when sued for injunctive relief, would be a [suable] person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" 491 U.S. 58, 71 n.10 (1989) (citing, *inter alia*, *Ex parte Young*). *Accord Quern v. Jordan*, 440 U.S. 332, 338 (1979) ("[W]e held in *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] that in a 42 U.S.C. § 1983 action a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief") (cleaned up). That view is in keeping with the Supreme Court's longstanding recognition that (absent some statutory prohibition) the federal courts generally have jurisdiction to use their equitable powers to restrain unconstitutional government actions. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (collecting cases).

Ex parte Young works in tandem with § 1983 but operates on the sovereign immunity level. That case began when Edward Young, Minnesota's attorney general, violated a federal injunction and was held in contempt by the district court. Young filed a habeas action directly in the Supreme Court and "challenged his confinement by arguing that Minnesota's sovereign immunity deprived the federal court of jurisdiction to enjoin him from performing his official duties." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254 (2011) (Scalia, J.) ("*VOPA*"). The *Ex parte Young* Court "disagreed"; "because an unconstitutional legislative enactment is 'void,' a state official who enforces that law 'comes into conflict with the superior authority of [the] Constitution,' and therefore 'is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" *VOPA*, 563 U.S. at 254 (quoting *Ex parte Young*). In essence, "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." *Id.* at 255.

Rather than recognizing a cause of action, then, the *Ex parte Young* Court simply "established an important limit on the sovereign-immunity

principle." *Id.* at 254. As this Court has put it before, *Ex parte Young* adopted a "legal fiction, the premise that a state official is 'not the State for sovereign-immunity purposes' when 'a federal court commands [him or her] to do nothing more than refrain from violating federal law.'" *Williams v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020) (quoting *VOPA*, *supra*) (cleaned up).

This Court's prior decisions reflect the traditional understanding of the relationship between § 1983, which provides the cause of action, and *Ex parte Young*, which enables the cause of action to proceed in federal court despite the state's sovereign immunity. For instance, *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 394 (5th Cir. 2015), involved a dietary supplement maker's pre-enforcement challenge to a looming enforcement action by Texas's attorney general. The Court summarized the landscape as follows: The states retain their sovereign immunity from suit in federal court unless they waive it "or Congress has clearly abrogated it," and "§ 1983 does not abrogate state sovereign immunity." *Id.* at 393–94. But that limitation in § 1983 is no bar to a federal pre-enforcement case because a "suit is not 'against' a state . . . when it seeks prospective, injunctive relief from a state actor based on an alleged

ongoing violation of the federal constitution." *Id.* at 394 (cleaned up). "Under the doctrine articulated in *Ex parte Young*," such a state official is "stripped of his official clothing and becomes a private person subject to suit." *Id.* The *NiGen* opinion specifically turned away questions over "this court's subject matter jurisdiction" because "all of NiGen's claims except for tortious interference are brought under 1983, a federal statute, and allegedly arise under the U.S. Constitution." *Id.* at 395.

To take another example, in *Aguilar v. Texas Department of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1988), the Court held that the "Eleventh Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983," unless the "*Ex parte Young* exception" applies because the suit is "brought against individual persons in their official capacities" seeking prospective equitable relief.

Cases from the other federal courts likewise recognize the traditional interaction between § 1983 and *Ex parte Young*'s sovereign immunity exception. *See*, *e.g.*, *Negrón-Almeda v. Santiago*, 528 F.3d 15, 24–25 (1st Cir. 2008) (rejecting plaintiffs' theory that *Ex parte Young* recognized a "separate (implicit) cause of action" distinct from § 1983); *Westside Mothers v. Haveman*, 289 F.3d 852, 860–62 (6th Cir. 2002) (first

concluding that sovereign immunity did not bar plaintiffs' suit because *Ex parte Young* applied, and then evaluating whether plaintiffs had a substantive "private right of action under § 1983"); *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1233 (10th Cir. 2010) (similar); *Wu v. Thomas*, 863 F.2d 1543, 1550 (11th Cir. 1989) (explaining that the "eleventh amendment continues to be an obstacle to actions brought under 42 U.S.C. § 1983" except where the *Ex parte Young* legal fiction applies).

Congress shares the same understanding that § 1983, not *Ex parte Young*, provides the substantive cause of action. Under the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, successful plaintiffs in various types of civil rights cases may seek prevailing-party fees. Congress, to encourage civil rights enforcement, specified that fees would be available for § 1983 cases but did not specify that fees would be available for cases brought under *Ex parte Young*. *See* 42 U.S.C. § 1988. The most natural explanation for that drafting choice is that Congress, like the courts, understood that § 1983 is the operative cause of action for prospective equitable actions against state officials. *Cf. Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 72 (1992) (looking to

Congress's treatment of various civil rights acts to "validat[e]" the judicial understanding of those states); *accord id.* at 78 (Scalia, J.) (concurring on similar grounds).

Lastly, litigants—including repeat players on both sides of the "v."—share the same understanding. It is customary in cases against state officials to plead § 1983 (not *Ex parte Young*) as the operative cause of action. And despite the customary hard-fought battles about standing, ripeness, and various threshold justiciability issues, *Amici* are unaware of serious 12(b)(6) challenges to the fundamental cause of action itself.

Despite that shared understanding, the stay opinion concluded that "the only way to bring an official-capacity claim against an officer of the State is to do so under the equitable cause of action recognized in *Ex parte Young*." 4 F.4th at 311. A claim under § 1983, by contrast, would be "dismissible." *Id*. That conclusion rested on Judge Oldham's concurrence in *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 496 (5th Cir. 2020) (en banc) (Oldham, J., concurring).

But even accepting the *Green Valley* concurrence as correct, nothing in that opinion commands the stay opinion's conclusion with respect to § 1983. The *Green Valley* concurrence concluded only that *Ex parte Young*

recognized an equitable cause of action to enjoin state officials, not that Congress did not pass a statutory one. In relevant part, the concurrence emphasized *Ex parte Young*'s statements that "the question of sufficiency of rates is important and controlling; and, being of a judicial nature, it ought to be settled at the earliest moment by some court," and "when a Federal court first obtains jurisdiction it ought, on general principles of jurisprudence, to be permitted to finish the inquiry and make a conclusive judgment, to the exclusion of all other courts." 969 F.3d at 496 (quoting 209 U.S. at 166) (cleaned up). From that, the concurrence concluded that "[i]n other words, a federal cause of action was available to seek equitable relief against state officers." *Id.*

The stay opinion took things further and essentially held that the *Ex parte Young* cause of action somehow precluded a cause of action under § 1983. But that does not follow. Even if *Ex parte Young* recognized a new equitable cause of action (which is debatable), it would not mean that § 1983 does not provide a separate cause of action; the two would not be mutually exclusive. *Cf. Will*, 491 U.S. at 66 (explaining that "the scope of the Eleventh Amendment and the scope of § 1983 are [] separate

issues"). And as explained above, the motion panels treatment of § 1983 diverges from precedent and Congressional design.

Stepping back a bit in the analysis, there are also reasons to be circumspect about the stay opinion's underlying view of *Ex parte Young*. The Supreme Court's language in *Ex parte Young* does not necessarily speak in terms of recognizing a new cause of action. As Judge Oldham's *Green Valley* concurrence observed, on the view that the Court *was* recognizing a cause of action, "[i]t's unclear how the *Young* Court reached the conclusion that a freestanding federal equity cause of action existed." 969 F.3d 496 n.3.

Perhaps it is unclear because *Ex parte Young* did not reach that conclusion after all. A more parsimonious explanation of the decision might be that the Court was not recognizing a cause of action but was instead explaining why there were no adequate legal remedies, which would have made equitable remedies unavailable. *See* 209 U.S. at 163–66 (rejecting the assertion that there was a "plain and adequate remedy at law" which would mean that "equity, therefore, has no jurisdiction in such a case"). *Cf. Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 559 (5th Cir. 1998) (recognizing that "the 'cause of action' inquiry is distinct from

the 'remedies' question"); *accord Free Enter. Fund*, 561 at 491 n.2 (noting general availability of equitable remedies to restrain unconstitutional action).

In any event, the merits panel need not divine *Ex parte Young*'s meaning to resolve this case. Here, it is enough to accept that these claims were brought under § 1983, which this Court and others have long recognized is an appropriate vehicle for bringing them. To the extent the motions panel ruled otherwise, it erred. The merits panel should reject the stay opinion's holding and (re)align Fifth Circuit law with the traditional view.

III. The stay panel's alternate holding will be problematic on multiple levels.

The stay panel's alternative holding is not academic—it will have significant practical and doctrinal consequences for the courts, litigants, and citizens.

First, in the experience of *Amici*, it is rare for litigants to plead under *Ex parte Young*, meaning that pending cases in various stages of progress may need to be re-pleaded or will face new jurisdictional problems.

Second, limiting the application of § 1983—and thus § 1988—will impede Congress's policy choice to incentivize civil rights litigation, which will upend settled expectations in the short run and lead to under-enforcement of the Constitution .

Third, this Circuit's law will (needlessly) diverge from the law of other courts—from the Supreme Court to other circuits.

All of those consequences can be avoided by adhering to the traditional view of § 1983, as *Amici* urge the Court to do.

CONCLUSION

For these reasons, the merits panel should expressly reject the stay opinion's alternate holding that an action premised on *Ex parte Young* cannot be brought under § 1983.

/s/ Aaron K. Block
Aaron K. Block
THE BLOCK FIRM LLC
309 East Paces Ferry Road NE
Suite 400
Atlanta, Georgia 30305
(404) 497-8419
aaron@blockfirmllc.com

Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of November, 2021, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiffs-Appellees will be filed with the Clerk of the Court

/s/ Aaron K. Block
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

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Dated: November 24, 2021 /s/ Aaron K. Block
Counsel for Amici Curiae