No. 22-1735

IN THE

United States Court of Appeals for the Seventh Circuit

REYNA ANGELINA ORTIZ, *et al.*,

Plaintiffs-Appellants,

v.

KIMBERLY M. FOXX, not personally but solely in her capacity as Cook County's State's Attorney, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, No. 19-cv-2923, Judge Charles P. Kocoras

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Pursuant to Circuit Rule 26.1, *amicus* state that the Constitutional Accountability Center is the only law firm that has appeared for *amicus* in this Court.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION

In the wake of the Civil War, as southern state officials continued to trample upon the rights of African Americans and their allies, the Forty-Second Congress enacted Section 1983, providing a right to sue "[e]very person" who under color of state law deprives another person of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Invoking that statute, Plaintiffs here filed suit seeking declaratory and injunctive relief against several Illinois state officials, including state judges who are "responsible in their official capacities for enforcing

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for Plaintiffs-Appellants and counsel for Defendant-Appellee Cook County State's Attorney Kimberly M. Foxx consent to the filing of this brief. Counsel for Defendants-Appellees Chief Judge Timothy C. Evans and Presiding Judge Sharon M. Sullivan does not consent. A motion for leave to file accompanies this brief.

the Illinois Name Change Statute" by "preventing Plaintiffs from filing petitions for name changes[]" and rejecting out of hand "any petitions for name changes filed by Plaintiffs." Compl. ¶ 4, App. A022.

Rather than address the merits of the "important substantive questions" raised by Plaintiffs, the district court dismissed their claims, citing "serious justiciability concerns," including the principles of judicial immunity and sovereign immunity. Op. 16-17, App. A018-A019. But those doctrines present no barrier to relief here. Indeed, the text and history of Section 1983 demonstrate that one of the statute's chief objectives was to ensure the availability of federal relief against state judges who refused to protect the rights enshrined in the Constitution. And almost forty years later, in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court doubled down on these principles of federal supremacy, recognizing that sovereign immunity is unavailable in suits seeking injunctive relief against state officers, including state judges, where "necessary to vindicate the federal interest in assuring the supremacy of [federal] law," *Green v. Mansour*, 474 U.S. 64, 68 (1985). The district court's decision is deeply at odds with this precedent and history.

During the Reconstruction era, Congress passed a series of measures designed to empower the federal courts to help combat widespread discrimination in southern judicial systems. In addition to crafting the Fourteenth Amendment, promising privileges and immunities, due process, and equal protection of the laws, Congress

passed the Civil Rights Act of 1866, which subjected state officials—including judges—to criminal liability for failure to respect that Amendment's guarantees. When Congress later passed the Civil Rights Act of 1871, containing what is now Section 1983, the bill's proponents and detractors all understood that it would empower federal courts to enjoin state officers—again, including judges—who sought to enforce state laws that contravened the federal Constitution. Thus, during a time when "state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights," Congress enacted Section 1983 to create "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239-40 (1972). And even if state courts themselves purported to provide a remedy for such violations, the remedy created in Section 1983 would be "supplementary to any remedy any State might have." *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963).

Nearly half a century later, the Supreme Court removed another barrier to the vindication of federal rights through its decision in *Ex parte Young*. There, the Court recognized that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). Since then, "the *Young* doctrine has been accepted as necessary to permit

the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Young*, 209 U.S. at 160). Neither this Court nor the Supreme Court has ever held, as a categorical matter, that the *Ex parte Young* doctrine is inapplicable to state judges. Indeed, in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), the Supreme Court explicitly left open the possibility that in cases like this one in which state judges "enforce state laws" rather than simply "work[ing] to resolve disputes between parties," the *Ex parte Young* doctrine may "permit federal courts to issue injunctions against state-court judges." *Id.* at 532.

The decision of the court below fails to respect these fundamental principles of federal supremacy that undergird Section 1983 and *Ex parte Young*. In concluding that Plaintiffs' lawsuit could not proceed simply because the primary individuals who administer and enforce the Illinois name-change statute are state judges, the court created a roadmap for states to create legislative schemes designed "to nullify a federal right." *Haywood v. Drown*, 556 U.S. 729, 736 (2009); *see* Appellants' Br. 51-52. This is especially concerning in a case like this one where the text of the Illinois name-change statute wholly bars Plaintiffs and others similarly situated from filing name-change petitions in state courts in the first place, potentially leaving

them with *no avenue whatsoever* to vindicate the constitutional rights that they claim the name-change statute violates.

Moreover, in concluding that the judges in this case could not be sued, the court below also misconstrued the nature of the role that state judges play in administering and enforcing the name-change statute. While it is true that, at least under current doctrine, Section 1983 and *Ex parte Young* limit relief against state judges to instances in which those judges act in non-judicial capacities, this Court has "cautioned against liberally categorizing acts as judicial," *Kowalski v. Boliker*, 893 F.3d 987, 998 (7th Cir. 2018), including by making that determination "only because the actor is a judge," *McMillan v. Svetanoff*, 793 F.2d 149, 154 (7th Cir. 1986). Yet that is precisely what the court below did. If the court had properly engaged with the text and operation of the name-change statute, it would have recognized that state judges serve as judges in name only when they administer the statute, acting in a ministerial role by simply applying a checklist of factors to determine whether to permit a name-change petition to proceed, and in an enforcement capacity when they reject such applications in otherwise non-adversarial proceedings.

At the end of the day, this is "a straightforward pre-enforcement suit seeking prospective relief," *File v. Martin*, 33 F.4th 385, 390 (7th Cir. 2022), to stop Illinois judges from enforcing the requirements of the state's name-change statute by preventing Plaintiffs from filing name-change applications or rejecting those

applications. Nothing in the text, history, or modern applications of the justiciability doctrines cited by the court below should prevent it from proceeding.

ARGUMENT

I. Congress Enacted Section 1983 to Vindicate the Supremacy of Federal Law and Create a Remedy for Constitutional Violations by All State Officials, Including Judicial Officers Who Were Complicit in Efforts to Undermine Reconstruction.

Section 1983 was enacted "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*, 407 U.S. at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). Passed as part of the Civil Rights Act of 1871, the law reflects Congress's commitment to the promise of the Reconstruction Amendments. When it became clear that, notwithstanding those Amendments, state officials in the Reconstruction South were letting abuses of formerly enslaved people and their allies go unchecked, and perpetuating such abuses themselves, Congress passed Section 1983 to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242.

As Justice Thomas has pointed out, the text of Section 1983 "ma[kes] no mention of defenses or immunities." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). "Instead, it applies categorically to the deprivation of constitutional rights under color of state law," *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from the

denial of certiorari), providing a right to sue "[e]very person" who under color of state law deprives another person of "any rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983. Consistent with that broad scope, Section 1983 authorizes lawsuits seeking injunctions against state judges who are chiefly responsible for administering and enforcing unconstitutional state laws.

A. Even before the Civil Rights Act of 1871, Congress had passed legislation that contemplated substantial federal intrusion into state judiciaries, including through the creation of criminal liability for state judges who engaged in constitutional violations. These laws were passed in response to the Black Codes, enacted "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019). Many of these laws "expressly excluded blacks from voting, owning land, making contracts, [and] securing access to the courts," while the "oppressive racial impact [of others] depended on selective enforcement, customary caste relations, and private discrimination against blacks." Paul R. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 Mich. L. Rev. 462, 474 (1982). Notably, "[t]he framers of the Black Codes envisioned that the southern criminal justice system would be the primary enforcement mechanism." Donald H. Zeigler, *A Reassessment of the* Younger

Doctrine in Light of the Legislative History of Reconstruction, 1983 Duke L.J. 987, 994 (1983).

Among the laws that Congress passed in response to the Black Codes was Section 1983's predecessor statute, the Civil Rights Act of 1866. David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, Cardozo L. Rev. De Novo 90, 98-99 (2022). The 1866 Act guaranteed "such citizens, of every race and color . . . full and equal benefit of all laws and proceedings for the security of person and property," while permitting them to be subject to "like punishment, pains, and penalties, and to none other." An Act to Protect All Persons in the United States in Their Civil Rights and Liberties, and Furnish the Means of Their Vindication, ch. 31, § 1, 14 Stat. 27 (1866). It also provided for *criminal* penalties if its measures were violated, *see id.* § 2, and gave federal district courts exclusive jurisdiction over "all crimes and offences committed against the provisions of this act," as well as concurrent jurisdiction, with the federal circuit courts, "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act," *id.* § 3.

Opponents of these provisions objected that they would allow federal courts to interfere in state judicial systems, including by subjecting state court judges to criminal prosecutions for acts taken from the bench. *See, e.g.*, Cong. Globe, 39th

Cong., 1st Sess. 1293 (1866) (Rep. Bingham); *id.* at 1154 (Rep. Eldridge); *id.* at 478 (Sen. Saulsbury). The majority of Congress was unmoved by these objections, however, and the Civil Rights Act of 1866 passed overwhelmingly in Congress over President Johnson's veto. Zeigler, *supra,* at 1001.

B. In 1871, following reports of continued violence against African Americans and the refusal of southern states to take this breakdown of justice seriously, the Forty-Second Congress considered an additional Civil Rights Act. As it debated this legislation, Congress heard about problems infecting almost every aspect of state judiciaries. *See Monroe v. Pape*, 365 U.S. 167, 174 (1961) ("The debates are replete with references to the lawless conditions existing in the South in 1871."); *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (Congressional "members were not unaware that certain members of the judiciary were implicated in the state of affairs which [Section 1983] was intended to rectify.").

For instance, Congress received reports that, "as the result of Klan intimidation, and perhaps empathy," Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959, 974 (1987), local courts were "under the control of those who are wholly inimical to the impartial administration of law and equity," Cong. Globe, 42d Cong., 1st Sess. 394 (1871) (Rep. Rainey), and "unable or unwilling to check the evil," *id.* at 321. Senator Pratt complained that the "the arm of justice is paralyzed" and "punishment has not been inflicted in a single case of the

hundreds of outrages which have occurred." *Id.* at 505. Senator Morton concluded that "the States do not protect the rights of the people; . . . State courts are powerless to redress these wrongs, [leaving] large classes of people . . . without legal remedy in the courts of the States." *Id.* app. at 252. And Senator Osborn noted that "[i]f the state courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all." *Id.* at 653.

Other supporters of the Act went even further, noting that "not only were local judiciaries 'impotent,'" Nichol, *supra*, at 975 (quoting Cong. Globe, 42d Cong., 1st Sess. 459 (Rep. Coburn)), but many were also "in league with the Klan," *id.* Representative Beatty described southern judges who openly accepted bribes from Klansmen, Cong. Globe, 42d Cong., 1st Sess. 429, and Representative Rainey explained that local judges were "secretly in sympathy with the very evil against which we are striving," *id.* app. at 394; *see also, e.g.*, *id.* at 186 (Rep. Platt) (noting that local judges "are made little kings, with almost despotic powers to carry out the partisan demands of the Legislature which elected them—powers which, almost without exception, have been exercised against Republicans without regard to law or justice").

Whether through passive refusal to enforce federal law or active complicity with those intent on undermining Reconstruction, state court judges had wholly abdicated their responsibility to enforce federal law, making it imperative that

Congress "enact the laws necessary for the protection of citizens of the United States." *Id.* at 653 (Sen. Osborn); *see Monroe*, 365 U.S. at 174 (explaining that the 1871 legislation was prompted not by "the unavailability of state remedies," but by "the failure of certain States to enforce the laws with an equal hand"). President Grant agreed that "the power to correct these evils is beyond the control of State authorities," and he recommended that Congress pass "such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States." *Id.* at 173.

That is exactly what Congress did, enacting a broad remedy that provided a cause of action in law and equity against "any person" who, "under color of any law, statute, ordinance, regulation, custom, or usage of any State," deprived another of "any rights, privileges, or immunities secured by the Constitution of the United States . . . any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871).

C. Consistent with that clear textual mandate, Section 1983's drafters expected federal courts to "act aggressively to protect federal rights." Zeigler, *supra*, at 1016 n.185. "Whenever . . . there is a denial of equal protection by the State," one Congressman explained, "the courts of justice of the nation stand with open doors,

ready to receive and hear with impartial attention." Cong. Globe, 42d Cong., 1st Sess. 459 (Rep. Coburn); *see also id.* at 376 (Rep. Lowe) ("this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired"); *id.* at 449 (Rep. Butler) ("every citizen . . . should have a remedy against the locality whose duty it was to protect him and which had failed on its part").

Congress fully understood that Section 1983 would empower the federal courts to correct constitutional violations by state judges and judicial systems. As one proponent explained, "when the courts of a State violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts." *Id.* at 501 (Sen. Frelinghuysen). Opponents of the bill shared that understanding. One complained that the bill would "invade the provinces of the State courts with new laws and systems of administration," *id.* at app. 258 (Rep. Holman), while others argued that the bill "disparage[d]" the state courts by suggesting that they could not be "trusted," *id.* at app. 216 (Sen. Thurman); *see id.* at 361 (Rep. Swann) ("[t]he first section of this law ignores the State tribunals as unworthy to be trusted"); *id.* at 385 (Rep. Lewis) ("the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor"); *id.* at app. 50 (Rep. Kerr) ("It is a covert

attempt to transfer another large portion of jurisdiction from the State tribunals . . . to those of the United States.").

Proponents were adamant, however, that these matters not be "left with the States," where "large classes of people" were "without legal remedy in the courts." *Id.* at app. 252 (Sen. Morton); *see id.* at app. 262 (Rep. Dunnell) (calling "repugnant" the notion that "our protection must come from the State in which we chance to reside" and that "the Federal Government has nothing to do [on] behalf of the citizen"). Section 1983's supporters therefore sought to grant individuals direct access to the federal courts.

Thus, crucially, Section 1983 was intended to authorize the federal government to assert "immediate jurisdiction through its courts, *without the appeal or agency of the State in which the citizen is domiciled*." *Id.* at 389 (Rep. Elliott) (emphasis added); *see id.* at 571 (Rep. Stockton) ("the proceedings . . . shall be in the Federal courts"). Both the bill's proponents and its opponents shared this view of Section 1983's scope. As one opponent argued, Section 1983 would "not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. *It takes the whole question away from them in the beginning*." *Id.* at app. 86 (Rep. Storm) (emphasis added).

In sum, Section 1983 was universally understood as empowering the federal courts to hold state courts—including judges—accountable for their role in perpetuating violations of federal law.

D. Consistent with Section 1983's text and history, federal courts for over a century interpreted that statute to permit injunctions against state court judges in all instances—even when those judges acted in their traditional adjudicative capacities. *See Pulliam v. Allen*, 466 U.S. 522, 528 (1984) ("Although injunctive relief against a judge rarely is awarded, the United States Courts of Appeals that have faced the issue are in agreement that judicial immunity does not bar such relief."); *id.* at 540 ("[T]here is little support in the common law for a rule of judicial immunity that prevents injunctive relief against a judge," and "[t]here is even less support for a conclusion that Congress intended to limit the injunctive relief available under § 1983 in a way that would prevent federal injunctive relief against a state judge."). However, in 1996, Congress amended the text of Section 1983 by adding a provision stating that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853.

As the Senate report accompanying it made clear, however, the new provision of Section 1983 did "not provide absolute immunity for judicial officers," S. Rep.

No. 104-366, at 37 (1996), as doing so would undermine the entire foundation upon which Section 1983 was built. Most notably, the 1996 amendment only barred injunctive relief "for an act or omission taken in such officer's *judicial* capacity," 42 U.S.C. § 1983 (emphasis added), meaning that a defendant's title of "judge" remains insufficient on its own to support judicial immunity. *See Kowalski*, 893 F.3d at 997 (judges are "amenable to suit for non-judicial acts"); *Dawson v. Newman*, 419 F.3d 656, 661 (7th Cir. 2005) ("judicial immunity applies 'to judicial acts, but not to ministerial or administrative acts'" (quoting *Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985))).

Thus, a court confronted with a question of judicial immunity must "attempt[] to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Forrester v. White*, 484 U.S. 219, 227 (1988). In undertaking this task, courts ensure that, consistent with Section 1983's text, history, and purpose, no state actor—not even a judge—is immune from injunctive relief if the actor has a direct role in administering or enforcing an unconstitutional state law.

II. Just as Section 1983 Created a Remedy to Vindicate Federal Rights, the Doctrine of *Ex parte Young* Limits State Sovereign Immunity Where Necessary to Protect the Supremacy of Federal Law.

In cases like this one—where plaintiffs seek only declaratory and injunctive relief against state officers in their official capacities—Section 1983 and the doctrine

of *Ex parte Young* work in conjunction to create a path for relief, the former by creating a cause of action to enforce constitutional rights, and the latter by establishing that sovereign immunity does not apply in situations where an officer acts in derogation of federal law. Thus, much like Section 1983 itself, the doctrine of *Ex parte Young* applies to all state actors—including state court judges acting in a non-judicial capacity—in order to vindicate the supremacy of federal law. *See* U.S. Const. art. VI, cl. 2 ("[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land"); *Green*, 474 U.S. at 68 ("*Ex parte Young* gives life to the Supremacy Clause").

In *Ex parte Young*, the plaintiff sought to enjoin the Attorney General of Minnesota from enforcing a state law claimed to violate the Fourteenth Amendment of the Constitution. 209 U.S. at 142-44. The challenged law limited railroad rates within Minnesota and established harsh penalties for violators, including fines and jailtime. *Id.* at 146-47. Young, the Minnesota Attorney General, had asserted that Minnesota's sovereign immunity deprived the federal court of jurisdiction to enjoin him from performing his duties with respect to that statute. The Supreme Court rejected his argument. *Id.* at 159-60. In so doing, the Court explained that "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.'" *Virginia Office for Protection*, 563 U.S. at 254 (alterations in original) (quoting *Young*, 209 U.S. at 159-60).

Consistent with that logic, Supreme Court decisions "repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." *Pennhurst*, 465 U.S. at 105 (citing, for example, *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974); *Ga. R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952)). For this reason, in *Pennhurst State School & Hospital v. Halderman*, the Court rejected the extension of the *Ex parte Young* doctrine to state officials who violated state law, reasoning that "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." 465 U.S. at 106. Similarly, in *Virginia Office for Protection & Advocacy v. Stewart*, the Court held that a state agency may sue officers of another agency of the same state for violations of federal law under *Ex parte Young* because "the validity of an *Ex parte Young* action [does not] turn on the identity of the plaintiff," 563 U.S. at 256; rather, it turns on an allegation of "an ongoing violation of federal law" implicating federal supremacy principles, and a request for "relief properly characterized as prospective," *id.* at 255 (quotation marks omitted).

Decisions of this Circuit have repeatedly echoed these principles. *See, e.g.*, *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 523 (7th Cir. 2021) ("[t]he

relevant inquiry is whether the suit seeks prospective relief against an ongoing violation of federal law"); *Ind. Prot. & Advoc. Servs. v. Ind. Fam. & Soc. Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010) (as long as a suit seeks "prospective equitable relief for ongoing violations of federal law," it is permissible under *Ex parte Young*); *Marie O. v. Edgar*, 131 F.3d 610, 616 n.10 (7th Cir. 1997) ("one valid method of 'ensuring the States' compliance with federal law' is that 'an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law'" (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.14 (1996))). Thus, it is well established that the *Ex parte Young* doctrine eliminates the sovereign immunity defense in all cases seeking prospective relief against state actors—including state judges—who administer or enforce state law in violation of the Constitution.

It is true that in *Ex parte Young*, the Supreme Court noted that "the right to enjoin . . . a state official . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature." 209 U.S. at 163. But as the Court recently made clear in *Whole Woman's Health v. Jackson*, this exception to *Ex parte Young* does not bar *all* suits against judicial officers. Most notably, it does not bar suits brought against judges acting in *non-judicial* capacities by enforcing or administering unconstitutional state laws. *See* 142 S. Ct. at 532 ("*Usually*, [state judges] do not enforce state laws as executive officials might;

instead, they work to resolve disputes between parties." (emphasis added)); *id.* (explaining that the *Ex parte Young* doctrine "does not *normally* permit federal courts to issue injunctions against state-court judges" (emphasis added)). Indeed, the Court's refusal in *Whole Woman's Health* to apply *Ex parte Young* turned on its conclusion that the judges in that case did *not* have any role in enforcing or administering the challenged abortion regulation other than adjudicating cases filed in their courts pursuant to the regulation. *Id.* at 532-33. The Court said nothing about the ability to sue state judges where, as here, those judges *do* have a direct role in administering and enforcing the challenged statute, at least as plausibly alleged by Plaintiffs. *See Daves v. Dallas County*, 22 F.4th 522, 562 n.12 (5th Cir. 2022) (Haynes, J., dissenting) (noting that the holding in *Whole Woman's Health* was limited to situations in which "state court judges ha[ve] no relation to [the challenged statute]—they neither created nor enforce[] it").

Notably, the Court's decision to leave open the possibility of suits against state judges where they are involved in administering and enforcing a challenged statute is consistent with a long line of cases decided before it which emphasize that injunctive relief against state judges must be available where those judges fail to respect federal constitutional rights. For instance, in the wake of the enactment of Section 1983 and the federal Civil Rights Act of 1875, the Supreme Court held in *Ex parte Virginia* that the Fourteenth Amendment empowered Congress to bar racial

discrimination in jury service by state courts. The Court quickly brushed aside the immunity protestations of a judge indicted under the 1875 Act, emphasizing that the federal power "to enforce [the Constitution's guarantees] against State action . . . whether that action be executive, legislative, or judicial . . . is no invasion of State sovereignty." 100 U.S. at 346.

And in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court unanimously held that when a state court presides over an action to enforce a racially restrictive covenant in violation of the Fourteenth Amendment, the judge's action "bears the clear and unmistakable imprimatur of the State." *Id.* at 20. The Court explained that "[s]tate action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Id.* The Court invoked similar language in *Mitchum v. Foster*, emphasizing that "federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." 407 U.S. at 242. *Whole Woman's Health* explicitly declined to overrule these cases. *See* 142 S. Ct. at 534 (distinguishing without overruling *Shelley* and *Mitchum*).

Thus, just as Section 1983—even after its 1996 amendment—leaves injunctive relief available against state judges acting in non-judicial capacities, the doctrine of *Ex parte Young*, even as interpreted in *Whole Woman's Health*, continues to limit sovereign immunity under those same circumstances.

III. The Ruling of the Court Below Is at Odds with Section 1983 and the *Ex parte Young* Doctrine and Creates a Roadmap for States to Avoid Liability for Unconstitutional Statutes.

A. In *Ex parte Young*, the Supreme Court declared that "[t]he State has no power to impart . . . any immunity from responsibility to the supreme authority of the United States." 209 U.S. at 160. Yet "immunity from the responsibility to the supreme authority of the United States," *id.*, is precisely what the court below endorsed, rejecting wholesale the idea that Plaintiffs could have a viable remedy against an unconstitutional state statute where the administration and enforcement of that statute was vested in the state judiciary.

If this legislative gamesmanship works, any state can insulate any constitutional right from pre-enforcement judicial review simply by delegating its administration and enforcement to judicial officers. *See* Appellants' Br. 51-52. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926). That result is at odds with *Ex parte Young*, and it is inconsistent with

the vital principle of the supremacy of federal law that led the Forty-Second Congress to enact Section 1983 in the first place.

The district court's defiance of these bedrock doctrinal principles is especially concerning in a case like this one where it is not even clear that Plaintiffs would have an avenue to raise constitutional objections to the name-change statute in state court name-change proceedings.[2] In *Whole Woman's Health*, the Supreme Court's refusal to permit the case to proceed against certain state defendants turned in large part on its rationale that other "paths exist[ed] to vindicate the supremacy of federal law in this area." 142 S. Ct. at 537. Most notably, the Court stated that any individual sued by a private party under the challenged Texas abortion regulation could have "pursue[d] state and federal constitutional arguments in his or her defense." *Id.*

In contrast, Plaintiffs here are would-be *petitioners* in name-change proceedings, but the name-change statute explicitly states that, due to their criminal histories, they "shall not be permitted to file a petition for a name change in the courts of

[2] Not that they should have to. As the Supreme Court has explained, "[e]quity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect . . . the rights of persons against injuries otherwise irremediable." *Terrace v. Thompson*, 263 U.S. 197, 214 (1923); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014) (collecting cases permitting pre-enforcement judicial review of state laws alleged to violate the federal Constitution). Moreover, as described above, Section 1983 was enacted to provide a remedy in federal courts precisely because the Reconstruction Framers did not trust state courts to protect federal rights.

Illinois." 735 Ill. Comp. Stat. Ann. 5/21-101 (West 2022). In other words, the statute itself renders Plaintiffs improper parties for name-change proceedings—where they might otherwise raise constitutional objections to the statute—and the district court's dismissal of their federal lawsuit effectively leaves them with *no* clear path to vindicate their constitutional rights. That result cannot be squared with the history of Section 1983 and the principle of the supremacy of federal law that the Supreme Court espoused in *Ex parte Young*.

B. In concluding that the judges in this case could not be sued, not only did the court below violate these core doctrinal principles, but it also wholly misconstrued the nature of the role that judges play in administering and enforcing Illinois's name-change statute.

To begin, this Court has "cautioned against liberally categorizing acts as judicial," *Kowalski*, 893 F.3d at 998, including by making that determination "only because the actor is a judge," *McMillan*, 793 F.2d at 154; *see Ex parte Virginia*, 100 U.S. at 348 ("Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance."). Yet that is precisely what the court below did. Rather than assessing the language of the Illinois name-change statute or the plausibility of Plaintiffs' allegations about the role that judges play in that statutory scheme, the court concluded that, because *judges*, as opposed to clerks or other

officers, are vested with authority to grant or deny name change statutes, "processing a name-change petition" necessarily "requires discretion and judgment," core judicial features. Op. 14, App. A016.

There is nothing in the text of the name-change statute supporting that conclusion. Indeed, there is nothing in the district court's opinion itself explaining how "judicial" discretion and judgment come into play in the name-change process. Instead, the court decided that because judges administer name-change applications, those applications inherently involve judicial functions, rather than assessing the name-change application process itself to understand the role that state judges play in it.

If the court below had examined how the name-change statute actually operates, it would have recognized that when state court judges administer the statute, they perform an act that straddles the line between enforcement and ministerial administration but in no way resembles a traditional adjudicative role. For instance, after a person submits a petition for a name change, they must appear for a non-adversarial hearing that largely resembles an administrative proceeding that might just as well be conducted by a clerk or other figure who is not a judge. *See Kowalski*, 893 F.3d at 998 (a "ministerial act" is one "which might as well have been committed to a private person as to a judge" (quotation marks omitted)). At the same time, to the extent that any party has a role in enforcing the statute against Plaintiffs, it must

be the state judges responsible for administering the statute—after all, unless the Illinois State's Attorney objects to a petition, *see* 735 Ill. Comp. Stat. Ann. 5/21-102.5 (West 2022), the state judge is the only other party involved and acting as a potential barrier to a petitioner's ability to obtain a legal name change through enforcement of the unconstitutional state statute, *see* 735 Ill. Comp. Stat. Ann. 5/21-101.

The forms provided by the state judiciary further underscore the non-judicial nature of the state judges' role. The form for name-change applications simply consists of a checklist of statutory requirements.[3] Even more telling is the form order designed for judges to use when administering the statute, which has no section for any sort of analysis—just checkboxes for "[t]he statements made in the Request for Name Change meet the statutory requirements" or "[t]he statements made in the Request for Name Change do not meet the statutory requirements."[4] Completion of this form plainly does not require any specialized judicial skills or judgment.

Indeed, the Supreme Court has held that closely analogous tasks like the promulgation and enforcement of rules of professional conduct "fall on the non-judicial side of th[e] divide." *Kowalski*, 893 F.3d at 998 (citing *Forrester*, 484 U.S. at

[3] *See* https://www.illinoiscourts.gov/Resources/d324e1a6-89ec-4f7c-a7dd-37c4d6aed72e/Name_Change_Adult_Petition.pdf.

[4] *See* https://www.illinoiscourts.gov/Resources/212650fc-0f8a-409b-b635-2a95ca332768/Name_Change_Adult_Order.pdf.

228-29). For this reason, in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), the Court declined to extend judicial immunity to judges who propounded and enforced the Bar Code, holding that they "would be amenable to suit for injunctive and declaratory relief" in a suit challenging the constitutionality of certain Virginia Bar rules, *Forrester*, 484 U.S. at 228 (citing *Supreme Court of Virginia*, 446 U.S. at 734-37). And in line with *Supreme Court of Virginia*, just a few months ago, this Court held that "a straightforward pre-enforcement suit seeking prospective relief enjoining [Wisconsin Supreme Court] justices from enforcing the requirements of State Bar membership and payment of compulsory dues" did not implicate the judicial functions of the state justices, meaning that judicial immunity imposed no barrier to the suit. *File*, 33 F.4th at 390.

So too here. This is "a straightforward pre-enforcement suit seeking prospective relief," *id.*, to stop Illinois judges from enforcing the requirements of the state's name-change statute by preventing Plaintiffs from filing name-change applications or rejecting those applications out of hand based on the plain language of the statute. Because the judges' application of that statute is non-judicial and constitutes a direct barrier to Plaintiffs' ability to change their names in accordance with their federal constitutional rights, the state judges are not entitled to judicial immunity or sovereign immunity.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 29(d), and Circuit Rule 29 because it contains 6,510 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief of *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 14th day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on July 14, 2022.

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Executed this 14th day of July, 2022.

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