No. 09-529

IN THE

Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,
Petitioner,

v.

JAMES S. REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICUS CURIAE NEW JERSEY PUBLIC ADVOCATE IN SUPPORT OF PETITIONER

JOSEPH J. MUELLER
Counsel of Record
ARIEL I. RAPHAEL
SYDENHAM B. ALEXANDER, III
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Blank Page

QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Blank Page

INTEREST OF AMICUS CURIAE[1]

The Department of the Public Advocate of the State of New Jersey is charged by state law with advocating the "public interest" on behalf of New Jersey residents, including the elderly, people with mental illness or developmental disabilities, consumers, and children. New Jersey law provides that the Public Advocate may "represent the public interest in such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest," and defines public interest to include "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States." N.J. Stat. Ann. §§ 52:27EE-12, -57. The Public Advocate is one of many state agencies throughout the United States charged with enforcing state and federal rights in both state and federal court—and against both private defendants and state officials.

In the decision below, the Fourth Circuit incorrectly ruled that a federal forum is not available to state plaintiffs seeking to enjoin individual state officials to comply with federal law. In particular, the court of appeals held that the Virginia Office of Protection and Advocacy ("VOPA") could not, as a state agency, bring a suit in federal court to require individual state officials to provide VOPA with records to which VOPA was entitled under federal law. *See* 42

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

U.S.C. § 10805(a). The Fourth Circuit so held despite explicitly acknowledging that a private plaintiff could bring a suit under *Ex parte Young*, 209 U.S. 123 (1908), to enjoin prospective compliance with federal law by state officials, in precisely those circumstances.

The Fourth Circuit's decision could disrupt enforcement systems duly enacted by New Jersey and other states. The Public Advocate submits this *amicus curiae* brief to offer the Court an informed perspective on how the court of appeals' decision could undermine the protection and advocacy agencies that states have chosen to establish.

SUMMARY OF ARGUMENT

The decision below turned state sovereign-immunity principles on their head, jurisdictionally handicapping states in the name of protecting these same states—potentially upsetting state statutory frameworks governing state agencies charged with protecting vulnerable state citizens. The Fourth Circuit held that the long-standing doctrine of *Ex parte Young* is not available to states in circumstances where that same doctrine unquestionably would be available to private plaintiffs. This holding directly curtailed the enforcement powers of the state protection and advocacy agency established by the Commonwealth of Virginia, and endangers the powers of similar state agencies invested by states with the authority to enforce federal law in federal court against lawbreaking state officials.

The Fourth Circuit incorrectly applied the established rules of state sovereign immunity—rules that protect states from being named as *defendants* in certain private suits but do not limit the ability of states to

bring claims as *plaintiffs*—and created a new "state intramural dispute" exception to *Ex parte Young*. This unprecedented exception ignores that a suit against an individual official is *not* a suit against the state.

Moreover, discrimination against state plaintiffs conflicts with the purpose of state sovereign immunity: safeguarding the "sovereign dignity" of states. *See, e.g., Alden* v. *Maine*, 527 U.S. 706, 715 (1999). The Fourth Circuit's decision to treat state plaintiffs as inferior to private plaintiffs did not "accord[] the States the respect owed them as members of the federation." *Id.* at 748-749.

Amicus curiae Public Advocate of New Jersey respectfully urges the Court to grant the certiorari petition to correct the Fourth Circuit's departure from *Ex parte Young* and the core purpose of state sovereign immunity.

ARGUMENT

I. NEW JERSEY AND OTHER STATES CHOSE TO CREATE STATE AGENCIES WITH THE POWER TO ENFORCE FEDERAL LAW IN FEDERAL COURT—AND THE FOURTH CIRCUIT'S DECISION HANDICAPS THESE STATE AGENCIES

A wide range of states have chosen, as a matter of state law, to create state protection and advocacy agencies—including the Public Advocate of New Jersey—to serve the public interest, and have empowered these agencies to enforce federal law in federal court, including against individual state officials. The Fourth Circuit's decision, if applied to all such organizations, would impose a jurisdictional handicap that would impede these state agencies in performing their state duties.

A. The Department Of The Public Advocate Of The State Of New Jersey

In July 2005, after years of vigorous advocacy by a broad coalition of New Jersey citizens, the New Jersey legislature restored the Department of the Public Advocate of the State of New Jersey (the "Public Advocate"). The Public Advocate, which had originally been established by the state of New Jersey in 1974, but was dissolved by the state twenty years later, was restored pursuant to the Public Advocate Restoration Act, with the mandate to "represent the public interest in such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest." N.J. Stat. Ann. § 52:27EE-57. The public interest is defined broadly under the New Jersey statute as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States ...." *Id.* § 52:27EE-12.

In restoring the Public Advocate, the New Jersey legislature designated it as New Jersey's Protection and Advocacy Agency within the meaning of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 15043(a)(2)(A)(i), hereafter "DD Act") and the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. § 10805(a)(1), hereafter "PAIMI Act"). *See* N.J. Stat. Ann. § 52:27EE-29(b) (designating Public Advocate as mental health protection and advocacy agency); *id.* § 52:27EE-38(b) (designating Public Advocate as protection and advocacy agency for persons with developmental disabilities). The redesignation process transferring the protection and advocacy function (for purposes of receiving federal funding) from the private entity that has been serving that function has not yet been instituted before the federal Department of Health and Human Services, but

the New Jersey legislature clearly intends for that process to occur. *See* N.J. Stat. Ann. §§ 52:27EE-37, -45.

Like VOPA, the Public Advocate is an independent state agency charged with protecting the rights of the state's most vulnerable citizens, including individuals with mental illness or developmental disabilities. *Compare* Va. Code Ann. § 51.5-39.2A *with* N.J. Stat. Ann. §§ 52:27EE-29 to -50. In addition, the Public Advocate includes the state Ombudsman for the Institutionalized Elderly, which is the first responder for reports of elder abuse in the state's nursing homes and other residential settings, and the Corrections Ombudsman, which responds to complaints and disruptions within the state prison system. *See* N.J. Stat. Ann. §§ 52:27EE-65, 52:27G-5.1 to -16, 52:27EE-24 to -28.

B. Every State Has Chosen To Establish A Protection And Advocacy Agency

In a testament to the vitality of the states' interest in protecting their most vulnerable citizens, all fifty states have chosen to accept federal funding under the DD and PAIMI Acts and to establish protection and advocacy systems, many of which are authorized by state statute to litigate federal claims in federal court.[2]

---

[2] *Amicus* Public Advocate does not address whether the states' decisions to create protection and advocacy systems constitute waivers of Eleventh Amendment immunity that would permit suits against the states themselves for money damages. The key point here is that states have chosen to vest state agencies with the power to ask federal courts to enjoin compliance with federal law by lawbreaking state officials. The states' decisions to authorize suits by state agencies to secure prospective compliance with federal law fall within the classic *Ex parte Young* model, and do not implicate waiver issues.

See generally U.S. Dep't of Health & Human Servs., List of State Protection and Advocacy Agencies, *at* http://www.acf.hhs.gov/programs/add/states/pas.html (last updated Nov. 27, 2009).

Congress enacted the DD Act following the discovery of "inhumane and despicable conditions" at a state-operated facility for persons with developmental disabilities. *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996). The PAIMI Act similarly resulted from a Congressional inquiry into conditions at state-operated psychiatric facilities. *See* S. Rep. No. 99-109, *reprinted in* 1986 U.S.C.C.A.N. 1361, 1985.

These Acts allow states to establish either state-operated or private protection and advocacy agencies, and do not draw any distinction between the powers or responsibilities of public and private agencies. Many states (and territories) have established independent state agencies, rather than private nonprofit agencies, to carry out the protection and advocacy functions. These states and territories include Alabama (established by unpublished Governor's directive), American Samoa (Am. Samoa Code Ann. c. 14, §§ 4.1401 *et seq.*), Connecticut (Conn. Gen. Stat. §§ 46a-7 *et seq.*), Indiana (Ind. Code §§ 12-28-1-1 *et seq.*), Kentucky (Ky. Rev. Stat. Ann. §§ 31.010 *et seq.*), North Dakota (N.D. Cent. Code §§ 25-01.3-01 *et seq.*), Ohio (Ohio Rev. Code Ann. §§ 5123.60 *et seq.*), Puerto Rico (P.R. Laws Ann. tit. 3, ch. 24A, §§ 532 *et seq.*) and Virginia (Va. Code Ann. § 51.5-39.2A).

States have authorized protection and advocacy agencies to bring federal claims *in federal court. See, e.g.*, Va. Code Ann. § 51.5-39.2A (VOPA may employ counsel "to initiate actions on behalf of the Office ... in

any matter, including state, *federal* and administrative proceedings" (emphasis added)); Conn. Gen. Stat. § 46a-11 (The Connecticut Office of Protection and Advocacy for Persons with Disabilities may bring an action in "*any court*, agency, board or commission in this state" (emphasis added)); N.D. Cent. Code § 25-01.3-06 (The North Dakota Committee on Protection and Advocacy may "[p]ursue legal, administrative, and other appropriate remedies to ensure the protection and the rights of persons with developmental disabilities or mental illnesses ... *in a federal* or state court ...." (emphasis added)).

II. THE FOURTH CIRCUIT RULING DEPARTS FROM LONG-STANDING PRECEDENT AND DISADVANTAGES STATES AS COMPARED TO PRIVATE PLAINTIFFS

The Fourth Circuit's ruling could disrupt the statutory frameworks described above, without any basis for such disruption in the doctrine of state sovereign immunity. The Circuit's ruling suffers from two basic legal errors. First, under the long-standing rule of *Ex parte Young*, a suit against a state officer is *not* a suit against a state, and the Circuit thus miscast this case as an "intramural dispute." Second, the decision treats states as inferior to private individuals in their ability to invoke the *Ex parte Young* doctrine, and thus conflicts with what this Court has described as the animating purpose of state sovereign immunity: respecting the dignity of states.

The Fourth Circuit's decision would, if applied more broadly, fracture the *Ex parte Young* doctrine, undermining decades of this Court's precedent guaranteeing aggrieved parties access to federal courts to ensure that state officials conform their future conduct to governing federal law. This Court should grant the

writ here to correct the Fourth Circuit's erroneous decision depriving state agencies—and only state agencies—of the fundamental right of access to a federal forum to enforce federal law.

A. The Circuit Miscast This Case As An "Intramural Dispute," Creating A New And Legally Unwarranted Exception To The Rule Of *Ex parte Young*

The Fourth Circuit's decision effectively reverses-in-part the century-old rule of *Ex parte Young*, which holds that a suit against a state officer, seeking prospective compliance with federal law, rather than damages for past misconduct, is not to be treated as a suit against the state itself. As this Court held, "[T]he use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159-160. This logic applies with equal force where the state is the plaintiff, and the Circuit erred by holding otherwise.

1. A suit against an individual for injunctive relief is not a suit against the state

The distinction established in *Ex parte Young* separates individuals from the state, to "ensure[] that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("*Young* and its progeny render the [Eleventh] Amendment wholly inapplicable to a certain class of suits. Such suits are

deemed to be against officials and not the States or their agencies[.]").[3]

Following *Ex parte Young*, this Court has consistently allowed suits against state officials for prospective relief from violations of federal law, because they are not suits against the state. *See Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte*

---

[3] *See also Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("The landmark case of *Ex parte Young* created an exception to [sovereign immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State."); *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) ("[T]he Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials[.]"); *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State."); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Petitioner's right to maintain this action in a federal court depends, first, upon whether the action is against the State of Indiana or against an individual.... Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932) ("The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief."); *Truax* v. *Raich*, 239 U.S. 33, 37 (1915) ("As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of state, are about to proceed wrongfully to the complainant's injury ... it is established that the suit cannot be regarded as one against the state.").

Young avoids an Eleventh Amendment bar to a suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (alteration in original; internal quotation marks omitted)).[4]

The distinction between the state and individual officials as defendants is pellucid in cases that have mixed both types of claims: this Court rejects claims against the state and allows claims for prospective relief against individuals. *See, e.g., Papasan* v. *Allain*, 478 U.S. 265, 277-278 (1986) (rejecting retroactive award of monetary relief from state treasury but allowing claim for an injunction against officials); *Alabama* v. *Pugh*, 438 U.S. 781, 781-782 (1978) (per curiam) (allowing suit against individual defendants while dismissing identical claims against state).

This Court has recognized that in certain limited circumstances, the nature of the relief sought may be qualitatively different from conventional injunctive relief, such that the *Ex parte Young* rule may not apply.

---

[4] *See also Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) ("a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law"); *Hutto* v. *Finney*, 437 U.S. at 690 (permitting financial penalty to enforce injunction of state officials); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 n.6 (1978) (refusing to overrule *Ex parte Young* or restrict its application); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977) (*Ex parte Young* "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law"); *Alabama Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (rejecting defendants' contention that "a suit to restrain state officials from enforcing unconstitutional state laws is, in effect, a suit against the state").

See, e.g., *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (suit seeking title to state land). But this case does not present such an unconventional request for relief: the Fourth Circuit itself recognized that a private plaintiff could invoke *Ex parte Young* in precisely the circumstances present here. *See Virginia* v. *Reinhard*, 568 F.3d 110, 119 (4th Cir. 2009); *see also infra* Part II.B.

Nor are decisions addressing *damages* requests (*Alden* v. *Maine*, 527 U.S. 706 (1999)) or injunctions seeking to enforce *state* law (*Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)) relevant to the analysis of a suit seeking an *injunction* to enforce *federal* law, and the Circuit erred by relying on such authority. The Circuit's professed justification for citing such cases—*i.e.*, to protect the states from "excessive federal meddling with their internal authority"—runs aground on the simple fact that here Virginia itself chose to vest VOPA with the authority to litigate federal claims in federal court; this state choice is entitled to respect, and distinguishes this case from cases such as *Alden* and *Pennhurst*.

In short, the century-old rule of *Ex parte Young*, properly applied, resolves this case. Because VOPA's suit seeks prospective relief requiring individual defendants to comply with federal law, it is not a suit against a state and is not barred by the Eleventh Amendment.

2. There is no intramural dispute because the state is not a defendant

The Court of Appeals incorrectly assumed that this suit presents an "intramural state dispute," *Reinhard*, 568 F.3d at 113, or "intramural contest," *id.* at 119, or "internecine feud," *id.* at 121, in which the plaintiffs

seek "to turn the State against itself," *id.* at 120, 121, and have a federal court "referee contests between [state] agencies," *id.* at 121.[5] That might be the case if plaintiffs had sued a state agency. But *Ex parte Young* makes clear that the state is not a defendant in this suit. VOPA seeks to enforce federal requirements against individual state officers who have allegedly deviated from these binding requirements. The suit presents a contest between VOPA and allegedly law-breaking individual defendants—not the state against "itself."

Correctly identifying the defendants in this case removes the false premise supporting the court of appeals' decision, and with that premise removed, the decision collapses. No decision of this Court bars a state protection and enforcement agency from carrying out its state-authorized mission of suing individuals who violate federal law and thereby harm vulnerable state citizens.

Indeed, the decision below cited no precedent explicitly recognizing an "intramural" exception to *Ex*

---

[5] To the extent that the Fourth Circuit suggested that adversarial proceedings brought by one state agency against an official employed by another state agency are not justiciable as an "intra-branch dispute," it is incorrect. Here, the Virginia legislature vested VOPA with the statutory authorization, and indeed responsibility, to initiate adversarial proceedings challenging state officials; that VOPA is itself a state agency does not affect its Article III standing or otherwise render the dispute nonjusticiable. *See, e.g., United States* v. *Nixon*, 418 U.S. 683 (1974) (where Attorney General's regulations empowered Special Prosecutor to contest President's invocation of executive privilege, justiciable case or controversy existed even though Special Prosecutor was official of Executive Branch).

parte Young. Instead, the court of appeals sought to extrapolate this exception from loose language and unrelated holdings in several cases involving municipalities in which the Court rejected plaintiffs' claims to federal rights enforceable in *any court*. *See Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (plaintiff has no federal constitutional rights against state); *City of Trenton* v. *New Jersey*, 262 U.S. 182, 192 (1923) ("no substantial federal question is presented"); *Stewart* v. *City of Kansas City*, 239 U.S. 14, 15 (1915) ("no Federal question was raised"); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 179-180 (1907) (no violation of federal law); *Reinhard*, 568 F.3d at 122 (plaintiffs in those cases "could not obtain relief under federal law"). This Court determined as a matter of substantive law that no federal rights were violated in those four disputes and did not hold, as a jurisdictional mater, that otherwise-well-pleaded claims were jurisdictionally barred from federal court under sovereign-immunity principles.

These cases are inapposite to the Fourth Circuit's jurisdictional holding and distinguishable on their own terms—as VOPA plainly pleaded an actionable claim for access to records improperly withheld by individual state officials. *See, e.g., Protection & Advocacy for Persons with Disabilities* v. *Mental Health & Addiction Servs.*, 448 F.3d 119, 121 (2d Cir. 2006) (Sotomayor, J.) ("we hold that PAIMI unambiguously grants OPA [a state protection and advocacy agency] access to peer review records and affirm the district court's entry of a declaration and injunction requiring the Department to disclose to OPA the peer review records" regarding two deaths); *Pennsylvania Prot. & Advocacy, Inc.* v. *Houston*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.) ("PAIMI requires that an organization such as a PP & A be given access to peer review reports such as those

at issue [regarding patient's death] irrespective of state law."); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 499 (11th Cir. 1996) (enjoining defendant from failing to release records to state protection and advocacy program). Indeed, the court of appeals stated that "VOPA can enforce federal law in state court," *Reinhard*, 568 F.3d at 124, but failed to recognize that the existence of an enforceable federal right is inconsistent with every case it cited for the "intramural" rule.

B. The Fourth Circuit Rule Denies States The Same Rights Afforded To Private Plaintiffs, Undercutting The Sovereign Dignity Of States

The consequence of the court of appeals' decision is that, in the name of respect for states, it denies state plaintiffs rights afforded to private plaintiffs. The Circuit acknowledged that "*Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system," *Reinhard*, 568 F.3d at 119, but proceeded to dismiss the suit because it was filed by a state agency. This ignores this Court's clear pronouncements that state sovereign immunity is designed to protect the dignity interests of states; by discriminating against state plaintiffs, the Circuit's decision turns these principles on their head.

1. The Fourth Circuit rule discriminates against state plaintiffs, contrary to the decisions of this Court

This Court has repeatedly held that the sovereignty of states encompasses the power to sue. *See, e.g.*, *Massachusetts* v. *Environmental Prot. Agency*, 549 U.S. 497, 518-520 (2007); *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600-608

(1982) (tracing long history of states' power to sue to prevent injury to their citizens).

Indeed, in its decisions on standing, the Court has confronted directly the comparison between state plaintiffs and private plaintiffs and held that sovereignty entitles state plaintiffs to "special solicitude" when they seek access to federal courts. *Massachusetts*, 549 U.S. at 520; *see also id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual."). "At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations." *Alfred L. Snapp & Son*, 458 U.S. at 611 (Brennan, J., joined by Marshall, Blackmun, Stevens, J.J., concurring).

Against this backdrop, the participation of the state as the *plaintiff* in a lawsuit against a state officer does not offend sovereign immunity. *Cf. Alden*, 527 U.S. at 713 ("the States' immunity *from suit* is a fundamental aspect of [their] sovereignty" (emphasis added)). Indeed, the founders explicitly distinguished between suits against states, which infringe state sovereignty, and suits by states, which do not. *See* 3 *Debates on the Federal Constitution* 556 (J. Elliot 2d ed. 1854) (John Marshall stating "I see a difficulty in making a state defendant, which does not prevent its being plaintiff," *quoted in Alden*, 527 U.S. at 718 (1999)).

To support its unprecedented discrimination against state plaintiffs, the court of appeals cited isolated statements in two footnotes from this Court's decisions: *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.14 (1996) ("an *individual* can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law" (emphasis added));

Board of Trs. of Univ. of Ala. v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (referring to *Ex parte Young* suits by "private individuals"). From these references, the court of appeals concluded that discrimination against state plaintiffs was a "basic element" of *Ex parte Young* doctrine. *Reinhard*, 568 F.3d at 118.

These footnotes refer to the use of *Ex parte Young* by "individuals" for the simple reason that sovereign immunity itself has often been summarized as protection of states against suit by individuals. The articulated purpose of state sovereign immunity is to protect states against the "indignity" of *being sued by private plaintiffs* in certain circumstances. *See, e.g.*, *Alden*, 527 U.S. at 715 ("The generation that designed and adopted our federal system considered immunity *from private suits* central to sovereign dignity." (emphasis added)); *Board of Trs.*, 531 U.S. at 363 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."); *Alabama* v. *Pugh*, 438 U.S. at 781 (per curiam) ("[T]he Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States and their agencies."); *Ex parte Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."); *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.").

Nothing in these decisions—or their supporting rationale—limits states' ability to act as plaintiffs. The Fourth Circuit's over-reading of the language in these cases subverts their basic goal of safeguarding the dignity and sovereignty of states.

Indeed, if the court of appeals were correct that a limitation to private plaintiffs were "a basic element of the [*Ex parte Young*] doctrine," *Reinhard*, 568 F.3d at 118, then this Court's extensive and divided analysis in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) would have been unnecessary because the plaintiff was not a private plaintiff but a sovereign tribe, a party analogous to a sovereign state. *See id.* at 268. Instead of resolving the case by reference to the plaintiff's identity, however, this Court held that the outcome depended on "the difference between the *type of relief* barred by the Eleventh Amendment and that permitted under *Ex parte Young*." *Id.* at 281 (emphasis added).

Again, the doctrinal focus is on protecting states as *defendants* from private suits—not restricting states as *plaintiffs*. It hardly promotes the interests of federalism and state autonomy when, in the name of state sovereignty, a court thwarts the intent of the legislature of the very state it is purportedly seeking to protect.

2. States' choices to create and define state enforcement agencies deserve respect

The Fourth Circuit acknowledged that Virginia's sovereignty is not harmed when private nonprofit agencies and individuals bring suit against individual officials. *See Reinhard*, 568 F.3d at 119. Under the Circuit's logic, if Virginia had chosen to vest a private nonprofit organization with the protection and advocacy powers enabled by the PAIMI Act, this private nonprofit could bring *in federal court* the very same suit that VOPA was prohibited from pursuing. To treat Virginia's choice to implement the PAIMI Act through a state agency, rather than a private nonprofit organization, as somehow raising a bar to federal juris-

diction, conflicts with the basic purpose of state sovereign immunity: according states respect. Virginia made a *state* choice to create a *state* agency, and this choice deserves respect. The Fourth Circuit derogates this choice by posing barriers to the federal litigation of federal rights when state agencies sue for prospective injunctive relief, but not when private agencies do so.

Such state choices reflect due consideration for the special circumstances presented by suits involving public officials, while permitting such suits to proceed in federal court. New Jersey law, for example, requires notice to public defendants before suit: "Prior to initiating litigation, the Public Advocate shall communicate, in writing, with a public entity against which the Public Advocate anticipates filing adversarial action ... to clearly provide the potential litigants with a final opportunity to resolve the matters in controversy outside the court system." N.J. Stat. Ann. § 57:27EE-78.

These state provisions, duly enacted by the state legislature and the state executive, provide the appropriate means for the state to exercise its sovereignty and balance the interests presented by suits such as VOPA's. By ignoring states' choices and inventing a new, discriminatory, judge-made exception to *Ex parte Young*, the court of appeals departs from the law and undermines the dignity of states.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSEPH J. MUELLER
Counsel of Record
ARIEL I. RAPHAEL
SYDENHAM B. ALEXANDER, III
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

DECEMBER 2009

Blank Page