No. 09-529

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, by the VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

v.

JAMES S. REINHARD, in his official capacity as Commissioner, Department of Behavioral Health and Developmental Services of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petition involves a suit by one Virginia state agency—the Virginia Office for Protection and Advocacy—against Virginia state officials at another state agency. Although it is undisputed that the state agency may obtain relief in state court, the state agency chose to sue in federal court. The Fourth Circuit held that sovereign immunity precluded the suit. The question presented is:

> May a state agency invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against state officials from the same State?

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Virginia Attorney General William C. Mims, on behalf of James S. Reinhard, in his official capacity as the Commissioner of the Virginia Department of Behavioral Health and Developmental Services, Denise D. Micheletti, in her official capacity as the Director of Central Virginia Training Center, and Charles M. Davis, in his official capacity as Director of Central State Hospital (collectively "Virginia Officials"), submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

The Petition involves a novel and narrow question—may a state agency invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against state officials from the same State? As the Fourth Circuit noted, "[the Petitioner] has cited no case, nor have we found any, holding that—or even analyzing whether—the *Ex parte Young* doctrine applies equally when the plaintiff is a state agency." *Pet. App.* 14a-15a. Because "the interest of the states in avoiding excessive federal meddling with their internal authority is well recognized in [this] Court's sovereign immunity jurisprudence," *Pet. App.* 18a, the court of appeals "decline[d] to expand the doctrine of *Ex parte Young* . . . to lift the bar of sovereign

[1] On November 5, 2009, this Court extended the time for filing a response to December 28, 2009.

immunity in federal court when the plaintiff is a state agency." *Pet. App.* 3a. While the Petitioner "may pursue its claims in state court, . . . it would be inconsistent with our system of dual sovereignty for a federal court to rely on *Ex parte Young* to adjudicate an intramural state dispute like this one." *Pet. App.* 3a.

This Court should decline review for three reasons. First, there is no conflict among the lower courts. Second, the Fourth Circuit's decision is fully consistent with this Court's jurisprudence. Third, the Petitioner may pursue its federal law claims in the Virginia courts.

STATEMENT OF THE CASE

1. The Petitioner, the Virginia Office for Protection and Advocacy ("VOPA"), "is an *independent Virginia state agency* that serves as the Commonwealth's [protection and advocacy agency]." *Virginia Office for Prot. & Advocacy v. Reinhard*, 405 F.3d 185, 187 (4th Cir. 2005) (emphasis added). *See also Virginia Code* §§ 51.5-39.2 – 51.5-39.12 (statutory establishment of VOPA). Congress encourages the states to create entities like VOPA by providing federal funding to protection and advocacy systems that meet the requirements of the Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("PAIMI Act"), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of

Rights Act ("DD Act"), 42 U.S.C. §§ 15001-15115. Under these acts, States may choose to make their protection and advocacy systems either state agencies or private, nonprofit entities. *See* 42 U.S.C. §§ 15044(a), 10805(c)(1)(B). *See also* 45 C.F.R. § 1386.20. Although most States have chosen the private option, Virginia chose to create a state agency.

All of the Respondents are state officials with another Virginia state agency. Commissioner Reinhard is the head of the Department of Behavioral Health and Developmental Services ("Department"). Among other things, this Department has responsibility for operating sixteen state facilities throughout Virginia that provide twenty-four hour per day care for persons with mental illness and mental retardation and individuals committed as sexually violent predators. *See Virginia Code* § 37.2-304. Director Micheletti is the head of the Department's Central Virginia Training Center, a facility that provides care, training, and rehabilitation services to persons with mental retardation. Director Davis is the head of the Department's Central State Hospital, a psychiatric facility.

2. Consistent with federal law, VOPA has the authority to engage in various pursuits on behalf of individuals with mental illness and other disabilities, such as investigating complaints of discrimination, abuse, and neglect. *Virginia Code* § 51.5-39.4(5). *See also* 42 U.S.C. §§ 15043(a)(2)(I)-(J), 10805(a)(4). As part of its investigation into the death or serious injuries of three persons in facilities operated by the

Department, VOPA has requested certain "peer review" records. VOPA believes that the PAIMI Act and the DD Act require the Virginia Officials to produce the records.

The Virginia Officials disagree. Two federal regulations, 42 C.F.R. § 51.41(c)(4)[2] and 45 C.F.R. § 1386.22(c)(1),[3] explicitly exempt peer review

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[2] This federal regulation, which implements the PAIMI Act, provides, in pertinent part:

> (c) Information and individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records, which shall be available to the P&A system under the Act shall include, but not be limited to:
>
> (4) Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.*

42 C.F.R. § 51.41(c)(4) (emphasis added).

[3] This federal regulation, which implements the DD Act provides in pertinent part:

> (c) Information in the possession of a facility which must be available to P&A systems in investigating instances of abuse and neglect under section 142(a)(2)(B) (whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records) shall include, but not be limited to:

(Continued on following page)

materials from disclosure if such records are privileged under state law.[4] Because Virginia has a state law protecting the disclosure of peer review material, *Virginia Code* §§ 8.01-581.16 and 581.17, and a state law that specifically prohibits VOPA from obtaining these records, *Virginia Code* § 51.5-39.4(4), these federal regulations allow the Virginia Officials to refuse to disclose the materials. Moreover, regardless of its general authority to investigate allegations of abuse or neglect, VOPA has no authority to ask the Virginia Officials to disclose materials that state law makes privileged. *See Virginia Code* § 51.5-39.4(4).

> (1) Information in reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for a facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.*

45 C.F.R. § 1386.22(c)(1) (emphasis added).

[4] Several Circuits have declared that one or both of the regulations are invalid. *See Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119, 125-26 (2nd Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Services v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1024 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 427 (3rd Cir. 2000) (Alito, J.). Yet, the United States has neither withdrawn the regulation nor conceded its invalidity.

3. Because the two state agencies were unable to resolve their dispute, VOPA sued the Virginia Officials in the district court. The Virginia Officials moved to dismiss for failure to state a claim and on the basis of sovereign immunity. The district court denied the motion on both grounds. *Pet. App.* 30a-46a.

First, the trial court held that VOPA stated a claim that the Virginia officials were violating federal law and that the state officials' argument based on the peer review privilege was inappropriate for resolution on a Fed. R. Civ. P. 12(b)(6) motion because it was an "affirmative defense to the merits." *Pet. App.* 34a-35a.

Second, the district court held that sovereign immunity did not bar VOPA's suit. *Pet. App.* 35a-45a. After noting that abrogation of sovereign immunity was not at issue, *Pet. App.* 35a, the court found that Virginia had not waived its sovereign immunity. *Pet. App.* 36a-40a. Yet, the trial court found that *Ex parte Young* applied. *Pet. App.* 40a-42a. In reaching that conclusion, the district court rejected the Virginia officials' argument that the doctrine of *Ex parte Young* did not permit a suit in federal court by one state agency against officials of another agency of the same State. *Pet. App.* 43a-45a.

4. Because a denial of sovereign immunity is a final order under the collateral order doctrine, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*,

506 U.S. 139, 143-44 (1993), the Virginia Officials appealed.[5]

On appeal, the Fourth Circuit reversed. *Pet. App.* 1a-29a. The lower court found that Congress had not abrogated sovereign immunity, *Pet. App.* 8a-10a, and that Virginia had not waived its sovereign immunity. *Pet. App.* 10a-13a. Turning to whether *Ex parte Young* applied, Judge Wilkinson's opinion for a unanimous court made five points.

First, VOPA's status as a state agency is critical to whether it can invoke *Ex parte Young*. *Pet. App.* 13a-17a. While *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland,* 535 U.S. 635 (2002), suggests the invocation of *Ex parte Young* requires nothing more than an allegation of an on-going violation of federal law, the inquiry is more complex when a state agency is involved. *Pet. App.* 14a. "VOPA's argument for an indiscriminate application of *Ex parte Young* cannot be reconciled with the guidance of [this] Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997)." *Pet. App.* 16a (citation original).

Second, principles of dual sovereignty prevent federal courts from adjudicating this dispute. Relying on *Alden v. Maine,* 527 U.S. 706 (1999), and *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984), the Fourth Circuit found that "a federal

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[5] Because the denial of a motion to dismiss for failure to state a claim is not a final judgment, the Virginia Officials could not appeal that aspect of the judgment.

court, without the imprimatur of Congress or the consent of the state, [was not allowed] to resolve a dispute between a state agency and state officials." *Pet. App.* 19a. As the court of appeals explained:

> Recognizing an inherent power in the federal courts to settle this sort of internecine feud—"to turn the State against itself"—would disparage the status of the states as sovereigns. Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability.

Pet. App. 19a-20a (citations omitted).

Third, this Court's "cases related to the political subdivisions of the states [recognize] that alleging a violation of federal law does not itself override the states' interest in maintaining their sovereignty with respect to internal state conflicts." *Pet. App.* 22a. While these cases did not involve sovereign immunity, "these decisions are nonetheless relevant to our sovereign immunity inquiry because the Court made clear that, even in the presence of an alleged violation of federal law, the *nature of the party* making the federal claim implicated the state's interest in

keeping its internal authority intact." *Pet. App.* 23a (emphasis original).

Fourth, VOPA could pursue its claims in state court. Litigating the issues in state court would not lead to inconsistent or erroneous applications of federal law. *Pet. App.* 25a-26a. This Court could review any decision of the Supreme Court of Virginia interpreting federal law and VOPA's convenience did not justify diminishing Virginia's sovereignty. *Pet. App.* 26a.

Fifth, VOPA's status as an independent state agency does not empower VOPA to sue state officials in federal court. The Fourth Circuit also noted that allowing state agencies to sue state officials in federal court might result in numerous lawsuits involving public universities and, conceivably, every agency that receives federal funds. *Pet. App.* 26a-28a.

In sum, "allowing a state's officials to be called before a federal court by one of the state's own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states." *Pet. App.* 29a. Thus, "expanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." *Pet. App.* 29a (citation omitted).

5. VOPA sought rehearing *en banc* and the court of appeals denied the request. *Pet. App.* 47a-48a. The Petition followed.

REASONS FOR DENYING THE PETITION

This Court should deny review for three reasons.

First, there is no conflict among the lower courts. There is no conflict among the circuits on the narrow issue of whether a state agency may invoke *Ex parte Young* against state officials of the same State. Additionally, the refusal of other circuits to apply *Coeur d'Alene Tribe* in other circumstances does not create a conflict with the Fourth Circuit's application of the *Coeur d'Alene Tribe* decision in these circumstances. Furthermore, there is no conflict concerning the ability of political subdivisions to invoke *Ex parte Young* against the State that created them.

Second, the Fourth Circuit's decision is fully consistent with this Court's jurisprudence. *Verizon* did not overrule *Coeur d'Alene Tribe*. Dual sovereignty principles preclude the federal courts from deciding disputes between a state agency and state officials of the same State. Moreover, a suit by a state agency against state officials of the same State was "anomalous and unheard of" at the time the Constitution was adopted.

Third, VOPA may enforce its federal law claims in the Virginia courts. The Supreme Court of Virginia's original proceedings are sufficient to decide VOPA's claims. State courts have a duty to vindicate federal rights and are capable of doing so. When a state agency may bring its federal claims in state court, a state agency may not invoke *Ex parte Young* against state officials of the same State.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS.

A. There Is No Conflict Among The Lower Courts Concerning The Ability Of A State Agency To Invoke *Ex parte Young* Against State Officials Of The Same State.

The Fourth Circuit's decision is extraordinarily narrow. The court of appeals held "only that, because VOPA is a state agency, *Ex parte Young* is the improper vehicle for VOPA to gain access to a federal forum." *Pet. App.* 28a. While the reasoning is relevant to similar issues involving political subdivisions, the lower court limited its inquiry to "'whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*,' when *the plaintiff is a state agency*." *Pet. App.* 17a (emphasis added).

On this narrow issue, there is no conflict among the lower courts. At the time the Fourth Circuit rendered its decision, no other court had addressed the issue. *Pet. App.* 14a. While a Seventh Circuit

panel subsequently addressed the issue and reached the same result, a grant of rehearing *en banc* vacated the panel discussion. *See Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548, 553 (7th Cir. 2009), *vacated and rehearing en banc granted*, (7th Cir. Nov. 10, 2009). Nevertheless, because Judge Easterbrook's opinion for the panel endorsed and expanded upon the Fourth Circuit's reasoning, *id.* at 553, it reinforces the correctness of the lower court's decision.[6]

Moreover, the lower court's ultimate result—that a state agency may not obtain injunctive relief against state officials from the same State—is consistent with other Circuits' decisions addressing suits by state agencies against state officials of the same State. The Eleventh Circuit concluded that a state agency lacks standing to obtain injunctive relief against the State in federal court. *United States v. Alabama,* 791 F.2d 1450, 1455-56 (11th Cir. 1986). The Fifth Circuit found that "[a] state agency has no constitutional rights to assert against the state of which it is a part," *Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992), but also concluded that the entity suing was not a state agency. *Id.* at 1182-83.

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[6] Indeed, a vacated Circuit panel opinion of three judges is at least as persuasive as a single circuit judge's concurrence or dissent.

Furthermore, contrary to VOPA's suggestions, *Pet.* 24-25, cases from other Circuits where state protection and advocacy entities have sued state officials of the same State for injunctive relief do not undermine the Fourth Circuit's conclusion. *See Pet. App.* at 15a n.1 (distinguishing cases). Many of those cases involve suits by protection and advocacy entities organized as *private* entities, not as state agencies. *See Missouri Prot. & Advocacy Servs.,* 447 F.3d at 1023; *Center for Legal Advocacy v. Hammons,* 323 F.3d at 1264; *Houstoun,* 228 F.3d at 425 (Alito, J.). Those Circuit cases that did involve suits initiated by a protection and advocacy entity organized as a state agency did not address the sovereign immunity issue. *See Connecticut Office of Prot. & Advocacy for Persons with Disabilities,* 448 F.3d at 121 (Sotomayor, J.); *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.,* 97 F.3d 492 (11th Cir. 1996). *Cf. Protection & Advocacy for Persons with Disabilities v. Armstrong,* 266 F. Supp. 2d 303, 313 (D. Conn. 2003) (permitting a different suit by Connecticut's public protection and advocacy system under *Ex parte Young* without addressing the fact that the plaintiff was a state agency).

B. The Refusal Of Other Circuits To Apply *Coeur d'Alene Tribe* In Other Circumstances Does Not Create A Conflict With The Fourth Circuit's Application Of The *Coeur d'Alene Tribe* In These Circumstances.

Undeniably, the Circuits frequently have refused to give *Coeur d'Alene Tribe* an expansive reading. *See Tarrant Reg'l Water Dist. v. Sevenoaks,* 545 F.3d 906, 912 (10th Cir. 2008); *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2nd Cir. 2005); *Dubuc v. Michigan Bd. of Law Exam'rs*, 342 F.3d 610, 617 (6th Cir. 2003). However, contrary to VOPA's contentions, *Pet.* 19-20, this refusal to apply *Coeur d'Alene Tribe* does not constitute a conflict among the Circuits. Rather, it simply demonstrates that other Circuits view *Coeur d'Alene Tribe* as inapplicable to the unique circumstances of a particular case. Just as the validity of congressional abrogation of sovereign immunity turns on the nature of the claim, *United States v. Georgia*, 546 U.S. 151, 159 (2006), the application of *Coeur d'Alene Tribe* turns on the nature of the claim. When a state agency seeks to invoke *Ex parte Young* against officials from the same State, then *Coeur d'Alene Tribe* applies.

Significantly, none of the decisions cited by VOPA or its amici involved a situation where a state agency was seeking to invoke *Ex parte Young* against state officials from the same State. A refusal to apply *Coeur d'Alene Tribe* in other circumstances does not mean

that those Circuits would refuse to apply *Coeur d'Alene Tribe* in *these* circumstances. To the contrary, when confronted with a virtually identical situation, a Seventh Circuit panel relied on the Fourth Circuit's reasoning and reached the same result. *Indiana Prot. & Advocacy Servs.*, 573 F.3d at 553 (vacated panel opinion).

C. There Is No Conflict Concerning The Ability Of Political Subdivisions To Invoke *Ex parte Young* Against Officials Of The Same State.

Apparently recognizing that there is no conflict on the narrow issue actually decided by the Fourth Circuit, VOPA claims there is a conflict among the Circuits on the ability of political subdivisions—such as counties, cities, school boards, and special districts—to invoke *Ex parte Young* against state officials from the States that created them. *Pet.* 21-24. VOPA exaggerates both the existence of the split and the holdings of the cases that purportedly create the split.

If there was any ambiguity on this issue, it was resolved last Term by *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1100 (2009). In *Ysursa*, public employee unions challenged the ability of the State to restrict the speech of some of its political subdivisions—the local school districts. In holding that the State could restrict the speech of school districts, this Court declared:

> A private corporation is subject to the government's legal authority to regulate its conduct. A political subdivision, on the other hand, is a subordinate unit of government created by the State to carry out delegated governmental functions. A private corporation enjoys constitutional protections, but a political subdivision, "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Id. at 1101 (citations omitted). *Ysursa* simply reaffirms the constitutional rule announced in the early decades of the twentieth century. *See Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40 (1933); *Trenton v. New Jersey,* 262 U.S. 182, 185 (1923); *Stewart v. City of Kansas City,* 239 U.S. 14, 16 (1915); *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178-79 (1907). Constitutional law has changed dramatically in the last seventy-five years, but the one rule remains the same—absent an explicit state statute, political subdivisions may not invoke *Ex parte Young* against state officials of the same State.

While VOPA cites several Circuit cases allowing political subdivisions to bring federal law claims against the state officials of the same State, a careful reading of those decisions reveals that the decisions turned—at least in part—on state law considerations. *See Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 629 (10th Cir. 1998) (noting substantial independence of Colorado school districts); *Allegheny County*

Sanitary Auth. v. United States E.P.A., 732 F.2d 1167, 1173 n.3 (3rd Cir. 1984) (interpreting Pennsylvania statute as allowing political subdivision "to sue the state and federal defendants named in this suit"); *Rogers v. Brockette,* 588 F.2d 1057, 1065 (5th Cir. 1979) (Texas law allows local school boards "to attack the state agency's decisions in court."). To the extent that these decisions turn on an interpretation of the relevant state law, they are fully consistent with *Ysursa*. A State may authorize its political subdivisions to sue the State. Conversely, in as much as these decisions may be interpreted as establishing a categorical right of political subdivisions to bring federal law claims against state officials of the same State, *Ysursa* repudiates the reasoning. State law determines a political subdivision's rights against the State that created it. *Ysursa*, 129 S. Ct. at 1101.

II. THE FOURTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

The Fourth Circuit's decision is fully consistent with this Court's jurisprudence. This "Court has never used *Ex parte Young* to let one arm of a state sue another." *Indiana Prot. & Advocacy Servs.,* 573 F.3d at 553 (vacated panel opinion).

A. *Verizon* Did Not Overrule *Coeur d'Alene Tribe.*

Although this Court has declared that *Ex parte Young* applies whenever the complaint alleges an ongoing violation of federal laws and seeks prospective relief, *Verizon,* 535 U.S. at 645, this Court's decisions suggest the inquiry "is hardly so simple." *Pet. App.* 14a. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Coeur d'Alene Tribe*, this Court refused to apply *Ex parte Young* to situations where there was an allegation of an ongoing violation of federal law and request for injunctive relief. *Coeur d'Alene Tribe*, 521 U.S. at 269-70, 281-88; *Seminole Tribe*, 517 U.S. at 74-76. *Verizon* did not purport to overrule *Seminole Tribe* or *Coeur d'Alene Tribe*.[7] To the contrary, this Court analyzed whether the *Seminole Tribe* limitations were applicable. *Verizon,* 535 U.S. at 647-48.

Rather than the simplistic straightforward inquiry of *Verizon*, "our *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal

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[7] VOPA suggests that *Alden* casts doubt on the continued vitality of *Coeur d'Alene Tribe. Pet.* 20-21. Regardless of what *Alden* suggests about *Coeur d'Alene Tribe, Alden* clearly supports the Fourth Circuit's decision. *Pet. App.* 15a, 18a-21a. In any event, this Court will not overrule *Coeur d'Alene Tribe* by implication. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

law." *Verizon*, 535 U.S. at 649 (Kennedy, J., concurring). As this Court explained:

> To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed . . . in *Seminole Tribe* that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction . . . Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Coeur d'Alene Tribe, 521 U.S. at 270 (opinion of the Court) (citations omitted). Instead of the "empty formalism" implied by *Verizon*, this Court "must examine the effect of the . . . suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." *Coeur d'Alene Tribe*, 521 U.S. at 281 (opinion of the Court).

B. Dual Sovereignty Principles Preclude The Federal Courts From Deciding Disputes Between A State Agency And State Officials Of The Same State.

Applying the special sovereignty interests test of *Coeur d'Alene Tribe*, federal courts may not resolve

disputes between a state agency and state officials. *Cf. Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849) (This Court would not decide which group of state officials was the legitimate government of Rhode Island). Whenever "different state actors have taken contrary positions in this litigation, federalism concerns are elevated." *Horne v. Flores*, 129 S. Ct. 2579, 2596 (2009). No branch of the National Government may "assert . . . authority over a State's most fundamental political processes." *Alden,* 527 U.S. at 751. Just as the principles of dual sovereignty are violated "when a federal court instructs state officials on how to conform their conduct to state law," *Pennhurst,* 465 U.S. at 106, they are violated when a federal court resolves "an intramural contest" between "a state's warring factions." *Reinhard*, 405 F.3d at 191 (Wilson, J., concurring). To say otherwise would mean that the National Government—through the federal judiciary—could "turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will. . . ." *Alden,* 527 U.S. at 749. "Such plenary federal control of state governmental processes" would "denigrate[ ] . . . the separate sovereignty of the States." *Id.* "It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on one hand, and its officials and administrative agencies on the other. This is of vital concern to States." *Coeur d'Alene Tribe*, 521 U.S. at 276 (Kennedy, J., joined by Rehnquist, C.J., announcing the judgment of the Court).

Contrary to contentions of VOPA's amici, *New Jersey Public Advocate Br.* 14-19, refusing to allow a state agency to sue State officials of the same State in federal court does not undermine the principle "that States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). In the protection of its quasi-sovereign interests, Virginia may sue private parties, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), or the United States, *Massachusetts*, 549 U.S. at 520. Moreover, because the "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government," *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002), Virginia may sue *another* State. *See, e.g.*, *Virginia v. Maryland*, 540 U.S. 56 (2003). Yet, this is not a suit where Virginia is asserting its quasi-sovereign interests against a private party, the United States, or another state; it is a suit where one state agency is suing state officials over the meaning of federal law. It is not *Virginia v. Private Party,* or *Virginia v. United States* or *Virginia v. Maryland*, it is *Virginia v. Virginia*. *See Indiana Prot. & Advocacy Servs.*, 573 F.3d at 551 ("This suit might as well be captioned 'Indiana v. Indiana.'"). By refusing to hear this case, the Fourth Circuit did not diminish Virginia's sovereignty, it enhanced it.

This Court has never held explicitly that a state agency may not invoke *Ex parte Young* against state

officials of the same State, but it has held that a state-created governmental entity "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysursa*, 129 S. Ct. at 1101 (quoting *Williams,* 289 U.S. at 40).[8] Since a state-created governmental entity has no constitutional claims against the State that created it, then logically a state-created governmental entity may not invoke *Ex parte Young* against state officials of the same State. State law determines the powers of state-created governmental entities, regardless of whether such entities are "independent" state agencies or the various types of political subdivisions.

Of course, there have been instances when this Court has heard disputes between two state agencies or between two state officials. *See Horne*, 129 S. Ct. at 2590-91; *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1441 (2009); *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 459 n.1 (1967). However, none of those cases involved a state agency invoking *Ex parte Young* against state officials of the same State in federal court. *Horne* involved a situation where private plaintiffs had obtained injunctive relief in federal court against state

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[8] While there are important legal and constitutional distinctions between political subdivisions and state agencies, those distinctions are not relevant to the issue of whether a state agency may invoke *Ex parte Young* against officials of the same State.

officials. Years later, one of those defendant officials wished to obtain relief from the federal court order, but the private plaintiffs and other defendant state officials opposed his efforts. *Horne*, 129 S. Ct. at 2590-91. A dispute among defendant state officials in a case initiated by a private plaintiff is fundamentally different from a case initiated by one state agency against state officials from another agency. In both *Office of Hawaiian Affairs* and *Lassen*, this Court was reviewing federal law decisions of a state supreme court. *Office of Hawaiian Affairs*, 129 S. Ct. at 1442; *Lassen*, 385 U.S. at 459. A State or state agency asking this Court to review a federal law decision of a state supreme court is fundamentally different from a state agency suing state officials in federal court. This Court has the authority to review decisions by state courts on matters of federal law without regard to sovereign immunity. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 30-31 (1990).

C. A Suit By A State Agency Against State Officials Of The Same State Was "Anomalous and Unheard Of" At The Time The Constitution Was Adopted.

There is a presumption "that the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Maritime Comm'n*, 535 U.S. at 755 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). At the time of the

Framing, English common law allowed *private* parties to obtain injunctive relief against royal officials who were violating the law. *See generally* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 10-19 (1963) (discussing English common law's treatment of suits against officers). "Without officer liability, sovereign immunity would have left governments totally unchecked—a design that would have been unbecoming of the young Republic." Sina Kian, Note, *Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans v. Louisiana and Ex parte Young*, 61 STAN. L. REV. 1233, 1247 (2009). Given "the common law pleading system and the relevant doctrines that complemented its role in sovereign immunity," *Ex parte Young* is "predictable." *Id.* at 1235. Thus, *Ex parte Young* is fully consistent with the experiences of those who adopted our National Charter, but "an action by a state agency against state officials in federal court, by contrast, has no similar historical pedigree, and it would be a more obvious affront to a state's sovereign interests." *Pet. App.* 18a.[9]

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[9] VOPA cites Professor Jaffe's article for the proposition that there is historical basis for the claim that local government entities could sue officers. *Pet.* 31. However, Professor Jaffe's discussion of suits by local government entities involved English cases from the *late nineteenth century*. Jaffe, *supra*, at 17-18. The English experience concerning suits by local governmental entities in the late nineteenth century is irrelevant to the

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III. VOPA MAY ENFORCE ITS FEDERAL LAW CLAIMS IN THE VIRGINIA COURTS.

VOPA's inability to invoke *Ex parte Young* does not mean that VOPA has no forum to pursue its claims. Because sovereign immunity does not apply to claims based on the self-executing provisions of the Virginia Constitution, *Gray v. Virginia Sec'y of Transp.*, 662 S.E.2d 66, 71-73 (Va. 2008), VOPA may bring an original action for a writ of mandamus in the Supreme Court of Virginia.[10] *See* Va. Const. art. VI, § 1 (conferring original jurisdiction on the Supreme Court of Virginia to hear writs of mandamus). If VOPA sued the Virginia Officials in state court and if the resolution of VOPA's claims turned on federal law, this Court could review the Supreme Court of Virginia's federal law decision. *Office of Hawaiian Affairs*, 129 S. Ct. at 1442-43.

Although the Virginia "Officials concede, and VOPA does not dispute, that VOPA may bring this suit in state court and obtain the same relief that it seeks" in federal court, *Pet. App.* 25a, VOPA nevertheless insists that it must be able to sue in federal court. *Pet.* 26-29. VOPA is wrong for three

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question of whether the Framers expected state agencies to sue officials of the same State in federal court.

[10] VOPA is not able to bring this action in a state trial court of general jurisdiction. While Virginia's trial courts of general jurisdiction may issue writs of mandamus against local officials, *Virginia Code* § 17.1-513, they lack the authority to issue writs of mandamus against state officials.

reasons. First, the Supreme Court of Virginia's original proceedings are sufficient to decide VOPA's claims. Second, state courts have a duty to vindicate federal rights and are capable of doing so. Third, when a state agency may bring its federal claims in state court, a state agency may not invoke *Ex parte Young* against state officials of the same State.

A. The Supreme Court Of Virginia's Original Proceedings Are Sufficient To Decide VOPA's Claims.

VOPA's argument misunderstands the original action for a writ of mandamus in the Supreme Court of Virginia. For example, VOPA claims that a writ of mandamus is contingent on judicial discretion. *Pet.* 26. Yet, as the Supreme Court of Virginia made clear, when "the right involved and the duty sought to be enforced are clear and certain and [when] there is no other available specific and adequate remedy, the writ will issue." *Gannon v. State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992). Thus, if federal law actually requires the Virginia Officials to produce the documents, the Supreme Court of Virginia will issue the writ. Similarly, VOPA asserts, "there appears to be no mechanism for fact finding in an original proceeding." *Pet.* 27. In reality, the Supreme Court of Virginia's rules provide for the taking of evidence in original jurisdiction proceedings. *See* Va. S. Ct. R. 5.7(b), (e). Although VOPA's claims are entirely legal and involve no facts, the Supreme Court of Virginia could resolve evidentiary disputes.

B. State Courts Are Equal To Federal Courts In Vindicating Federal Rights.

Second, to the extent that VOPA and its amici are suggesting that federal courts are superior to state courts in resolving federal law claims, the argument has no merit. "[S]tate courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials. . . ." *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009). "[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). "[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt,* 493 U.S. 455, 458-59 (1990). Indeed, VOPA, while suing on behalf of others rather than itself, has asked the Virginia courts to enforce federal rights. *See Winborne v. Virginia Lottery*, 677 S.E.2d 304 (Va. 2009) (deciding whether the Virginia Lottery, a state agency, is violating the Americans with Disabilities Act).

While VOPA and its amici might view federal courts as more convenient, the purpose of dual sovereignty is not "administrative convenience," but the protection of our "fundamental liberties." *Federal Maritime Comm'n,* 535 U.S. at 769. As the abstention doctrines demonstrate, federalism concerns frequently lead to delay and inconvenience. *See* 20 Charles Allan Wright & Mary Kay Kane, FEDERAL PRACTICE &

PROCEDURE: FEDERAL PRACTICE DESKBOOK § 54 (2002) (discussing the costs of the abstention doctrines).

C. When A State Agency May Bring Its Federal Claims in State Court, A State Agency May Not Invoke *Ex parte Young* Against State Officials Of The Same State.

Because there is an adequate state forum for VOPA's claims, there is no reason to allow a Virginia state agency to invoke *Ex parte Young* against officials of the same State. *See Coeur d'Alene Tribe*, 521 U.S. at 270-80 (Kennedy, J., joined by Rehnquist, C.J., announcing the judgment of the Court) (suggesting that *Ex parte Young* is unavailable when the state courts provide an adequate forum for resolution of the claims). "Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105 (citations omitted). "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Id.* at 99 (emphasis in original). Forcing a state agency to pursue its claims against state officials in state court allows the

vindication of federal rights, but also respects the sovereignty of the State.

CONCLUSION

For the reasons stated above, this Court should **DENY** the Petition for Certiorari.

Respectfully submitted,

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