No. 09-

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
BY ITS 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.

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

PETITION FOR A WRIT OF CERTIORARI

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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*.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Virginia, by its Office for Protection and Advocacy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit (App., *infra*, 1a-29a) is reported at 568 F.3d 110. The decision of the district court (App., *infra*, 30a-46a) is unreported.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on June 2, 2009. Petitioner timely filed a petition for rehearing and rehearing en banc. The Fourth Circuit denied the petition on July 30, 2009.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The relevant portions of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.*, and the Virginia statutes are set forth at App., *infra,* 49a-81a.

INTRODUCTION

This case involves the ability of federal courts to assure prospective compliance with federal statutes designed to protect individuals with disabilities and mental illness from abuse and neglect.

Two federal statutes provide federal funding to States to establish entities—either independent state agencies or private non-profit corporations—that possess various powers intended to detect abuse and neglect, including the right of access to certain medical records. Virginia elected to participate in these federal programs and designated petitioner, an independent state agency, to serve as its Protection and Advocacy System.

In this lawsuit, petitioner is seeking records relevant to its investigation into the deaths of two individuals and injuries to a third that occurred while the individuals were residents of state-run institutions. Petitioner alleged that the respondent state officials are denying it access to the records in violation of federal law and sought prospective relief.

The court of appeals held that this suit was barred by the Eleventh Amendment, and did not fall

within the *Ex parte Young* doctrine, simply because the plaintiff was a state agency. In doing so, the court below created or enlarged several splits in the circuits and has drawn into question the availability of adequate federal remedies for petitioner and a host of similarly situated entities seeking to enforce federal law. The court of appeals' rationale is not based on the history or purpose of *Ex parte Young* and, in fact, disregards that doctrine's core function of making a federal forum available to assure that state officials comply with the Supremacy Clause. The United States as amicus urged the court below to grant rehearing en banc to reverse the decision because of its legal errors and adverse effect on effectiveness of the federal programs, but the court of appeals disregarded the views of the United States.

STATEMENT OF THE CASE

A. Statutory Framework

1. ***Federal Statutes.*** In response to public reports of deplorable conditions at a New York state institution for persons with mental retardation in the 1970s, Congress enacted legislation creating a federal grant program that paid States to establish Protection and Advocacy Systems that would be dedicated to protecting individuals with disabilities from abuse and neglect. *See* Developmental Disabilities Assistance and Bill of Rights Act (DD Act), Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 *et seq.*); S. Rep. No.

93-1297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6408-6409.

In the 1980s, Congress enacted a similar statute to fund Protection and Advocacy Systems focused on protecting individuals with mental illness. *See* Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 *et seq.*). In express statutory findings, Congress determined that "individuals with mental illness are vulnerable to abuse and serious injury" and that existing "State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801(a)(1), (a)(4). Congress made clear that it intended the federal funds to assist States in establishing Protection and Advocacy Systems that could engage in "activities to ensure the enforcement of the Constitution and Federal and State statutes." *Id.* § 10801(b)(2)(A).

Every State accepts federal funds under these statutes and each State has established a Protection and Advocacy System.

Congress intended that a Protection and Advocacy System be independent of the State, but Congress gave States flexibility as to how to achieve that goal. Under both federal statutes, to ensure that Protection and Advocacy Systems are effective in investigating abuse or neglect in state-run (as well as private) treatment facilities, Congress provided that

the Systems "shall * * * be independent of" any state agencies that provide treatment. *Id.* §§ 15043(a)(2)(G), 10805(a)(2). While a State is free to establish a Protection and Advocacy System either as a "private non-profit entity" or as a state entity, *id.* §§ 15044(a), 10805(c)(1)(B), in either situation, the Governor may appoint no more than one-third of any governing board of a System. *Id.* § 15044(a)(2). Virginia and seven other States have established independent state agencies,[1] while the remaining forty-two States have opted for not-for-profit corporations.

Once a State establishes a System as either a private non-profit or state entity, it cannot change the nature of the System from private to public (or vice versa) absent "good cause," *id.* § 15043(a)(4)(A), and any such change can be reviewed initially by the federal government at the request of the System, *id.* § 15043(a)(4)(D), and then a federal court, *see Office of the Governor v. Department of Health & Human Servs.*, 997 F.2d 1290, 1292 (9th Cir. 1993).

Congress provided additional federal protections for, and oversight of, Protection and Advocacy Systems. States are prohibited from imposing "hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent

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[1] *See* Conn. Gen. Stat. § 46a-7 *et seq.*; Ind. Code § 12-28-1-1 *et seq.*; Ky. Rev. Stat. Ann. § 31.010 *et seq.*; N.Y. Mental Hyg. Law § 45.01 *et seq.*; N.D. Cent. Code § 25-01.03-01 *et seq.*; Ohio Rev. Code § 5123.60 *et seq*. Alabama's system is established by unpublished Governor's directive.

that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system." 42 U.S.C. § 15043(a)(2)(K). Protection and Advocacy Systems are subject to federal onsite review, *id.* § 15044(d), and are required to submit annual reports to the federal government, *id.* §§ 10805(a)(7), 15044(e).

In addition to authorizing advocacy on behalf of individuals, both statutes anticipate a separate protection role for the system by expressly providing that a Protection and Advocacy System, "shall * * * have access" to patient records and treatment facilities, *id.* §§ 15043(a)(2)(I), (c), 10805(a)(3), (4), and shall have authority to pursue "administrative, legal, and other appropriate remedies" to ensure the protection of individuals with disabilities or mental illness who are receiving care or treatment in the State, *id.* §§ 15043(a)(2)(A)(i), 10805(a)(1)(B). This federal right to access records is *not* contingent on state law. To the contrary, since 1988, the System has been entitled to records even if "the laws of a State prohibit an eligible system from obtaining access to the records." *Id.* § 10806(b)(2)(C); *see also id.* § 10806(a) (providing that System may disclose certain records required to be maintained as confidential under state law).

2. *Virginia Law.* Virginia established petitioner VOPA in 2002 as an "independent state

agency." Va. Code § 51.5-39.2A.[2] That independence is reflected in several provisions.

First, VOPA's governing board consists of eleven "nonlegislative citizen members," only three of whom are appointed by the Governor. Va. Code § 51.5-39.2B. The remaining eight members are appointed by the legislative branch (five by the Speaker of the House of Delegates and three by the Senate Committee on Rules). *Ibid.* VOPA itself nominates board members and, although the appointing authorities are not limited to these nominees, they "shall seriously consider the persons nominated and appoint such persons whenever feasible." *Ibid.* Members of the board serve for fixed terms and may be removed only through a judicial proceeding and only for good cause. *See id.* § 51.5-39.2F (incorporating § 24.2-230 *et seq.*).

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[2] VOPA is listed in the category of "Independent Agencies," which "do not operate in the Executive, Judicial, or Legislative Branches of Virginia." http://www.virginia.gov/cmsportal3/government_4096/branches_of_state_government_4097. VOPA's predecessor agency was the Department for Rights of Virginians with Disabilities, for which the Virginia Secretary of Health and Human Services was responsible. Va. Code §§ 2.1-51.15 (as amended), 51.5-36 through 51.5-39 (repealed). In carrying out this redesignation process, the Governor was required to, and did, "submit an assurance to the Assistant Secretary [of the Department of Health and Human Services] that the newly designated Protection and Advocacy agency meets the requirements of the statute and the regulations." 45 C.F.R. § 1386.20; 2002 Va. Acts c. 572, cl. 4.

Second, "[n]otwithstanding any other provision of law," petitioner is "independent of the Office of the Attorney General," which is run by an elected official. Va. Code § 51.5-39.2A. VOPA possesses the authority "to employ and contract with legal counsel * * * to initiate actions on behalf of [VOPA] * * * in any matter, including state, federal and administrative proceedings." *Ibid.* VOPA is virtually unique among Virginia state agencies in its authority to retain its own legal counsel without permission from the Attorney General. *See* Va. Code § 2.2-510.

Third, VOPA's finances are independent. VOPA's Board administers "a special nonreverting fund to be known as the Protection and Advocacy Fund," Va. Code § 51.5-39.5B. "Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the [State's] general fund but shall remain in the Fund." *Ibid.* VOPA may "apply for and accept, gifts, donations, grants, and bequests * * * from the United States government * * * and from any other source and [may] deposit all moneys received in the Protection and Advocacy Fund." *Ibid.* To these ends, VOPA "shall have the power to comply with such conditions and execute such agreements as may be necessary, convenient or desirable." *Ibid.* The State, by contrast, may not reduce the funds it dedicates to VOPA based on the presence of federal funds. 42 U.S.C. § 15043(a)(2)(M).

VOPA is authorized to "access records of facilities [and] institutions * * * that provide care or treatment to individuals with disabilities regarding the

commitment, care, treatment, and habilitation of such individuals, unless the disclosure of such records is specifically prohibited by federal law." Va. Code § 51.5-39.4(4). The state law provides, however, that "there shall be no right of access to privileged communications pursuant to § 8.01-581.17," involving certain medical reports generated by peer review committees. *Ibid.* VOPA is further authorized to "initiate any proceedings to secure the rights" of persons with disabilities. *Id.* § 51.5-39.2(A).

B. Factual Background

This case arises from petitioner VOPA's attempt to investigate the deaths of two individuals and injuries to a third, that occurred while the individuals were residents of institutions operated by the Commonwealth of Virginia. The facts discussed below are drawn from petitioner's complaint and its motion for a preliminary injunction.

Resident A. The first of these individuals, "Resident A," suffered from mental illness and retardation and died while a resident of Central Virginia Training Center (CVTC), which respondent Micheletti runs under the supervision of respondent Reinhard, as Commissioner of the Department of Behavioral Health and Developmental Services.

Resident A had a decades-long history at CVTC of ingesting non-edible items. After exhibiting symptoms of bowel obstruction, Resident A was transported to a community hospital for surgical removal

of two latex gloves from his intestines. Resident A died eight days after the surgery.

VOPA initiated an investigation to determine whether Resident A's death resulted from abuse or neglect. As part of this investigation, VOPA repeatedly requested copies of certain reviews conducted by CVTC in conjunction with Resident A's death. CVTC acknowledged VOPA's requests, but failed to provide the reviews.

Resident B. "Resident B," an individual with mental retardation, was assaulted at CVTC by another resident and was observed by CVTC staff covered in blood. A CVTC staff member found multiple pieces of human ear tissue and a large amount of blood on the floor in Resident B's room.

VOPA initiated an investigation to determine whether Resident B's injuries resulted from abuse or neglect. VOPA repeatedly requested copies of certain reviews conducted by CVTC concerning Resident B's injuries, but CVTC refused to provide them.

Resident C. The second death was of an individual with mental illness, "Resident C," who was a patient at Central State Hospital (CSH), which respondent Davis runs under the supervision of respondent Reinhard.

Resident C complained of being unable to breathe when CSH staff attempted to place him in restraints. During this restraint incident, efforts to revive Resident C became necessary, but failed. Resident C

was transported to a community hospital and was pronounced dead.

VOPA initiated an investigation to determine whether the death was the result of abuse or neglect. VOPA repeatedly requested copies of certain reviews conducted by CSH relating to the death of Resident C, but its requests were rebuffed on grounds of peer review privilege.

C. Proceedings Below

1. Petitioner VOPA filed this action against respondent state officials in the United States District Court for the Eastern District of Virginia seeking a preliminary and permanent injunction to provide the requested records and declaratory judgment that respondents were violating federal law in refusing to provide the records.

2. The district court denied respondents' motion to dismiss, which was based on failure to state a claim and Eleventh Amendment immunity. App., *infra*, 30a-46a.

The district court held that petitioner had stated a claim because it alleged that respondents refused to provide records that are required to be provided to petitioner under federal law. App., *infra*, 34a. The court concluded that respondents' reliances on the state law barring the release of records involving peer review privilege (and the question whether it was preempted) was an affirmative defense to the merits

of the complaint that was not appropriate for resolution at that time. *Id.* at 35a.

The district court also rejected respondents' reliance on the Eleventh Amendment. The court first concluded that respondents had not waived their immunity by accepting federal financial assistance under a statute that clearly contemplated litigation between petitioner and other state agencies. App., *infra*, 39a-40a.[3] But the court held that the action could proceed against respondents under *Ex parte Young*.

The court concluded that petitioner met the "predicate for the application of *Ex parte Young*," in that it sued "officials in their official capacities," and not the state entities themselves. *Id.* at 40a. Further, the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 41a (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). This was because respondents "continue to refuse to provide records" as required by federal law and petitioner sought "an injunction that [respondents] prospectively release the records." *Id.* at 41a-42a.

The district court rejected the claim that the action presented "special sovereignty interests" that "trump[ed]" *Ex parte Young*. *Id.* at 43a. The court

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[3] The court of appeals affirmed that holding, App., *infra*, 10a-13a, and petitioner does not seek further review of it.

held that there was "no decision which supports" respondents' "broad rule" that the Eleventh Amendment requires a federal court to "refrain from deciding any cases brought by a state agency against another state agency." *Id.* at 45a.

Instead, the court reasoned, it is "the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests." *Id.* at 45a. This case does not concern disputes between a State and a political subdivision regarding "internal budgetary arrangements" that, the district court noted, had been an area in which the federal courts had avoided involvement. *Id.* at 43a. Adjudicating this alleged violation of federal law "does not interfere with the prerogative of the State." *Id.* at 44a.

3. Respondents filed an interlocutory appeal to challenge the denial of Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The court of appeals reversed and remanded with instructions to dismiss the action. App., *infra*, 1a-29a.

The court of appeals held that despite its "superficial appeal," *Ex parte Young* was not available because petitioner was a state agency. *Id.* at 14a. The court of appeals relied on (1) the absence of any historical evidence that such suits had been previously permitted, *id.* at 14a-16a; (2) "sovereign interests and federalism concerns" as reflected in

cases such as *Coeur d'Alene*, *Alden v. Maine*, and *Pennhurst*, *id.* at 16a-20a; and (3) Supreme Court cases refusing to give relief to political subdivisions that sued States for alleged constitutional violations, *id.* at 21a-24a.

4. Petitioner filed a petition for rehearing en banc. The United States filed an amicus brief in support of that petition. App., *infra*, at 82a-98a. The court of appeals denied rehearing en banc. *Id.* at 47a-48a.

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' PER SE RULE EXCLUDING A CLASS OF PLAINTIFFS FROM INVOKING *EX PARTE YOUNG* DEPRIVES THOSE PLAINTIFFS OF NEEDED REMEDIES, CREATES A SPLIT IN THE CIRCUITS, AND IS CONTRARY TO THE SUPREMACY CLAUSE INTERESTS UNDERLYING *EX PARTE YOUNG*

In *Ex parte Young*, 209 U.S. 123 (1908), this Court held that the Eleventh Amendment did not bar a suit in federal court for injunctive relief claiming that a state official violated federal law. The doctrine of *Ex parte Young* encapsulated a century's worth of American jurisprudence and reflected an English tradition extending back many centuries more. Given the breadth and depth of the state sovereignty principle within our federalist system, the doctrine of *Ex parte Young* was "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 *Ex parte Young*, 209 U.S. at 160).

The Fourth Circuit has adopted a per se rule that, because petitioner is a state agency, the Eleventh Amendment allows only a state court to adjudicate whether petitioner's federal statutory rights were violated by state officials. This is so even though (1) petitioner stated a claim that respondents' policy of refusing to provide certain documents was preempted by federal law, by force of the Supremacy Clause, App., *infra*, 6a; Resp. C.A. Opening Br. 8 nn.9 & 10; (2) Congress granted jurisdiction to the federal district courts to hear all questions arising under federal law, including such Supremacy Clause claims, 28 U.S.C. § 1331; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); Resp. C.A. Opening Br. 3; and (3) petitioner's claim falls squarely within the accepted scope of *Ex parte Young*, in that it seeks declaratory and injunctive relief to remedy an ongoing violation of federal law.

Indeed, respondents admitted, and the court below agreed, that if the party that brought this suit had been chartered by the State as a corporation, there would be no Eleventh Amendment bar to this suit being heard in federal court. App., *infra*, 16a-17a; Resp. C.A. Opening Br. 26 ("If VOPA were a non-profit entity rather than a state entity, there would be no sovereign immunity issue.").

The Fourth Circuit erred in holding that petitioner's status as a state agency forecloses this

Ex parte Young suit. It blended an amalgam of inapposite doctrines and placed them, incorrectly, under the aegis of the Eleventh Amendment. In fact, there is nothing in the text, history, or purpose of the Eleventh Amendment that bars this suit.

In holding otherwise, the Fourth Circuit has undermined an important remedial mechanism to vindicate federal law that Congress intended to be available to petitioner and many other independent state agencies that advocate on behalf of classes of persons unable to advocate for themselves, has created a split with other courts of appeals about the method for determining when *Ex parte Young* is appropriately invoked, and has disregarded the Supremacy Clause interest underlying that doctrine. As the United States explained below, the court of appeals' decision "threatens to undermine the enforcement of federal laws designed to protect the health and safety of individuals with developmental disabilities or mental illness." App., *infra*, 89a.

A. The Court Of Appeals' Decision Creates A Split Regarding *Ex parte Young* And Does So In Reliance On One Side Of A Long-standing Split Regarding When A State-Created Entity May Sue Its Creator

The Eleventh Amendment provides no basis for a federal court to refuse to hear this case. By holding that the Eleventh Amendment requires this case involving a federal claim against state officials to be heard only in state court, the court below creates an

inter-circuit split, exacerbates another existing conflict, and departs from a consistent practice of federal courts hearing suits brought by state entity Protection and Advocacy Systems.

1. The Fourth Circuit's reliance on Coeur d'Alene *to determine whether the Eleventh Amendment bars this action brings it into conflict with every other circuit*

a. By looking to the characteristics of the plaintiff, rather than the nature of the defendant and the relief sought, the Fourth Circuit brought itself into conflict with the way all other courts have determined when an action against state officials is barred by the Eleventh Amendment.

The Fourth Circuit created a conflict by relying on the "special sovereignty interests" analysis of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to hold that the Eleventh Amendment barred this action. Other courts of appeals have consistently refused to rely on an interest analysis in determining whether to hear an *Ex parte Young* action, and have confined *Coeur d'Alene* to actions brought against state officials to challenge state regulatory jurisdiction over real property.

In *Coeur d'Alene*, five Justices, in opinions reflecting two different rationales, held that, under the "particular and special circumstances" of that case, *Ex parte Young* was not available when "the declaratory and injunctive relief the [Indian] Tribe

seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." 521 U.S. at 287, 282. The lead opinion, authored by Justice Kennedy but joined in whole only by Chief Justice Rehnquist, would have applied a "careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," including consideration of whether there was a "prompt and effective remedy in a state forum." *Id.* at 278, 274. A concurring opinion authored by Justice O'Connor, and joined by Justices Scalia and Thomas, rejected that approach, *id.* at 291-296, as did the dissenting opinion of four Justices.

After *Coeur d'Alene*, this Court rejected the balancing approach urged by the plurality in that case. In *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), the Court held that *Ex parte Young* required only a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)). *Verizon* reversed a Fourth Circuit decision which held that the Eleventh Amendment barred an *Ex parte Young* action against state officials because "of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State

officials." *Bell Atlantic Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 295 (4th Cir. 2001).

Particularly in light of this Court's decision in *Verizon*, all the other courts of appeals to have reached the question have uniformly read *Coeur d'Alene* to hold *only* that a remedy that would divest a State of title to, or regulatory jurisdiction over, real property is equivalent to a forbidden monetary remedy and thus beyond the scope of *Ex parte Young*. Outside that narrow compass, courts of appeals have refused to apply the "special sovereignty interest" exception of *Coeur d'Alene* to bar any other type of suit. *See, e.g.*, *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008) ("we cannot extend *Coeur d'Alene* beyond its 'particular and special circumstances,' which involved the protection of a State's land") (citation omitted); *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005) (limiting *Coeur d'Alene* to cases where "strong governmental land interests" are present); *Dubuc v. Michigan Bd. of Law Exam'rs*, 342 F.3d 610, 617 (6th Cir. 2003) ("Googasian's and Berry's reliance on *Coeur d'Alene* is unavailing because the present lawsuit is not the functional equivalent of a quiet title action that implicates a state's sovereign interest in its lands or waters.").

The Tenth Circuit had, for a time, taken a broader view of *Coeur d'Alene*. But, after *Verizon*, the Tenth Circuit acknowledged that it had previously "misconstrued" *Coeur d'Alene* to require "federal courts [to] examine whether the relief sought against

a state official implicates special sovereignty interests," and that *Verizon* clarified that "the courts of appeals need not (and should not) linger over the question whether 'special' or other sorts of sovereign interests are at stake" in applying *Ex parte Young*. *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (quoting *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007), *certs. denied*, 128 S. Ct. 873, 884 (2008)) (some internal quotation marks omitted).

b. Further, this Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999), decided two years after *Coeur d'Alene*, suggests that *Coeur d'Alene* may no longer be a proper application of the Eleventh Amendment.

In *Coeur d'Alene*, the plurality opinion reasoned that the Eleventh Amendment barred an *Ex parte Young* suit in federal court because a state court could hear the plaintiffs' federal claims. In *Alden*, however, the Court held, for the first time, that the constitutional protections of state sovereign immunity reflected in the Eleventh Amendment apply to suits claiming violations of federal law brought in state court. The Court held that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum." 527 U.S. at 749.

If, indeed, compelling state courts to adjudicate federal claims against States is *more* constitutionally

offensive than compelling federal courts to hear such suits, then it is not clear why the Eleventh Amendment would favor, as in *Coeur d'Alene* and this case, an *Ex parte Young* action in state court over an *Ex parte Young* action in federal court. Thus, after *Alden*, there appears to be no reason why the rule of *Ex parte Young* should be applied differently in state and federal courts. Certainly, it should not require state courts to be open to federal claims when federal courts are closed.

In any event, there was no state forum in which full relief was available. Here, as discussed below, the one proceeding identified by the court of appeals and respondents—an original action for mandamus in the Virginia Supreme Court—would be inadequate because, *inter alia*, it could not provide any interim or declaratory relief. *See* pages 26-27, *infra*.

2. The Fourth Circuit's decision relies on one side of a circuit split regarding the ability of state-created entities, other than private corporations, to sue the State

The Fourth Circuit relied on a line of century-old cases, none of which involved Eleventh Amendment immunity, for the proposition that suits by political subdivisions against the States that created them are prohibited. App., *infra*, 22a (citing *Williams v. Mayor of Balt.*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Stewart v. City of Kansas City*, 239 U.S. 14 (1915); *Hunter v. City of Pittsburgh*, 207 U.S. 16 (1907)).

In adopting a reading of those case, the Fourth Circuit selected one side of a longstanding split on whether state-created entities, other than private corporations, can sue the State that chartered them for violations of the Constitution or federal law.

Justice White noted almost 30 years ago that the courts of appeals are split on the proper meaning to give those cases. *See City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from the denial of certiorari). The situation has not improved since that time.

1. Some courts of appeals have adopted a per se rule that public entities cannot sue the States that created them for alleged violations of their *constitutional* rights. *See ibid.*[4] Even if the *Williams/Trenton*

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[4] That is so even though this Court has explained that the "correct reading" of those cases is that a "State's authority [was] unrestrained by the particular prohibitions of the Constitution considered in those cases." *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960). Those cases should thus have no relevance to the question of whether a public entity *may* sue a State for violations of the Constitution, as they simply go to the question of whether a public entity will prevail on its claim.

That explanation is consistent with a line of this Court's cases adjudicating constitutional claims brought by public entities against States on the merits and rejecting Eleventh Amendment and lack-of-standing arguments. *See, e.g., Papasan v. Allain,* 478 U.S. 265 (1986) (holding that plaintiffs, including school board superintendent, could rely on *Ex parte Young* to bring federal constitutional claim against state official); *Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968)

(Continued on following page)

line of cases established a prohibition against public entities raising constitutional challenges against the States that created them, such a prohibition should have no bearing on petitioner's suit, which seeks enforcement of a federal statute by an independent state agency.

2. The Ninth Circuit, however, has extended that per se rule and held that public entities cannot sue the States that created them for alleged violations of *federal statutes*. *See, e.g.*, *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000). The Fourth Circuit in this case seems to embrace that proposition.

3. At least three other courts of appeals have reached a conclusion contrary to that of the Ninth Circuit, permitting public entities to sue state officials to enforce federal statutes, as in this case. *See Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167, 1173 nn.3 & 5 (3d Cir. 1984); *Rogers v. Brockette*, 588 F.2d 1057, 1068-1071 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998) (agreeing with *Rogers* that "[n]either the *Williams/Trenton* line of cases nor any other subsequent Supreme Court case has held that a political

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(school board officials have standing to sue state officials); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982) (holding school district was entitled to attorneys' fees for prevailing on federal constitutional claim against state official).

subdivision is barred from asserting the structural protections of the Supremacy Clause of Article VI in a suit against its creating state"), *cert. denied*, 526 U.S. 1068 (1999).

Indeed, in *Allegheny County*, the Third Circuit held that the suit against state officials by a state-created public agency could proceed under *Ex parte Young*, the exact opposite holding of the decision below. "[T]he Eleventh Amendment is not a bar to all prospective relief against the state officials if violations of federal law are established." 732 F.2d at 1174.

3. *The Fourth Circuit's decision is contrary to the practice of other courts that have heard suits brought by state entity Protection and Advocacy Systems*

Until the Fourth Circuit's decision in this case, the federal courts have uniformly adjudicated suits brought by Protection and Advocacy Systems against state officials. As the United States explained, and as respondents do not dispute, "other courts of appeals consistently have allowed suit by [Protection and Advocacy] systems to proceed in federal court without regard to whether the system was a state agency or a private non-profit." App., *infra*, 85a; *see, e.g., Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center*, 97 F.3d 492 (11th Cir. 1996) (state system); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.)

(state system); *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006) (non-profit system).

After the decision in this case, the Seventh Circuit followed the Fourth Circuit in holding that a suit by a state entity Protection and Advocacy System was barred by the Eleventh Amendment. *See Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548, 552-553 (7th Cir. 2009). That holding just deepens the split in the circuits.[5]

B. The Decision Below Deprives Petitioner Of A Critical Means Of Enforcing Its Federal Rights, A Means Also Relied On By Many Other State Agencies And Political Subdivisions

1. The ability to obtain a federal forum, and take advantage of the broad equitable authority of the federal courts, is critical to the mission of petitioner and other state agency Protection and Advocacy Systems. In many of the States where the Protection and Advocacy Systems are state agencies, the federal courts offer numerous structural

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[5] A petition for rehearing is pending in the Seventh Circuit case. But there is no reason to wait to see what the Seventh Circuit does. Even if rehearing is granted and the Seventh Circuit switches sides, the Fourth Circuit's decision will still be contrary to that of numerous other circuits.

advantages that reinforce their ability to vindicate federal rights more effectively.

In general, federal courts have a broader geographic jurisdiction than state trial courts. A Protection and Advocacy System can thus bring a single suit in federal court to resolve a number of violations, each of which could be local, but that could be pursuant to statewide policy or have statewide effect. In state court, a Protection and Advocacy System would have to file multiple suits across the State to get a rule established. For example, in Ohio, each of the 88 counties has its own trial court of general jurisdiction; Alabama has 41 separate circuit courts; even a sparsely populated State like North Dakota has 7 judicial districts.

Further, in some States, state courts are structured to provide procedural advantages to state defendants. Thus, for example, in New York, a state agency obtains an automatic stay of an injunction simply by filing a notice of appeal. *See* N.Y. Civ. Practice Law & R. § 5519(a)(1).

Although the Fourth Circuit held that sovereign immunity would not prevent petitioner from bringing its claim against respondents through an original action for mandamus in the Virginia Supreme Court, App., *infra*, 25a, the court failed to recognize the limitations of that forum. Under Virginia law, the availability of the "extraordinary remedy" of mandamus is contingent on "judicial discretion." *Umstattd v. Centex Homes, G.P.*, 650 S.E.2d 527, 530

(Va. 2007). Further, if there are any fact disputes, there appears to be no mechanism for factfinding in an original proceeding. *See Stroobants v. Fugate*, 163 S.E.2d 192, 194 (Va. 1968). Writs of mandamus also generally do not have the flexibility of equitable remedies. Interim relief is not available. Thus, for example, the order issued by the district court enjoining respondents from destroying or altering the documents sought by petitioner pending resolution of the action, Dt. Ct. Dkt. No. 16, would not be available to the Virginia Supreme Court under its mandamus authority. Nor would the Virginia Supreme Court be able to grant the declaratory judgment sought by petitioner.

2. The Fourth Circuit's holding has implications beyond petitioner and beyond the federal statutes that petitioner enforces. States increasingly rely on independent government agencies charged with the responsibility of monitoring the conduct of other government officials to protect vulnerable citizens and enforce federal rights.

In addition to the Protection and Advocacy Systems that have been established in each State to protect people with disabilities and mental illness, Congress has encouraged States to establish independent agencies to protect other populations, including through litigation.

Thus, Congress has conditioned receipt of certain federal funds on a State's creation of an "Office of the State Long-Term Care Ombudsman" to assist people

residing in nursing homes and other institutions. 42 U.S.C. § 3058g. States must ensure that the Ombudsmen have "adequate legal counsel" to "assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman." *Id.* § 3058g(g)(1)(A). And the Ombudsmen may "seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents." *Id.* § 3058g(g)(2).

Even without federal encouragement, States have in a variety of settings adopted the view that permitting state agencies to litigate against other state agencies is an effective means of assuring that the public interest is served. Thus, many States have created independent agencies that advocate on behalf of consumers in front of state and federal rate-setting agencies. Other States have adopted special agencies that can sue governments to further the interests of children. A decade ago, an American Bar Association report documented that "[m]ore than 25 child welfare ombudsman programs exist in the United States today." American Bar Ass'n, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* 11 (1998), *available at* http://www.ncjrs.gov/pdffiles/164727.pdf. The report concluded that the "most powerful tool of [the ombudsman] is the ability to bring legal action to safeguard the rights of children." *Id.* at 12.

In New Jersey, the State has created an entire department that is intended to ensure through advocacy and litigation that other state and local

agencies do not violate the rights of their citizens. *See* N.J. Stat. Ann. § 52:27EE-59 (authorizing "instituting litigation on behalf of a broad public interest"); *see also id.* § 52:27EE-12 (defining "public interest" to mean "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens").

The Fourth Circuit's per se rule would exclude all these entities from suing state officials in federal court, even though their regulations clearly contemplate adversarial proceedings against a traditionally structured state agency, and even if they were seeking to enforce federal law. The United States thus correctly informed the court below that its decision "compromises vital federal protections for especially vulnerable individuals." App., *infra*, 85a.

C. The Fourth Circuit Disregarded The Federal Courts' Interest In The Supremacy Clause When It Arbitrarily Limited *Ex parte Young*

The Fourth Circuit's holding disregarded the foundations of *Ex parte Young*. In the past century, this Court has linked the *Ex parte Young* doctrine to the Supremacy Clause and the need to provide a federal forum for the vindication of federal rights. "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a

continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). As the United States explained, the court of appeals' decision "overlooks the historical rationale for the *Ex parte Young* doctrine." App., *infra*, 84a.

This Court has identified three aspects of *Ex parte Young* that address the concerns that undergird the Eleventh Amendment, and the principles of state sovereign immunity that it reflects.

First, because the Eleventh Amendment was animated by a desire to protect state treasuries, *Ex parte Young* does not permit retroactive damage awards and permits only prospective equitable relief. *See Edelman v. Jordan*, 415 U.S. 651, 669 (1974).

Second, to protect the dignity of the State, *Ex parte Young* does not permit suits against the State *in eo nomine* and permits only suits against individual state officials. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). This requirement also comports with the common law rationale that a state official who violates federal law exceeds his authority and is no longer shielded by the State's immunity.

Finally, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, it requires an allegation that a federal right has been violated and is not available to address whether state

officials have violated state law. *See Pennhurst*, 465 U.S. at 121.

None of these limits are implicated by this suit. This is a suit for prospective relief against a state official to vindicate federal law. It is the classic *Ex parte Young* suit.

The Fourth Circuit resisted this conclusion by contending that there was no historical analog for such a suit. But, in fact, in England, the legal doctrine that allowed suits against government officials (as opposed to the King *in eo nomine*) had been used by government entities as well as private persons. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 17-18 (1963).

Second, the Fourth Circuit described this suit as "intramural" and thus not appropriate for resolution in federal court. App., *infra*, 17a. But the Fourth Circuit did not explain why it viewed this case brought by an independent state agency as intramural compared to suits brought by private corporations chartered by Virginia. Historically, States granted charters to private and municipal corporations through legislation, and identified precisely the powers and duties of that corporation, and (assuming it reserved the authority to do so, *see Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)), the State was free to amend and revoke those charters at its discretion. *See* Lawrence M. Friedman, *A History of American Law* 190-191,

197-198 (2d ed. 1985). Even today, with the more routinized grant of charters of incorporation through general enabling acts, the State reserves the right to amend the laws governing private corporate charters. *See, e.g.*, Va. Const. art. IX, § 6.

To the extent the Fourth Circuit was suggesting a lack of concrete adversity between the parties, such a concern has never been a question relevant to Eleventh Amendment immunity. In any event, this Court has already held that suits between state agencies can have the requisite level of adversity. *See Lassen v. Arizona ex rel. Arizona Highway Dep't.*, 385 U.S. 458, 460 n.1 (1967) ("This action is in form and substance a controversy between two agencies of the State of Arizona * * *. We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause."); *see also Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009) (adjudicating suit between State and state agency); *Limtiaco v. Camacho*, 549 U.S. 483 (2007) (adjudicating suit between Guam Governor and Guam Attorney General).[6] Those adjudications are

[6] Respondents did not challenge petitioner's standing in the district court or in its appellate briefing, but did advert to the question in a supplemental letter and in their response to the petition for rehearing en banc. There can be no dispute, however, that the elements of Article III standing have been met. The failure to obtain the records to which federal law entitles VOPA is a type of "injury in fact" that this Court has

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consistent with this Court's case law that permits federal agencies to sue one another in those situations in which the President cannot dictate the outcome because one of the agencies is structurally "independent." *See United States v. Nixon*, 418 U.S. 683, 693-697 (1974); *United States v. ICC*, 337 U.S. 426, 460-461 (1949).

In this case, respondent Reinhard is appointed by and serves as the head of a state agency at the pleasure of the Governor, Va. Code §§ 37.2-301, -302, and the other two respondents report to respondent Reinhard. By contrast, as noted above, petitioner is not subject to the control of the Governor—the Governor appoints only a minority of the board that governs petitioner, and members of that board can only be removed for good cause through a judicial proceeding. Further, petitioner's litigation is not subject to the control of Virginia's elected Attorney General. Thus, neither respondents nor any member of the Virginia executive branch can cause VOPA to compromise its federally-established statutory right

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repeatedly recognized, respondents' refusal to provide the records is the cause of that injury, and ordering respondents to provide the records will redress that injury. *See, e.g., Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) ("a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information arguably subject to disclosure under federal law "constitutes a sufficiently distinct injury to provide standing to sue").

to records that are in the hands of respondents or its federally-established statutory duty to protect persons with disabilities and mental illness.

In these ways, petitioner is no differently situated for *Ex parte Young* purposes from any corporation chartered by Virginia seeking to enforce federal law. And, like those corporations, petitioner should be able to enforce its federal claims in federal court against state officials for prospective relief.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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