No. 09-529

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Blank Page

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The court below reached a result contrary to numerous circuits, using reasoning rejected by numerous circuits, in holding that petitioner Virginia Office for Protection and Advocacy cannot seek prospective injunctive relief in federal court against state officials to vindicate federal rights as authorized by *Ex parte Young*, 209 U.S. 123 (1908). That holding undermines petitioner's ability to detect (and thus deter) abuse and neglect of vulnerable populations and threatens to do the same to the other seven State Protection and Advocacy Systems that are constituted in a similar manner.

A. Contrary To Respondents' Claim, The Courts Of Appeals Are Divided On An Issue Of Exceptional Importance That Is Critical To A Comprehensive Federal Statutory Scheme To Prevent Abuse And Neglect In State-Run Institutions

1. The United States asserted below that this case presents an issue of "exceptional importance"

a. Respondents repeatedly characterize the issues in this case as "novel and narrow" (Br. in Opp. 1, 11, 23-24), but as the United States explained in an amicus brief in this very case, "[t]his case presents a question of exceptional importance to the enforcement of federal statutes designed to protect individuals

with disabilities from abuse and neglect." Pet. App. 83a. This view, expressed by the United States in an uninvited amicus brief urging that the Fourth Circuit reconsider the ruling below, plainly demonstrates that the issues present in this case warrant this Court's plenary review.

The same view is expressed by other state agencies as well. *See* Amicus Br. of N.J. Public Advocate 2.

b. Nor should this Court accept respondents' callous suggestion that the issues in this case are nothing more than novel and unimportant legal issues. Br. in Opp. 1, 11.

Far from unimportant, the federal Protection and Advocacy System statutes, which the ruling below seriously undermines, were designed to remedy the "inhumane and despicable conditions" that were frequently found in state-run institutions. *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996); *see also* 42 U.S.C. § 10801(a)(4) (congressional findings that "State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate").

Without the ability to obtain these records, a Protection and Advocacy System cannot fulfill its federal obligation to investigate and protect against abuse and neglect in state-run institutions. It is axiomatic that these agencies cannot remedy conditions of which they are unaware. But, as the

United States explained below, "[u]nder the panel's ruling * * *, a state can accept federal funds under these federal programs yet evade federal court enforcement simply by designating a state agency to serve as its [Protection and Advocacy System]." Pet. App. 85a.

Indeed, this case is indicative of the danger that will ensue if the ruling below is not reviewed and reversed by this Court. Notwithstanding respondents' failure to acknowledge the nature of the underlying dispute, this case involves concrete incidents of suspected abuse, not broad, speculative record requests. Pet. 9-11.

2. *An intolerable, recurring division in the courts of appeals exists over whether a public entity can sue state officials from its own State for violations of federal law in federal court*

Respondents contend that no conflict exists in the courts of appeals as to whether federal courts can adjudicate suits by Protection and Advocacy Systems against state officials. But respondents reach this conclusion only by disregarding the reasoning of the court below and disregarding the results reached by other courts of appeals.

a. The court below based its rationale on the premise that no public state-created entity could sue state officials in federal court for prospective relief under *Ex parte Young*. Respondents themselves agree

that distinctions between political subdivisions and state agencies "are not relevant" to whether the federal-court review authorized by *Ex parte Young* is available. Br. in Opp. 22 n.8.

As the petition demonstrates, the ruling below creates at least a 3-to-2 division in the courts of appeals on this issue. Pet. 23. In response, respondents contend that a "careful reading" of the decisions from the Third, Fifth, and Tenth Circuits demonstrates that those courts permitted *Ex parte Young* claims to go forward because of the independence the relevant State had conferred to the plaintiff public entities. Br. in Opp. 16-17 (citing *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), *cert. denied*, 526 U.S. 1068 (1999); *Allegheny County Sanitary Auth. v. EPA*, 732 F.2d 1167 (3d Cir. 1984); *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979)). That response confirms that those courts have held that a plaintiff's status as a public entity does *not* bar its suit in federal court under *Ex parte Young*. The court of appeals below reached the opposite conclusion and, in doing so, joined the Ninth Circuit. Pet. 23.

Further, to the extent respondents are correct that state law authorization to sue is relevant to the outcome of those cases (Br. in Opp. 16-17), respondents acknowledge that petitioner possesses that state law authority to sue, but contend that the Eleventh Amendment requires the suit to be heard in state court. Br. in Opp. 25. The Third, Fifth and Tenth Circuit have reached the contrary conclusion.

Respondents' reliance (Br. in Opp. 12, 15-16, 22) on *Ysursa v. Pocatello Education Association*, 129 S. Ct. 1093 (2009), and older cases holding that the *Constitution* does not create rights for public entities against their creators, is entirely misplaced. Petitioner is not seeking to enforce constitutional rights. It seeks to enforce a federal statutory right. And respondents do not dispute in this Court that, as the district court held, petitioner *has* a federal statutory right to access certain information in respondents' possession. *See* Br. in Opp. 7 n.5.

Nor do respondents dispute that Congress validly could vest a state agency such as petitioner with such a federal right. Congress did not "turn the State against itself," *Alden v. Maine*, 527 U.S. 706, 749 (1999), by unilaterally vesting in one state agency rights against the remainder of the State. As respondents concede (Br. in Opp. 2-3), the State *chose* to participate in a federal spending program that conditioned the receipt of certain federal funds on the creation of an entity with the right to access records and with the authority to pursue legal remedies. And then, without any federal encouragement, the State *chose* to constitute petitioner as a state agency, as opposed to a private nonprofit corporation. Given these two voluntary decisions by the State, respondents can hardly be heard to complain (Br. in Opp. 20-21) that petitioner has been commandeered by the federal government. *See Alden*, 527 U.S. at 755 (citing with approval *South Dakota v. Dole*, 483 U.S. 203 (1987)).

b. Respondents' apparent speculation that other courts of appeals might reach the same conclusion as the Fourth Circuit is no reason to deny review. Br. in Opp. 13. As the United States recognizes, the decision below already "creates a conflict with decisions of other circuits." Pet. App. 84a. And, as the United States explained, "federal courts have enforced [the federal Protection and Advocacy laws] in suits against state officials, without regard to whether the plaintiff [Protection and Advocacy] system was a public agency or a private non-profit." Pet. App. 91a (citing cases).

Nor is it relevant, as respondents suggest (Br. in Opp. 13), that some decisions have involved private nonprofit Protection and Advocacy Systems and others have involved public Protection and Advocacy Systems where the courts apparently assumed that such public entities could enforce federal law against state officials in federal court. *See, e.g.*, *Alabama Disabilities Advocacy Program*, 97 F.3d at 492 (Eleventh Circuit adjudicating claims of public entity Protection and Advocacy 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.) (public entity Protection and Advocacy System); *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006) (nonprofit Protection and Advocacy System). That does not diminish the fact that, under a comprehensive federal statutory scheme, some courts of appeals permit Protection and Advocacy Systems to

adjudicate their claims in federal court while others do not (and may thus be precluding *any* enforcement of federal law, *see* pp. 11-12 *infra*). Indeed, "[u]ntil now * * * no state ever contended that it could accept federal funds yet evade federal court enforcement by designating a state agency to serve as its [Protection and Advocacy] system." Pet. App. 92a (United States brief).

Finally, the Seventh Circuit's recent decision to address en banc the issue in this case underscores the need for this Court's plenary review. *See Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 573 F.3d 548 (2009), *op. vacated & pet. for reh'g en banc granted* (Nov. 10, 2009). Contrary to respondents' assertion (Br. in Opp. 12), that decision demonstrates that the issues presented here are real and recurring. Moreover, the conflict in the federal courts of appeals will only become more entrenched as a result of the Seventh Circuit's decision, regardless of which side of the division that court of appeals selects.[1]

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[1] Nor is there any reason for this Court to await the Seventh Circuit's decision. That case includes a threshold question (not at issue in this case) regarding the defendants' forfeiture of any claim of Eleventh Amendment immunity by their failure to raise the issue before the district court or before the three-judge panel. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (stating that Eleventh Amendment immunity "bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*").

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c. In any event, to the extent there is any question as to the adverse significance of the ruling below on the federal Protection and Advocacy System or as to the existence of a longstanding division in the federal courts of appeals over the ability of public entities to bring suits to enforce federal law in federal court against state offices, this Court should invite the Solicitor General to file a brief expressing the views of the United States.

3. *The "special sovereignty interests" analysis of the court of appeals is contrary to every other court of appeals decision rendered after* Verizon

With great understatement, respondents acknowledge that other courts of appeals "have refused" to give *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), "an expansive reading." Br. in Opp. 14. In fact, the courts of appeals have uniformly held that *Coeur d'Alene*'s "special sovereign interests" analysis is limited to suits involving title or regulatory jurisdiction over real property. Pet. 19-20; *see also* Amicus Br. of Law Professors 14-15.

Moreover, this Court recently granted certiorari in another case even though (unlike here) a pending en banc review could make the conflict at issue there disappear. *See Dillon v. United States*, 2009 WL 2899562 (U.S. Dec. 7, 2009); U.S. Br. in Opp., No. 09-6338, at 6-7.

This has been especially true since this Court's decision in *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002), cited the three-Justice concurrence and the four-Justice dissent in *Coeur d'Alene*, and not the portions of the majority opinion discussing special sovereignty interests. *Id.* at 645; *see also id.* at 648-649 (Kennedy, J., concurring) ("In *Coeur d'Alene* seven Members of this Court described *Ex parte Young* as requiring nothing more than an allegation of an ongoing violation of federal law and a request for prospective relief * * *."); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (*Verizon* "limited the reach of *Coeur d'Alene*"); *Osage Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 260 Fed. App'x 13, 21 (10th Cir. 2007) ("It is not clear what is left of *Coeur d'Alene* following *Verizon Maryland.*"), *cert. denied*, 129 S. Ct. 104 (2008).

In any event, *Coeur d'Alene* did not authorize federal courts to engage in ad hoc balancing of federalism interests based on the identity of the plaintiff. *Coeur d'Alene* focused exclusively on the "type of relief" sought to determine whether the suit was "barred by the Eleventh Amendment" or "permitted under *Ex parte Young*." 521 U.S. at 281 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1974)); *see also id.* at 282 (describing "far-reaching and invasive relief the Tribe seeks, relief with

consequences going well beyond the typical stakes in a real property quiet title action").[2]

B. The Availability Of Federal Court Redress For Federal Law Violations Under *Ex Parte Young* Is Not Dependent Upon State Court Remedies, Which Are Virtually Unavailable In This Case In Any Event

Relying on the two-Justice plurality opinion in *Coeur d'Alene*, respondents assert that there is no reason to allow petitioner to sue respondents in federal court on its federal claims because an original proceeding for mandamus in the Supreme Court of Virginia provides "an adequate forum" to address those federal claims. Of course, a majority of this Court in *Coeur d'Alene,* and then again in *Verizon*, rejected the very proposition that an adequate state forum was relevant when the suit was brought by either an Indian Tribe or a private business incorporated by the State. There is no reason a state-created public entity should be subject to different rules.

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[2] Respondents also suggest (Br. in Opp. 18) that *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), supports the decision below. But *Seminole Tribe* simply held that when Congress creates a federal right tied to an exclusive private right of action that required an injured party to sue the State, and not a state official, the injured party may not sue the state official under *Ex parte Young*. *See Verizon*, 535 U.S. at 647. There is no evidence that Congress intended to preclude reliance on *Ex parte Young* to enforce the federal rights created under the Protection and Advocacy statutes.

But, in any event, the Virginia Supreme Court (which respondents assert is the only state court open to petitioner, Br. in Opp. 25 n.10) is not an adequate forum. First, that court is not obliged to provide relief even if it finds a violation of law. The very case cited by respondents (Br. in Opp. 26) makes this clear: "A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion. Due to the drastic character of the writ, the law has placed safeguards around it. Consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, as well as the promotion of substantial justice." *Gannon v. State Corp. Comm'n,* 416 S.E.2d 446, 447 (Va. 1992). Further, if the Virginia Supreme Court denied relief based on these discretionary factors, rather than its interpretation of federal law, it is unclear whether this Court would have jurisdiction to review that ruling. *Cf. Yesler v. Board of Harbor Line Comm'rs*, 146 U.S. 646, 657 (1892) (when "the decision of the [state] Supreme Court indicates that, in its opinion, relator was not entitled to the writ of prohibition, because he had other remedies of which he might have availed himself" then "[t]his was a [state law] ground broad enough to sustain the judgment, irrespective of the decision of any Federal question").

Nor do respondents dispute petitioner's contention (Pet. 27) that the Virginia Supreme Court

lacks the authority to issue interim mandamus relief (akin to a preliminary injunction) to preserve the status quo. In this case, for example, the district court ordered that respondents preserve the documents pending completion of the proceedings. A forum that lacks the authority to prevent such irreparable harm could hardly be considered adequate.

Finally, respondents suggest (Br. in Opp. 26) that the Virginia Supreme Court has a fact-finding mechanism, contrary to that court's own precedent. Pet. 27. But the rules respondents cite involve only the possibility of taking depositions. Respondents do not explain (or point to any case explaining) how the Virginia Supreme Court can resolve any factual disputes that turn on credibility (such as whether particular documents exist) based on deposition testimony alone.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted. In the alternative, this Court should invite the views of the Solicitor General of the United States as to whether review should be granted.

Respectfully submitted,

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