No. 09-529

In the Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES S. REINHARD, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioner, an independent state agency, brought this action against state officials for prospective injunctive relief to remedy ongoing violations of the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq*. The question presented is whether the Eleventh Amendment bars this suit, notwithstanding the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because petitioner is a state agency.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. In 1975, Congress established the first of several grant programs that provide States funding to create protection and advocacy (P&A) systems to protect individuals with disabilities or mental illness from abuse and neglect. The law was enacted in response to reports of severe abuse and neglect at a New York state institu-

tion for the mentally disabled. See Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6012 (1976); S. Rep. No. 1297, 93d Cong., 2d Sess. 59 (1974). In 2000, Congress reauthorized the statute as the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), Pub. L. No. 106-402, 114 Stat. 1677 (42 U.S.C. 15001 *et seq.*), finding that "individuals with developmental disabilities are at greater risk than the general population of abuse [or] neglect," 42 U.S.C. 15001(a)(5), and are in need of improved services and assistance, 42 U.S.C. 15001(a)(6) and (12).

Under the DD Act, a State may receive federal funding to improve "community services and opportunities," including medical care, job training, and social supports, available to persons with developmental disabilities. 42 U.S.C. 15023(a), 15024. If the State wishes to receive this funding, it must create and maintain a P&A system to "protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. 15043(a). The P&A system is entitled to additional federal funding, which is paid directly to the system. 42 U.S.C. 15042(a) and (b).

Similar concerns about abuse and neglect of mentally ill individuals in state-run psychiatric facilities led to the enactment of the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 42 U.S.C. 10801 *et seq.*, in 1986. See S. Rep. No. 109, 99th Cong., 1st Sess. 1-3 (1985) (*PAIMI Senate Report*). The PAIMI Act authorized additional funding for P&A systems established pursuant to the DD Act, and expanded their mission to encompass the protection of individuals with mental illness. 42 U.S.C. 10802(2), 10803, 10827. The PAIMI Act was reauthorized most recently in 2000, see Youth Drug and Mental Health Services Act, Pub. L.

No. 106-310, Div. B, § 3206(f), 114 Stat. 1195. Congress has also enacted several other statutes that provide additional funding for P&A systems.[1]

b. Under the DD Act and the PAIMI Act, a P&A system "shall have the authority to investigate incidents of abuse and neglect * * * if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. 15043(a)(2)(B); see 42 U.S.C. 10805(a)(1)(A). To ensure that such investigations are effective, the statutes provide that P&A systems "shall * * * have" a broad right of access to "all records" that are relevant to an investigation in enumerated circumstances.[2] 42 U.S.C. 10805(a)(4), 15043(a)(2)(I) and (J). And P&A systems are entitled to prompt access: under the DD Act, institutions ordinarily must produce requested records within three business days of a P&A system's request, and must provide "immediate access" to records in cases involving the death of, or immediate danger to, a disabled individual. 42 U.S.C. 10543(a)(2)(J). "[R]ecords" are defined to include any records created by an institution's staff or an investigating agency, including those that "describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents." 42 U.S.C. 10806(b)(3)(A); see 42 U.S.C. 15043(c). The PAIMI Act specifies that these federal rights of access exist even if state law would otherwise "prohibit [the system] from obtaining access to the records of in-

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[1] See 29 U.S.C. 794e, 3004; 42 U.S.C. 300d-53, 1320b-21, 15461.

[2] P&A systems are also entitled to obtain access to disabled individuals receiving services, 42 U.S.C. 15043(a)(2)(H), and access to facilities that provide care to mentally ill individuals, 42 U.S.C. 10805(a)(3).

dividuals with mental illness in accordance with" federal law.[3] 42 U.S.C. 10806(b)(2)(C).

The DD and PAIMI Acts provide that a P&A system "shall have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of" individuals with disabilities or mental illness. 42 U.S.C. 10805(a)(1)(B), 15043(a)(2)(A)(i). In addition to pursuing remedies on their own behalf, P&A systems also may "pursue administrative, legal, and other remedies on behalf of" individuals with disabilities or mental illness. 42 U.S.C. 10805(a)(1)(C); see 42 U.S.C. 15044(b).

A participating State has the option to designate either a state agency or a private nonprofit entity to serve as its P&A system. See 42 U.S.C. 10805(c)(1)(B),

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[3] The Department of Health and Human Services (HHS), which administers the DD and PAIMI programs, see 42 U.S.C. 15002(26), 15004, 10802(6), 10803, 10826, has promulgated regulations defining records as including certain evaluative materials, but stating 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); 45 C.F.R. 1386.22(c)(1). A number of courts of appeals have ruled that notwithstanding HHS's regulation, the PAIMI Act preempts state peer-review privileges. See *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, No. 08-3183, slip op. 36-37 (7th Cir. Apr. 22, 2010) (en banc); *Protection & Advocacy for Persons with Disabilities, Conn.* v. *Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006); *Missouri Prot. & Advocacy Servs.* v. *Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023-1024 (8th Cir. 2006); *Center for Legal Advocacy* v. *Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc.* v. *Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000). The question whether a P&A system is entitled to obtain access to peer-review records when such records are privileged under state law is currently under regulatory review, see, *e.g.*, 73 Fed. Reg. 19,708, 19,731-19,732 (2008), and is not presented in this petition.

15044(a). Under either alternative, the P&A system must be independent of any state agency that provides treatment or services, 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), to ensure that the system will be effective in investigating abuse and neglect at state-run (as well as private) facilities. See *PAIMI Senate Report* 2. Whether the P&A system is public or private, the DD Act provides that the Governor may not appoint more than one-third of the system's governing board, 42 U.S.C. 15044(a)(2), and the Act also restricts the State's ability to apply funding and hiring restrictions on the system, 42 U.S.C. 10543(a)(2)(K). In addition, once a State establishes its P&A system, it may change the public or private nature of the system only by redesignating the system for "good cause." 42 U.S.C. 15043(a)(4).

c. The Commonwealth of Virginia has elected to participate in these federal spending programs. Virginia chose to place its P&A system in an independent state agency—the petitioner in this case—known as the Virginia Office of Protection and Advocacy. See Va. Code Ann. § 51.5-39.2(A) (2009). Petitioner is independent of the Attorney General of Virginia and has authority "to investigate complaints relating to abuse and neglect or other violation of the rights of persons with disabilities in proceedings under state or federal law, and to initiate any proceedings to secure the rights of such persons." *Ibid.*

2. Petitioner filed this action in the United States District Court for the Eastern District of Virginia, seeking records in connection with its investigation into the deaths of two individuals and injuries to a third that occurred while the individuals were residents of institutions operated by the Commonwealth. Pet. 9-11. The

defendants—respondents in this Court—are three state officials. Compl. paras. 10-12.

Petitioner alleged that in 2006, two patients at state-run institutions for individuals with mental illness or developmental disabilities had died and a third had been injured, leading petitioner to open investigations into whether those events were the result of abuse or neglect. Compl. paras. 13-26. Petitioner requested that respondents provide records relating to any risk-management or mortality reviews conducted with respect to the deaths and injuries. *Id.* paras. 15, 21, 27. Respondents, petitioner alleged, refused to produce the records on the basis of an asserted peer-review privilege. *Id.* para. 28. Petitioner alleged that the DD and PAIMI Acts entitled it to receive the records, notwithstanding any state-law privilege that might otherwise apply. *Id.* paras. 39, 41, 48. Petitioner sought a declaration that respondents' "refusal to provide the records requested * * * is in violation of the DD and PAIMI Acts"; an injunction requiring respondents to provide access to "records mandated by the DD and PAIMI Acts"; and an injunction prohibiting respondents "from interfering, in any way, with [petitioner's] access to records." *Id*. paras. A-C.

Respondents moved to dismiss, contending, as relevant here, that they were immune from suit under the Eleventh Amendment. Pet. App. 31a, 35a. The district court denied respondents' motion, explaining that because petitioner sought declaratory and injunctive relief against state officials in their official capacities, under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment did not bar the suit. In determining whether *Ex parte Young* applies, the district court stated, "a court 'need only conduct a straightforward inquiry into

whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Pet. App. 41a (quoting *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (*Verizon*)). The court also rejected respondents' contention that because petitioner is a state agency, "special sovereignty interests" counseled against allowing the suit to proceed under *Ex parte Young*. The court reasoned that "[i]t is the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests," and petitioner's suit properly sought prospective relief to enforce federal law. *Id.* at 44a-45a.

3. Respondents appealed the district court's sovereign immunity ruling under the collateral order doctrine, Pet. App. 6a; see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the court of appeals reversed and remanded. The court acknowledged that under the "straightforward inquiry" set out in *Verizon*, 535 U.S. at 645, and followed by the district court, *Ex parte Young* would permit petitioner's suit. Pet. App. 13a-14a. Indeed, the court noted, respondents conceded that petitioner's suit could proceed under *Ex parte Young* if it were brought by a private P&A system or an individual. *Id.* at 16a-17a.

Nonetheless, the court reasoned, relying on *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), a suit that "otherwise satisfie[s] the requirements of *Ex parte Young*" may be barred by sovereign immunity if the suit implicates "special sovereignty interests." Pet. App. 16a. In the court's view, petitioner's status as a state agency rendered the suit an "intramural contest" that "encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action

brought by a private plaintiff." *Id.* at 17a. The court found support for that proposition in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), which held that an action under *Ex parte Young* is not available to enforce state law, and in *Alden* v. *Maine*, 527 U.S. 706 (1999), which held that Congress lacks the power under the Commerce Clause to abrogate state sovereign immunity in state courts, as well as in decisions holding that state political subdivisions do not have constitutional rights that may be enforced against the State, Pet. App. 22a (citing *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907)). The court therefore held that "the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court." *Id.* at 17a. A state P&A system, the court observed, could still seek to enforce the DD and PAIMI Acts against state officials in state court, to the extent permitted by state law. *Id.* at 25a.

4. Petitioner filed a petition for rehearing and rehearing *en banc*. The United States filed a brief as *amicus curiae* in support of petitioner. Pet. App. 82a-97a. The court of appeals denied rehearing. *Id.* at 47a-48a.

DISCUSSION

The court of appeals incorrectly held that petitioner, as a state agency, may not invoke *Ex parte Young*, 209 U.S. 123 (1908), to enforce state officials' federal-law obligations under the DD and PAIMI Acts. The court of appeals' decision departs from this Court's precedents, which hold that *Ex parte Young* permits a suit whenever the complaint seeks prospective relief for an ongoing violation of federal law, regardless of the identity of the plaintiff. It also conflicts with the Seventh Circuit's re-

cent decision in *Indiana Protection & Advocacy Services* v. *Indiana Family & Social Services Administration*, No. 08-3183 (Apr. 22, 2010) (en banc) (*IPAS*), and threatens to undermine the enforcement of federal laws that Congress designed to protect especially vulnerable individuals from the abusive and neglectful practices that can result in injury and death. This Court's review is warranted.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER MAY NOT BRING AN *EX PARTE YOUNG* SUIT AGAINST STATE OFFICIALS

A. 1. Over a century ago, in *Ex parte Young*, this Court held that a federal court may adjudicate a suit against a state officer to enjoin official actions that violate federal law, even if the State would be immune under the Eleventh Amendment if the same suit were brought against the State itself. 209 U.S. at 159-160; see, *e.g.*, *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring in part and concurring in the judgment). This longstanding doctrine rests on the recognition that "[r]emedies 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).

The premise on which *Ex parte Young* is based is that a state officer who violates federal law is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. In such circumstances, "[t]he state has no power to impart to [its officer] any immunity from responsibility to the supreme authority of the

United States." *Ibid.* Accordingly, the officer may not invoke the sovereign immunity of the State, and the federal courts may adjudicate and enforce the officer's federal-law obligations. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 102 (1984) (*Pennhurst*).

The availability of the *Ex parte Young* doctrine in suits against state officials turns on the nature of the relief that the plaintiff seeks. See *Green*, 474 U.S. at 68-69. A plaintiff may not invoke *Ex parte Young* to sue state officials for money damages to be paid out of the state treasury, see *Edelman* v. *Jordan*, 415 U.S. 651, 665 (1974), or for any relief that in substance would "impose upon the State a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," *Verizon*, 535 U.S. at 646 (internal quotation marks, citation and emphasis omitted); see *Jordan*, 415 U.S. at 667. This limitation on the *Ex parte Young* doctrine stems from the recognition that while prospective remedies are "necessary" to protect federal rights, *Green*, 474 U.S. at 68, permitting "retroactive relief * * * would effectively eliminate the constitutional immunity of the States," *Pennhurst*, 465 U.S. at 105; *Jordan*, 415 U.S. at 653, 663. In an action for retrospective remedies, therefore, the State "is allowed to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 663 (citation omitted).

Applying these principles, this Court held in *Verizon* that in determining whether a plaintiff may invoke *Ex parte Young* to avoid an Eleventh Amendment bar to suit, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly charac-

terized as prospective.'" *Verizon*, 535 U.S. at 645 (brackets in original) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)).

2. Petitioner's complaint satisfies the "straightforward inquiry" set out in *Verizon*. Petitioner named as defendants three state officials in their official capacities. Compl. paras. 10-12; see *Verizon*, 535 U.S. at 645. Petitioner alleges that respondents are committing an ongoing violation of federal law by refusing to provide petitioner with access to patient records, as required by the DD and PAIMI Acts. Compl. paras. 41-42, 49-50. And petitioner seeks purely prospective relief: a declaration that respondents' refusal to provide the requested records violates federal law, and an injunction directing respondents to allow access to the records. *Id.* paras. A-B; Pet. 11. *Ex parte Young* requires no more. See *Verizon*, 535 U.S. at 646.

Indeed, respondents and the court of appeals acknowledged that examining the four corners of the complaint for the determinative characteristics identified in *Verizon* would lead to the conclusion that petitioner may avail itself of *Ex parte Young*. Thus, respondents "concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." Pet. App. 16a-17a.

B. Because petitioner is a state agency, however, the court of appeals reasoned that "this case differs from *Ex parte Young* in a critical respect," Pet. App. 14a, rendering *Verizon*'s "straightforward inquiry" inapplicable. That conclusion was erroneous.

1. The court of appeals relied primarily on *Coeur d'Alene Tribe*, which it read as requiring a case-by-case analysis of whether a suit that "otherwise satisfie[s] the

requirements of *Ex parte Young*" implicates "special sovereignty interests" that outweigh the importance of ensuring prospective compliance with federal law. Pet. App. 16a (quoting *Coeur d'Alene Tribe*, 521 U.S. at 281). But this Court has not engrafted a "special sovereignty interests" inquiry onto the traditional *Ex parte Young* analysis.

In *Coeur d'Alene Tribe*, the Court held that although the plaintiff sought prospective relief for an alleged ongoing violation of federal law, *Ex parte Young* did not permit the suit because it sought "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 282. Thus, rather than seeking "to bring the State's regulatory scheme into compliance with federal law," *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment), the suit differed from "a typical *Young* action" in that the Tribe sought to divest the State of any authority to regulate the disputed lands, *ibid.*; *id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment). Although other portions of the opinion, authored by Justice Kennedy and joined by Chief Justice Rehnquist, found the presence of "special sovereignty interests" significant and urged a case-by-case approach to the application of *Ex parte Young*, see *id.* at 270-280, the seven other Justices reaffirmed that the inquiry governing whether an *Ex parte Young* suit may proceed against state officials is "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 298-299 (Souter, J., dissenting); see *Verizon*, 535 U.S. at 648-649 (Kennedy, J., concurring).

In *Verizon*, the Court confirmed that *Ex parte Young* does not call for a case-by-case approach based on "special sovereignty interests." There, the Fourth Circuit, relying on the case-by-case balancing test proposed by Justice Kennedy in *Coeur d'Alene Tribe*, 521 U.S. at 270-280, had held that the plaintiffs could not bring an *Ex parte Young* suit against members of the Maryland Public Service Commission. See *Bell Atl. Maryland Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 294-298 (4th Cir. 2001), vacated *sub nom. Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002). This Court rejected that analysis and adopted the "straightforward inquiry" set out in Justice O'Connor's *Coeur d'Alene Tribe* concurrence. See *Verizon*, 535 U.S. at 645. The Fourth Circuit therefore erred in this case in departing from the *Verizon* framework and holding that "special sovereignty interests" could justify barring petitioner's suit even though it otherwise satisfies the requirements of *Ex parte Young*.

2. Even if the court of appeals were correct that an ad hoc consideration of "special sovereignty interests" has a place in the *Ex parte Young* analysis after *Verizon*, the court was wrong to conclude that such interests justify barring petitioner's suit here. Respondents and the court of appeals acknowledged, Pet. App. 16a-17a, that nothing about the relief sought in this case—an injunction requiring disclosure of the records to which petitioner is allegedly entitled under federal law—would unduly infringe state sovereignty interests, and indeed they conceded that a private P&A system or an individual could bring this suit under *Ex parte Young*. The "special sovereignty interests" on which the court relied, therefore, pertained narrowly to the State's asserted interest in not having its officers brought into federal

court by another, independent component of the State, regardless of the relief sought or the federal-law nature of the suit. To permit a state agency to "force other state officials to appear before a federal tribunal," the court reasoned, would be to adjudicate an "intramural" dispute, resulting in a "substantial" "infringement on a state's sovereign dignity." *Id.* at 17a-18a (quoting *Virginia Office for Prot. & Advocacy* v. *Reinhard*, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring)).

Even if federal courts might in some circumstances appropriately refrain on sovereign immunity grounds from adjudicating a state-agency suit that otherwise satisfies *Ex parte Young*, no such circumstances are presented here. Most fundamentally, the suit is not, as the court of appeals would have it, an "intramural contest." Pet. App. 17a (citation omitted). The State established petitioner specifically to enforce the federal duties that the State agreed to assume under the DD and PAIMI Acts, see Pet. 6-7 & n.2, and petitioner receives funds to do so directly from the federal government, 42 U.S.C. 10823, 15042(b). When petitioner sues state officials to enforce the DD and PAIMI Acts, then, petitioner is implementing federal law and policy, not engaging in an intramural state political dispute. See *IPAS*, slip op. 16; *id.* at 47 (Posner, J., concurring).

Moreover, the court of appeals overlooked a key feature of the DD and PAIMI Acts. Those Acts require that state-agency P&A systems, like non-profit P&A systems, be independent of state governmental control —precisely because, in protecting the rights of the disabled, they must sometimes take an adversarial position vis-a-vis other state entities. See 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), 15044(a). Petitioner is thus "insulated from the type of state control over policy * * * and

governance that could justify treating this as an 'intramural' dispute." *IPAS*, slip op. 16.

In choosing to accept federal funds under the DD and PAIMI Acts, the State agreed that it would create a P&A system that would be empowered to enforce federal requirements against state-run facilities. In implementing that agreement, the State chose to create a state entity rather than assign those functions to a private non-profit orgnaization. Having made those choices, the State cannot now argue that the petitioner's efforts to enforce the requirements of the DD and PAIMI Acts are an "affront," Pet. App. 18a, while the same suit would be permissible if brought by a non-profit P&A. See *IPAS*, slip op. 16; accord *id.* at 47 (Posner, J., concurring). Especially because the nature of petitioner's otherwise permissible *Ex parte Young* suit to enforce federal law is solely the result of the State's own choices regarding the assignment of P&A functions, it is difficult to see how the State's sovereignty is infringed.

3. *Pennhurst*, *supra*, and *Alden* v. *Maine*, 527 U.S. 706 (1999), on which the court of appeals also relied, Pet. App. 18a-19a, do not suggest otherwise. In *Pennhurst*, the Court held that *Ex parte Young* does not apply in suits alleging violations of state law, because the relief sought in such a suit would require a federal court to "instruct[] state officials on how to conform their conduct to state law," thereby "intru[ding] on state sovereignty" without vindicating any federal interest. *Pennhurst*, 465 U.S. at 106. That conclusion does not suggest that state entities like petitioner, established at the election of the State under a federal spending program, may not themselves invoke *Ex parte Young* to enforce federal law. Petitioner's status as a state agency does not

alter the fact that petitioner seeks only to require state officials to comply with specific federal-law duties.

In *Alden*, the Court held that Congress lacked the power under the Commerce Clause to abrogate a non-consenting State's immunity from damages actions in state court, in part because "plenary federal control of state governmental processes denigrates the separate sovereignty of the States." 527 U.S. at 749 (state-court abrogation could "commandeer the entire political machinery of the State."). *Alden*'s holding has no application here, as respondents do not contend, nor could they, that the State's voluntary participation in the DD Act and PAIMI Act funding programs raises similar commandeering issues. Nor does this suit somehow implicate any more general concern about federal control over intrastate governance: the relief sought—access to records—will not result in federal regulation of the structure of state government or purely internal political disputes. See *IPAS*, slip op. 46-47 (Posner, J., concurring).

4. The court of appeals also erred in relying on the line of cases beginning with *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), in which the Court held that state political subdivisions may not enforce certain constitutional provisions against a State. See Pet. App. 22a-23a (citing cases); see also *Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1101 (2009). As the court of appeals acknowledged, "[s]overeign immunity was not at issue" in that line of cases. Pet. App. 23a. In addition, the conclusion that the United States Constitution generally does not regulate a State's relationship with its political subdivisions, see *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344 (1960), does not imply a blanket rule that federal courts must refrain from adjudicating any suit

between different arms or creations of state government. Indeed, this Court has adjudicated such suits when the state entities are sufficiently independent of each other to create the requisite adversity. See, *e.g.*, *Lassen* v. *Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 459 n.1 (1967). That adversity is present here. See pp. 14-15, *supra*; Pet. 32-34.

II. THE DECISION BELOW CONFLICTS WITH A RECENT EN BANC DECISION OF THE SEVENTH CIRCUIT

A. The decision below conflicts with the Seventh Circuit's recent en banc decision in *IPAS*, *supra*. There, Indiana Protection and Advocacy Services (IPAS), a state-agency P&A system, brought suit seeking injunctive relief requiring state officials to permit it access to certain patient records. *IPAS*, slip op. 8-9. A panel of the Seventh Circuit raised the *Ex parte Young* question *sua sponte*, and, following the decision below, held that IPAS could not invoke *Ex parte Young* because of IPAS's status as a state agency. See *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, 573 F.3d 548, 552 (2009), vacated, No. 08-3183 (7th Cir. Nov. 10, 2009).

The en banc Seventh Circuit noted its disagreement with the Fourth Circuit's decision in this case, *IPAS*, slip op. 18 n.8, and held that "IPAS's lawsuit is a classic application of *Ex parte Young*." *Id.* at 18. The availability of *Ex parte Young*, the court reasoned, is governed by this Court's decision in *Verizon*—not *Coeur d'Alene Tribe*—and turns on "the identity of the defendant and the nature of the relief sought, not on the nature or identity of the plaintiff." *Id.* at 14. The court rejected the argument that IPAS's suit was a mere "intramural" dispute that should not be adjudicated by the federal

courts, stating that federal law required IPAS to be independent "from state government control." *Id.* at 16. To give the State's decision to create a state P&A system "any weight in the Eleventh Amendment inquiry," the court reasoned, would lead to a "strange" result, permitting the State to accept federal funds but then to use its choice to establish a state agency to "shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens." *Id.* at 16-17. Notably, the en banc court's *Ex parte Young* ruling in *IPAS* was unanimous, as Judge Easterbrook, the author of the panel opinion, "join[ed] [his] colleagues in disagreeing with" the Fourth Circuit's decision in this case. *Id.* at 58 (Easterbrook, J., dissenting).[4]

B. In addition, as petitioner notes, Pet. 24-25, the Second and Eleventh Circuits have adjudicated the merits of suits similar to petitioner's, in which a state-agency P&A system sought injunctive relief requiring state officials to comply with the access provisions of the DD and PAIMI Acts. See *State Office of Prot. & Advocacy for Persons with Disabilities* v. *Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996) (*Tarwater*). Because neither decision addressed the *Ex parte Young* issue,

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[4] In addition to holding that IPAS's suit was permissible under *Ex parte Young*, the Seventh Circuit held that the PAIMI Act provided a right of action to obtain access to records, *IPAS*, slip op. 19-36, and that IPAS was entitled to review the records that it sought, *id.* at 36-37. Judge Easterbrook dissented from the court's right-of-action holding. *Id.* at 49-63. This case presents no question concerning the availability of a right of action, and there is in any event no circuit conflict on that issue.

they do not squarely conflict with the decision below. Nonetheless, those decisions indicate that in at least two of the other circuits with state-agency P&A systems, the parties and the courts have assumed that the P&A systems can sue for injunctive relief to enforce their rights under the DD and PAIMI Acts.

III. THE QUESTION PRESENTED IS IMPORTANT

The court of appeals' decision threatens to vitiate petitioner's ability to enforce its federal right to obtain access to records at state-run institutions, as well as access to such facilities and their patients. The DD and PAIMI Acts make these access rights a centerpiece of the P&A systems' authority, see 42 U.S.C. 10805(a)(3) and (4): 15043(a)(2)(H)-(J); S. Rep. No. 493, 98th Cong., 2d Sess. 30 (1984), and P&A systems invoke these rights in a broad range of situations in order to conduct investigations into potential abuse and neglect. See, *e.g.*, *Disability Law Ctr. of Alaska, Inc.* v. *Anchorage Sch. Dist.*, 581 F.3d 936 (9th Cir. 2009) (upholding non-profit P&A system's right to obtain contact information of guardians of disabled students in a public school); *Hartford Bd. of Educ.*, 464 F.3d at 239-242 (upholding public P&A system's access to a state-run school for disabled children, to interview the children, and to obtain personal records); *Tarwater*, 97 F.3d at 498-499 (upholding public P&A system's access to medical records of patients in a state facility).

Under the court of appeals' decision, however, petitioner will effectively be unable to enforce its rights against state-run institutions in any forum: according to respondents and the court of appeals, petitioner's only potentially available avenue to obtain the records it seeks in state court would be an action for mandamus in

the Virginia Supreme Court. Pet. App. 25a-26a; Br. in Opp. 26. But that extraordinary remedy, available only at the court's discretion and upon a showing of clear entitlement, see *Umstattd* v. *Centex Homes, G.P.*, 650 S.E.2d 527, 530 (Va. 2007), would not enable petitioner to obtain the broad and expeditious access to records, facilities and individuals that the DD and PAIMI Acts envision. See *IPAS*, slip op. 17-18 n.7 (state-court mandamus remedy is inadequate because "Congress clearly intended [P&A systems] * * * to be able to respond quickly to threats of imminent harm"); Pet. 26-27.

Without the ability to judicially enforce its rights of access, a P&A system would be unable to fulfill its investigatory functions with respect to state facilities. Cf. 45 Fed. Reg. 31,009 (1980). Congress chose to accord broad investigative authority to P&A systems because prompt investigation of individual suspected instances of abuse is the most effective way to learn of abusive and neglectful conditions before they become systemic, and to protect individuals who are currently being abused or are in imminent danger. See *PAIMI Senate Report* 2-3. The federal government, even if it might bring enforcement actions on its own, see *IPAS*, slip op. 40 (Posner, J., concurring), cannot conduct these individual, quick-response investigations in every jurisdiction. And although HHS may suspend or terminate funding to non-compliant States, 42 C.F.R. 51.10, 45 C.F.R. 1386.111, that action would not serve to respond to or remedy individual instances of abuse and neglect, and terminating funding would simply penalize the P&A system and the disabled individuals who are "the intended beneficiaries of the federal program." *IPAS*, slip op. 39 (Posner, J., concurring). Protecting disabled individuals in the manner contemplated by Congress therefore fundamentally

depends on the investigatory powers vested in the local P&A systems, which in turn are founded on access to records, facilities and individuals. See *id.* at 38.

The court of appeals' decision also threatens to create a two-tiered and unequal system, in which private P&A systems would be able to bring suit in federal court against state or private institutions, while public P&A systems would be limited to enforcing legal remedies against private facilities. As a result, patients or clients of public facilities in States with public P&A systems would not receive the full extent of the protections provided in the DD and PAIMI Acts. But the DD and PAIMI Acts do not differentiate between the capabilities of private and public P&A systems; they assume that both will be able to enforce the Acts' uniform standards of care with respect to disabled and mentally ill individuals. See 42 U.S.C. 10802(2), 10805, 15043(a). Congress could not have contemplated that the extent of protection enjoyed by disabled individuals in each State would turn on whether the State chose to create a private or public P&A system.

Review is therefore warranted to resolve the conflict between the decision below and the Seventh Circuit's decision in *IPAS*, and to prevent the Fourth Circuit's decision from undermining the efforts of state-agency P&As to enforce their federal right of access to records and to investigate suspected abuse. Although the Fourth Circuit is the only court to date to restrict a state-agency P&A system's invocation of *Ex parte Young*, the issue is likely to arise in other jurisdictions, as the *IPAS* case demonstrates. In addition, the uncertainty created by the court of appeals' decision and the circuit conflict is itself harmful to public P&A systems' functions. With the availability of a suit under *Ex parte*

Young in doubt, P&A systems may be hindered in their ability to negotiate expeditious access to records, facilities, and individuals without litigation, and when they do go to court, they may face protracted litigation. Having to litigate this threshold procedural issue would in itself thwart the prompt access rights that are essential to the P&A systems' investigatory functions. Review by the Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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