



In The
Supreme Court of the United States

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

v.

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

Respondents.

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

SUPPLEMENTAL BRIEF

KENNETH T. CUCCINELLI, II
Attorney General
of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel

WILLIAM E. THRO
Special Counsel

CHARLES E. JAMES, JR.
Chief Deputy
Attorney General

JANE D. HICKEY
ALLYSON K. TYSINGER
Senior Assistant
Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Respondents

May 27, 2010

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**RESPONSE TO THE BRIEF OF
THE SOLICITOR GENERAL**

The Respondents, pursuant to Rule 15(8), submit the following response to the brief filed by the Solicitor General of the United States.

**I. THE CONFLICT AMONG THE CIRCUITS
IS NARROW AND INCONSEQUENTIAL.**

Since this Court invited the Solicitor General to express the views of the United States, the Seventh Circuit rendered a decision explicitly disagreeing with the Fourth Circuit's decision. *See Indiana Protection and Advocacy Services v. Indiana Family and Social Services Admin.*, ___ F.3d ___, No. 08-3183 (7th Cir. Apr. 22, 2010) (*en banc*). Although there is a conflict between the Seventh Circuit and the Fourth Circuit, this Court should decline review. This is so for three reasons.

First, the conflict is narrow. Only two Circuits—the Seventh and the Fourth—have addressed the ability of a protection and advocacy entity that is organized as a state agency to sue state officials of the same State in federal court. The Court should allow the issue to develop further in the lower courts to determine whether this is actually a recurring issue.

Second, the issue is unlikely to recur. Only eight States have protection and advocacy entities organized as state agencies. Moreover, the Respondents are unaware of any similar litigation currently in the

lower federal courts. This Court should not review an issue that rarely occurs.¹

Third, because the Petitioner is the only protection and advocacy agency organized as a state agency in the Fourth Circuit, the impact of the lower court's decision is limited to the one entity—the Petitioner. Quite simply, this Court should not grant review in a case where only the Petitioner is affected—and that effect is minimal because the Petitioner can seek relief in state court.

II. THE PETITIONER MAY PURSUE ITS CLAIMS IN STATE COURT

As explained in more detail on pages 25-29 of the *Brief in Opposition*, the Petitioner can pursue its claims in the Virginia state courts.² The Petitioner concedes that it can pursue its claims in state court. Thus, the practical effect of the Fourth Circuit decision is not to bar the Petitioner's claims, but simply to dictate *where* the suit is heard. This Court should not grant review of a decision that simply decides in a narrow class of cases whether the Petitioner litigates in state or federal court.

¹ When VOPA acts as counsel for a private litigant, rather than on its own behalf, the issue presented in this case is not implicated.

² It is undisputed that the Supreme Court of Virginia may hear the Petitioner's claims in an original action. It is an open question whether a state trial court of general jurisdiction may hear the matter.

III. IF THIS COURT DOES NOT DENY REVIEW, IT SHOULD HOLD THE PETITION PENDING RESOLUTION OF SOSSAMON V. TEXAS AND INDIANA'S FORTHCOMING PETITION.

If this Court does not deny review, it should hold the Petition pending resolution of *Sossamon v. Texas*, No. 08-1438, *cert. granted*, 130 S. Ct. ___ (May 24, 2010) and/or Indiana's forthcoming Petition seeking review of *Indiana Protection and Advocacy Services*.³

Sossamon requires this Court to decide if the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, allows recovery of damages and, if so, whether sovereign immunity has been waived for damages claims against the States. Because nothing in the statutory text of RLUIPA mentions damages or a waiver of sovereign immunity for damages claims, *Madison v. Virginia*, 474 F.3d 118, 131-32 (4th Cir. 2006), this Court must decide if a Spending Clause statute can impose conditions that are not clearly and unambiguously articulated in the statutory text. *Cf. Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'").

³ Indiana has informed the Seventh Circuit that it intends to seek certiorari and has asked the Seventh Circuit to stay the mandate pending resolution of its forthcoming Petition.

If this Court, consistent with *Arlington Central*, holds that a Spending Clause statute may not impose conditions that are not clearly and unambiguously articulated in the statutory text, then it will be effectively rejecting the United States' position, that, as a condition of receiving federal funds, Virginia agreed that its agency may sue Virginia officials in federal court. See *United States Brief* 15-17. In those circumstances, a denial of the Petition would be appropriate. Conversely, if this Court holds that a Spending Clause statute may impose conditions that are only implied by the statutory text, then this Court will be effectively endorsing the United States position. In that situation, a grant, vacate, and remand would be appropriate.

Alternatively, if this Court wishes to decide this narrow issue before deciding *Sossamon*, it should hold the Petition and grant Indiana's forthcoming Petition for review of *Indiana Protection and Advocacy Services*. The Seventh Circuit case is a superior vehicle to resolve the issue of whether a protection and advocacy entity that is organized as a state agency may sue state officials of the same State in federal court. The Seventh Circuit decision clearly presents the issue of whether Congress may use the Spending Clause to empower a state agency to sue state officials of the same State. See *Indiana Protection and Advocacy Services*, ___ F.3d at ___, No. 08-3183, Slip Op. at 9-14. The Fourth Circuit only decided this issue by implication.



CONCLUSION

For the reasons stated above and in the Brief in Opposition, this Court should **DENY** the Petition for Certiorari. Alternatively, this Court should **HOLD** the Petition pending *Sossamon* and/or Indiana's forthcoming Petition.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General
of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel

WILLIAM E. THRO
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CHARLES E. JAMES, JR.
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