No. 09-529

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, BY ITS OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER,

v.

JAMES W. STEWART, III, 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 VICKI Y. MONTGOMERY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR, CENTRAL STATE HOSPITAL.

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

BRIEF FOR PETITIONER

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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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 568 F.3d 110. The decision of the district court (Pet. App. 30a-46a) is unreported.

JURISDICTION

The court of appeals issued its opinion on June 2, 2009. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on July 30, 2009. Pet. App. 47a-48a.

This Court has jurisdiction 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 relevant Virginia statutes are set forth at Pet. App. 49a-81a.

STATEMENT OF THE CASE

A. Statutory Framework

1. Federal Statutes. Both the Developmental Disabilities Assistance and Bill of Rights Act (Developmental Disabilities Act), Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 *et seq.*), and the 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.*), were enacted in response to extensive abuse at state-run institutions for persons with mental disabilities and mental illnesses.

a. Congress enacted the Developmental Disabilities Act after learning during extensive hearings "that totally unacceptable conditions still prevail in many public and other facilities for the developmentally disabled." S. Rep. No. 94-160, at 28 (1975).

For example, Willowbrook State School, a New York state institution for persons with mental retardation, received significant national attention due to its substandard treatment of persons with developmental disabilities. Before enactment of the Developmental Disabilities Act, then-investigative reporter Geraldo Rivera uncovered extensive, graphic abuse of the developmentally disabled at Willowbrook. Rivera testified before Congress as to the obvious signs of abuse he found at the state-run institution:

> [W]hen you walk into a room that is about half the size of this one that has 200 children

> in it and those children are smeared with their own f[e]ces and they are naked and dressed in rags and knocking their heads against the wall and there are only three or four attendants to take care of these kids, I don't have to be a specialist to know there is something wrong there.

S. Rep. No. 94-160, at 29.

Rivera's testimony was confirmed by the findings of a federal investigation conducted at the request of the Senate. Federal investigators from the Department of Health, Education, and Welfare visited Willowbrook and found the state institution replete with "substandard and inadequate" care that ignored the "basic health and hygiene needs of the residents." *Id.* at 30.

Other state-run institutions subjected residents to similarly abhorrent conditions. At Alabama's Partlow State School and Hospital, reports revealed numerous abuses, including that 54 young resident boys were provided "[g]round food" and fed with "nine metal plates and nine metal spoons" served by "[n]ine working residents" in a manner that made it impossible to determine "which residents had been fed and which had not been fed." *Id*. at 30.

The problems in state-run facilities were difficult for States to resolve themselves. Congress found that "there is an inherent conflict in the role a State must play in delivering services and administering programs for persons with developmental disabilities

and in protecting the human and legal rights of such persons." *Id.* at 37.[1] And Congress also found that because the institutions are often "far removed" from urban areas and cut off from mainstream society, it was difficult to detect abuse and neglect. *Id*. at 28.[2]

Through the Developmental Disabilities Act, Congress sought to address these problems with a two-pronged approach. First, it offered States federal funds to develop plans to improve medical care, vocational training, and other social services for persons with developmental disabilities. 42 U.S.C. §§ 15023(a), 15024.

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[1] *See Developmental Disabilities Act Extension and Rights of Mentally Retarded: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Public Welfare*, 93d Cong. 536 (1973) (statement of United Cerebral Palsy Ass'ns) ("1973 S. Hrg.") ("The track record of states policing their own operations has not been good. Indeed many states do not even require their state operated facilities to meet their own state licensure requirements."); *id*. at 565 (statement of Federation of Parents' Organizations for New York State Mental Institutions) ("You have left the job in prior years to the States. They have shown for the most part that they cannot and will not do what is necessary without Federal assistance and Federal supervision."); *id*. at 645 (statement of Accreditation Council for Facilities for the Mentally Retarded) ("State-conducted surveys of State-operated facilities" represent "a conflict of interest").

[2] *See* 1973 S. Hrg. at 586 (statement of National Advisory Council on Developmental Disabilities) (individuals were "isolated from the community"); *id*. at 677 (statement of National Association of Coordinators of State Programs for the Mentally Retarded) (same).

Second, as a condition on receipt of those funds, a State also had to designate an independent entity as a Protection and Advocacy System to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such [developmentally disabled] individuals within the State who are or who may be eligible for treatment, services, or habilitation." 42 U.S.C. § 15043(a)(2)(A)(i).

In encouraging States to designate entities as Protection and Advocacy Systems, Congress stressed the importance of the System's independence so that "a developmentally disabled individual within the delivery system has a means to reach outside the established delivery system for examination of situations in which his rights as an individual citizen may be being violated." S. Rep. No. 94-160, at 38.

Seven years later, after hearings to study the activities of the Protection and Advocacy Systems on behalf of persons with developmental disabilities,[3] Congress described the Systems as being "of critical importance in an expanding effort by the Congress to assure disabled persons both protection of their rights under law and full access to federally funded

[3] *Oversight of Developmental Disabilities Assistance and Bill of Rights Act: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 98th Cong. (1984); *Bill of Rights Act: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 97th Cong. (1981).

programs." S. Rep. No. 98-493, at 28 (1984). At that time, Congress amended the Developmental Disabilities Act to provide additional protection to the System's independence.

For example, Congress prohibited States from withdrawing an entity's designation as a Protection and Advocacy System absent "good cause." Pub. L. No. 98-527, § 142(5), 98 Stat. 2662, 2680 (1984). In so doing, Congress explained that "litigation against any agency of state or local government" would not be good cause; it would be the sign of a working System. S. Rep. No. 98-493, at 29. Although Congress "commend[ed] the emphasis by P&A's on mediation and/or administrative remedies," it recognized "that there will undoubtedly be future instances where litigation is the necessary alternative to protect disabled persons' rights." *Id*. at 28.

b. Congress enacted the PAIMI Act in 1986 to expand the reach of Protection and Advocacy Systems to include protection of individuals with mental illness, in addition to people with disabilities.

In the 1980s, the Senate conducted hearings on the treatment of institutionalized persons who are developmentally disabled, mentally retarded, and mentally ill. *See Care of Institutionalized Mentally Disabled Persons: Joint Hearings before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources and the Subcomm. on Labor, Health and Human Servs., Educ. and Related Agencies of the S. Comm. on Appropriations*, 99th Cong.

(1985) ("1985 S. Hrg."). These hearings, along with a 246-page report by Senate staff on the conditions in state-run facilities, led to passage of the PAIMI Act. S. Rep. No. 99-109, at 1 (1985). Violence, neglect, and inhumane conditions were found in state-run institutions throughout the Nation. 1985 S. Hrg., at 704-709 (Staff Report on the Institutionalized Mentally Disabled).

As Senate investigators and hearing testimony demonstrated, States were completely failing to monitor, investigate, and ultimately address this abuse. *See id.* at 774 ("While all of the institutions Senate staff visited had documented policies for reporting complaints and abuse, implementation of these policies was often impractical and ineffective."). In addition, most Protection and Advocacy Systems did not provide such assistance to the mentally ill. *Id.* at 777 ("Although the Developmental Disabilities Act does not specifically prohibit state P&A's from providing services for the mentally ill, very few are served."). These findings were based, in part, on a Senate staff investigation. That investigation revealed that state-run facilities were monitored and inspected by "only a handful of state-paid monitors" whose reports were "largely denied public airing," leaving the residents unprotected and allowing employees of these institutions to "live and work in virtual secrecy." *Id.* at 699; *see also id.* at 700-701 (finding that some state-run "facilities have no apparent internal standards, as several wards may appear barren and in disrepair with the smell of

urine and cigarette smoke in the air and patients sleeping on bathroom floors").

In enacting the PAIMI Act, Congress expressly 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), (4).

Congress thus 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).

2. Although Congress intended that a Protection and Advocacy System be independent of the State, Congress gave States flexibility as to how to achieve that goal. Under both 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 nonprofit 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).

Every State accepts federal funds under the Developmental Disabilities Act and each State has designated a Protection and Advocacy System under the Developmental Disabilities Act and the PAIMI Act.

Initially, sixteen States designated a state entity as their Protection and Advocacy System. *See* Commission on the Mentally Disabled, American Bar Ass'n, *Developmental Disabilities Protection & Advocacy: A Review of the State Plans* at App. A-1 (1978). Today, only Virginia and seven other States continue to designate independent state agencies,[4] 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 a state entity, it cannot (as of 1984) 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.*

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[4] *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.

Department of Health & Human Servs., 997 F.2d 1290, 1292 (9th Cir. 1993).

Congress provided additional federal protections for, and federal 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 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).

3. Both the Developmental Disabilities Act and the PAIMI Act anticipate a separate protection role for the Protection and Advocacy System, regardless of whether it is a state or a not-for-profit entity. Both Acts expressly provide 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 to records is not contingent on state law. To the contrary, the System

is entitled to records even if "the laws of a State prohibit [the System] from obtaining access to the records." *Id*. § 10806(b)(2)(C) (PAIMI); Pub. L. No. 101-496, § 15, 104 Stat. 1191, 1200 (1990) (Developmental Disabilities Act); *see also* 42 U.S.C. § 10806(a) (providing that the System may disclose certain information required to be maintained as confidential under state law to the person who is the subject of the information). In enacting this requirement, Congress recognized that access to such records was necessary "to ensure the protection of mentally ill persons." S. Rep. No. 99-109, at 10 (1985).

2. Virginia Law. The current independence of petitioner VOPA, Virginia's designated Protection and Advocacy System, in terms of litigating authority and otherwise, is the result of more than 30 years of deliberate decisions by Virginia's political branches.

a. Petitioner's original predecessor (the Virginia Developmental Disabilities Protection and Advocacy System) was created in August 1977 by executive order. *See* Va. Exec. Order No. 55 (Aug. 15, 1977), http://tinyurl.com/1977-08-15-Va-EO55. It was then an "Office" within the Office of the Secretary of Human Resources. The Secretary appointed the Director of the advocacy Office. That advocacy Office had the "authority to pursue legal, administrative and other appropriate remedies to insure the protection of the rights of" people with developmental disabilities. *Id*. at 1. And it was directed to "[p]rovide access for persons who are developmentally disabled

to appropriate administrative or legal remediation of their needs." *Ibid*.

Four months later, the Governor rescinded that executive order. *See* Va. Exec. Order No. 60 (Dec. 20, 1977), http://tinyurl.com/1977-12-20-Va-EO60. The Governor replaced the order with one that removed the advocacy Office's authority to pursue legal remedies. Instead, the Office was required to advise the Secretary of Human Resources "immediately when it has been determined by the Office that the rights of any developmentally disabled person[s] residing within a State facility are being, or have been abridged or otherwise interfered with." *Id*. at 1. The Office could "thereupon" take "appropriate action" in any administrative forum, but if those actions were unsuccessful, it was to "refer the matter to an attorney not employed by the Commonwealth for further appropriate action." *Ibid*.

b. In 1981, a subsequent Governor withdrew Virginia from the Developmental Disabilities Act. *See* Library of Virginia Abstract, *Developmental Disabilities Planning Council of Virginia: Agency History* (1999), http://tinyurl.com/1999-Agency-History-Abstract; *see also* Glenn Frankel, *Dalton Withdraws Virginia from U.S. Mental Program*, WASH. POST, Dec. 5, 1980, at B1; 47 Fed. Reg. 36,968 (Aug. 24, 1982) (realloting federal funds not utilized by Virginia to other States). Thus, at that time, Virginia no longer had an obligation to maintain a Protection and Advocacy System.

The Governor rescinded the prior executive order and created a State Advocacy Office for the Developmentally Disabled. *See* Va. Exec. Order No. 47 (Jan. 9, 1981), http://tinyurl.com/1981-01-09-Va-EO47. The new Office still reported to the Secretary of Human Resources, but the Office's Director was appointed by the Governor. The new Office could "pursue administrative remedies with the appropriate State officials," but if no resolution was reached, the Office was instructed to "recommend alternatives to the Secretary." *Id*. at 1.

c. In 1982, yet another Governor decided that Virginia should again participate in the Developmental Disabilities Act. *See* Library of Virginia Abstract, *supra*; *Robb Asks Virginia's Readmission to Program for Mentally Disabled*, WASH. POST, July 2, 1982, at B7.

The Attorney General recommended that, in rejoining the Developmental Disabilities Act program, the Governor instruct the Office not to initiate litigation against another state agency without the Governor's written approval. Letter from Gerald Baliles, Attorney Gen. of Va., to Charles Robb, Governor of Va., at 2 (June 21, 1982), http://tinyurl.com/1982-06-21-AG-Ltr. The Attorney General explained that "[f]or a brief period of time in the past, the State Advocacy office was free to determine its own legal needs and initiate legal action in the courts against other state agencies; that authority, in theory, included the power to sue the Governor." Letter from Gerald Baliles, Attorney Gen. of Va., to Charles Robb,

Governor of Va., at 1 (May 12, 1982), http://tinyurl.com/1982-05-12-AG-Ltr. That independent litigating authority, the Attorney General believed, was not "warranted." *Ibid*.

The Governor did not issue a new executive order regarding the Office but simply adhered to the 1981 executive order. Although there is a gap in the available records, petitioner understands that the Governor adopted the advice of his Attorney General and required petitioner's predecessor to seek gubernatorial authorization prior to filing litigation.

d. In 1984, because doubts had been raised whether the Governor had the authority to create the Office without legislative approval,[5] the Virginia legislature codified petitioner's predecessor's status. 1984 Va. Acts ch. 580. The statute created the Advocacy Department for the Developmentally Disabled. In substance, the statute tracked the 1981 executive order. The Director of the Department was appointed by the Governor and served at his pleasure. Va. Code Ann. § 37.1-239 (Michie 1987). And the Department could only "[p]ursue administrative remedies with the appropriate state officials and recommend alternatives to the Secretary [of Human Resources] if a

[5] *See* Virginia Joint Legislative Audit & Review Comm'n, *An Assessment of Structural Targets in the Executive Branch of Virginia*, Va. H. Doc. No. 20, at 23-24, 107 (1984), http://jlarc.state.va.us/reports/Rpt58.pdf.

resolution to the problem is not attained." *Id.* § 37.1-240(3) (Michie 1987).

e. The authority of petitioner's predecessor changed in 1985 as part of the Virginians with Disabilities Act, 1985 Va. Acts ch. 421.

That statute renamed petitioner's predecessor the Department for Rights of the Disabled. Like the heads of its predecessors, the Director of the Department reported to the Secretary of Human Resources and was appointed by Governor, but was subject to confirmation by the General Assembly. Va. Code Ann. § 51.01-36 (Michie 1987).

The statute authorized the Department "to pursue legal, administrative, and other appropriate remedies to protect the rights of persons with disabilities." *Id.* § 51.01-37(5) (Michie 1987). The statute conditioned the filing of an action "in any court," however "upon the express approval of Governor." *Ibid*. Moreover, "[i]n the event there is no conflict of interest nor federal requirement to the contrary," the Governor could "refer such action to the office of the Attorney General." *Ibid*. In addition, the Department could not hire its own counsel absent express approval of the Attorney General. *Id.* § 51.01-37(6) (Michie 1987).

f. In 1991, the United States Department of Health and Human Services ("HHS") determined that the statutory requirement for gubernatorial approval prior to initiation of litigation was inconsistent with the Developmental Disabilities Act requirement of

independence. "If gubernatorial approval must be obtained prior to the pursuit of court action, then the Virginia P&A does not have the required authority to pursue legal remedies as mandated by law." Letter from Deborah McFadden, Comm'r, Dep't of HHS Administration for Children and Families, to James Rothrock, Director, Dep't for Rights of Virginians with Disabilities, at 3 (May 1, 1991), http://tinyurl.com/1991-05-01-HHS-Ltr.

In response, Virginia considered various options, including withdrawing from the Developmental Disabilities Act, designating a not-for-profit corporation its Protection and Advocacy System, or challenging HHS's interpretation of the Act. Memorandum from Susan Ferguson, Assistant Attorney Gen. of Va., to Howard Cullum, Sec'y of Human Resources (May 31, 1991), http://tinyurl.com/1991-05-31-AG-Memo. Virginia recognized that removing gubernatorial approval would leave it open to suits by petitioner's predecessor and would be unpopular with several constituencies who had lobbied to ensure gubernatorial oversight of the System's litigation activity. Memorandum from James Rothrock, Director, Dep't for Rights of Virginians with Disabilities, to Howard Cullum, Sec'y of Human Resources (July 9, 1991), http://tinyurl.com/1991-07-09-DRVD-Memo (discussing opposition of Virginia Municipal League and Virginia Association of Counties).

In the end, Virginia amended the statute to remove the gubernatorial approval and Attorney General representation provisions. 1992 Va. Acts

ch. 627 (codified at Va. Code Ann. § 51.5-37(4) (Michie 1992)).

g. In 2002, Virginia legislatively established petitioner VOPA in its current form as an "independent state agency," Va. Code Ann. § 51.5-39.2(A), with independent litigating authority. The current independence of VOPA is reflected in a number of provisions.

First, VOPA's governing board consists of eleven "nonlegislative citizen members," only three of whom are appointed by the Governor. *Id.* § 51.5-39.2(B). 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*. § 51.5-39.2(F) (incorporating § 24.2-230 *et seq*.).

Second, "[n]otwithstanding any other provision of law," petitioner is "independent of the Office of the Attorney General," which is headed by an elected official. *Id.* § 51.5-39.2(A). 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 id.* § 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." *Id.* § 51.5-39.5(B). "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). In the current biennial budget (June 2010-June 2012), Virginia will provide no funds to VOPA; petitioner's only source of new funds will be the estimated $2.5 million annual grant from the federal government. *See* 2010 Va. Acts ch. 874 at 365-366. In addition, the federal government provides the federal funds "directly" to VOPA. 42 U.S.C. § 15042(b).

And, of particular significance for this case, petitioner 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 Ann. § 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).

These 2002 amendments resulted from years of legislative efforts by advocates for people with disabilities who contended that Virginia's Protection and Advocacy System needed more independence from the executive branch to properly perform its watchdog function. Those efforts were based on persistent complaints that the System was ineffective and unwilling to criticize or sue state agencies. *See* Holly Heyser, *Advocates for Disabled Ask Feds to Stop Funding Agency*, VIRGINIAN-PILOT, July 27, 1999, at A-1; Holly Heyser, *Mental Health Reform Likely to Pass with Changes*, VIRGINIAN-PILOT, Apr. 7, 1999, at A-1; Michael Hardy, *Mental Health Advocates Back Independent Agency*, RICHMOND TIMES DISPATCH, Feb. 26, 2000, at A-10. Indeed, VOPA's predecessor acknowledged that it had "been stymied, historically, in carrying out its duties," even while praising the then-current Governor's administration. Holly Heyser,

Bill Giving Agency for Disabled Independence Clears Committee, VIRGINIAN-PILOT, Feb. 7, 1999, B-5.

When the legislation was enacted in 2002, the Governor at the time explained that the statute "remove[d]" the Protection and Advocacy System from the executive branch "to ensure that these systems are able to function with the required independence and autonomy." Letter from Mark Warner, Governor of Va., to Heidi Lawyer, Acting Director, Dep't for Rights of Virginians with Disabilities, at 1 (July 1, 2002), http://tinyurl.com/2002-07-01-Gov-Ltr.

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 VOPA's complaint and its motion for a preliminary injunction.

Resident A. The first of these individuals, "Resident A," was a person with mental illness and retardation. He died while a resident of Central Virginia Training Center (CVTC). Respondent Micheletti runs CVTC under the supervision of respondent Stewart, as Commissioner of the Department of Behavioral Health and Developmental Services. J.A. 12-13.

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. J.A. 13.

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. J.A. 14.

Resident B. "Resident B," an individual with mental retardation, was assaulted at CVTC by another resident, and was observed by CVTC staff running from Resident B's room 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. J.A. 14-15.

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. J.A. 15.

Resident C. The second death was that of an individual with mental illness, "Resident C," who was a patient at Central State Hospital (CSH), which respondent Montgomery runs under the supervision of respondent Stewart. J.A. 15.

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 where he was pronounced dead. J.A. 16.

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. J.A. 16.

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 requiring respondents to provide the requested records. J.A. 21. VOPA also sought a declaratory judgment that respondents were violating federal law in refusing to provide the records. J.A. 21.

2. The district court denied respondents' motion to dismiss, which was based on failure to state a claim and Eleventh Amendment immunity. Pet. App. 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. Pet. App. 34a. The district court held that it was not appropriate to

resolve at that time respondents' argument that a non-preempted state law permitted them to withhold the records. Pet. App. 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. Pet. App. 39a-40a.[6]

But the court held that the action could proceed against respondents under *Ex parte Young*, 209 U.S. 123 (1908). 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. Pet. App. 40a. Further, 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)). Petitioner claims that respondents "continue to refuse to provide records" as required by federal law and petitioner sought "an injunction that [respondents] prospectively release the records." Pet. App. 41a-42a.

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[6] The court of appeals affirmed that holding (Pet. App. 10a-13a) and petitioner did not seek further review of it.

The district court rejected the claim that the action presented "special sovereignty interests" that "trump[ed]" *Ex parte Young*. Pet App. 43a. The court 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." Pet. App. 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." Pet. App. 45a. This case does not concern disputes between a State and a political subdivision regarding "internal budgetary arrangements" which, the district court noted, had been an area the federal courts had avoided. Pet. App. 43a. Adjudicating the violation of federal law alleged here "does not interfere with the prerogative of the State." Pet. App. 44a.

3. Respondents filed an interlocutory appeal to challenge solely the denial of Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). "Because the denial of a motion to dismiss for failure to state a claim is not a final judgment," respondents did "not appeal that aspect of the judgment." Br. in Opp. 7 n.5. The court of appeals reversed and remanded with instructions to dismiss the action on Eleventh Amendment grounds. Pet. App. 1a-29a.

The court of appeals held that despite its "superficial appeal," *Ex parte Young* was not available

because petitioner was a state agency. Pet. App. 14a. The court of appeals relied on (1) the absence of any historical evidence that such suits previously had been permitted, Pet. App. 14a-16a; (2) "sovereign interests and federalism concerns" as reflected in cases such as *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), *Alden v. Maine*, 527 U.S. 706 (1999), and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), Pet. App. 16a-20a; and (3) Supreme Court cases refusing to give relief to political subdivisions that sued States for alleged constitutional violations, Pet. App. 21a-24a.

4. Petitioner filed a petition for rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 47a-48a.

SUMMARY OF ARGUMENT

The Eleventh Amendment does not bar this action for prospective relief to remedy an ongoing violation of federal law by state officials. *Ex parte Young*, 209 U.S. 123 (1908), authorizes this suit. The fact that petitioner is a state-created public entity does not change the analysis.

A.

1. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has treated the Eleventh Amendment as reflecting a broad vision of state sovereign immunity rooted in common law traditions and federalism. At the same time, however, this Court has been careful to avoid creating a situation where federal courts lack

authority to curb state violations of federal law in contravention of the Supremacy Clause. Thus, consistent with common law traditions, the Court has distinguished between plaintiffs suing the sovereign in its own name and those suing the sovereign's officials. This Court's decision in *Ex parte Young* encapsulated a century's worth of American jurisprudence.

2. To address the Eleventh Amendment's concern for protection of state treasuries, *Ex parte Young* does not permit retroactive damage awards.

To protect the dignity of the State, *Ex parte Young* suits are further limited. *Ex parte Young* does not permit actions directly against the sovereign in its own name; it permits only suits against individual state officials. And, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, its scope is limited to the enforcement of federal law.

3. Petitioner's suit is a classic *Ex parte Young* action. Indeed, respondents have acknowledged that, if this suit had been brought by an entity chartered by the State as a corporation, there would be no Eleventh Amendment bar to this suit being heard in federal court. Resp. C.A. Opening Br. 26. That should be the end of the case. *Ex parte Young*'s recognition of federal judicial power in suits against state officers to enjoin ongoing violations of federal law strikes the requisite balance between state and

federal interests. Where these conditions are met, no additional "balancing" is required or warranted.

B.

The Fourth Circuit's per se rule – that, because petitioner is a state agency, the Eleventh Amendment does not allow a federal court to adjudicate whether state officials are violating federal law – is unmoored in the purposes underlying the Eleventh Amendment and ignores the contrary historical evidence.

1. This Court has never limited who the plaintiff can be in an *Ex parte Young* suit. Such suits can be brought by individuals, corporations, Indian Tribes, and foreign nations. It would be incongruous to suggest that an *Ex parte Young* suit by an agency of a foreign country or another State accords the States their dignity, while a suit by a state agency that a State has created and given independent litigating authority does not. If anything, because the same sovereign created the parties on both sides of a lawsuit such as this one, it is actually less an affront to the sovereign than when a sovereign is sued by a private party or another sovereign. This is because, ultimately, the sovereign retains the authority to dissolve the state-agency plaintiff if the State believes the litigation (or the resulting relief) is too onerous.

There is nothing anomalous about permitting an entity created by the State to sue the State's officials in federal court under *Ex parte Young*. To the contrary, this happens regularly with regard to private corporations. While petitioner is a part of the state

government, its independence makes it not unlike a private corporation for present purposes. Like a private corporation, Virginia cannot make petitioner compromise its federally-established statutory right to records from respondents or its federally-established statutory duty to protect persons with disabilities and mental illness.

To be sure, a federal law that *unilaterally* vested one component of a State with federal rights against other components of that State might raise Tenth Amendment concerns. But that is not the case here. The federal right to access records that petitioner claims in this case derives from two voluntary choices made by the State. First, Virginia chose to establish a Protection and Advocacy System in order to be eligible to receive certain federal funds under the Developmental Disabilities Act. Second, Virginia elected to constitute petitioner as a public entity, rather than as a not-for-profit corporation. Given these two voluntary decisions, respondents can hardly complain that Virginia has been divided against itself by the federal government.

2. At the time of the Constitution's ratification and the ratification of the Eleventh Amendment, it was already well established in England that courts could entertain suits by governmental entities created by the King against the King's officials or other governmental entities created by the King. These examples show that two governmental parties could seek and obtain a judicial resolution in the King's court of a dispute as to whether the defendant's

conduct was consistent with the supreme law of England. Of course, because England lacked this Nation's federalist system, those cases never had to address questions regarding in which sovereign's court system such a suit should be heard. But the adjudication of such suits in England demonstrates that these suits are not new phenomena requiring the development of a new set of rules governing sovereign immunity. Rather, these suits were historically-recognized suits that warrant application of historically-established rules, reflected in *Ex parte Young*. Because the dispute here is about federal law, adverse parties representing two state-created governmental entities should be able to obtain resolution of their legal dispute in federal court to govern their actions prospectively.

3. Respondents have cited four cases from this Court that they claim establish that "political subdivisions may not invoke *Ex parte Young* against state officials of the same State." Br. in Opp. 16. But none of those cases involved suits against state officials. In each case, the municipality did not prevail in its challenge to a state law because of the broad authority States have in organizing and reorganizing their subdivisions. Those cases thus shed no light on the question whether a state-created public entity that possesses a federal right against its creator may rely on *Ex parte Young*. More relevant are this Court's cases in which the Court has resolved disputes on the merits between political subdivisions

(or their officials) and state officials brought originally in federal district court.

C.

1. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), held that under the "particular and special circumstances" of that case, *Ex parte Young* was not available. *Id*. at 287. To determine whether the suit was permitted under *Ex parte Young*, the portions of the opinion in *Coeur d'Alene* joined by a majority of Justices focused exclusively on the extraordinary relief sought. Specifically, the plaintiffs in that case sought an injunction to carve out part of the territory of the State from the control of the State as sovereign. There is no such proposed violation of the State's territorial integrity in this case. To the contrary, the relief sought here is quite modest – mere access to records.

And a majority of Justices in *Coeur d'Alene* and again in *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), rejected the more elaborate balancing approach urged by the two-Justice plurality in *Coeur d'Alene*. Yet that is the approach apparently followed by the court of appeals here.

2. In any event, even if balancing akin to that discussed by the two-Justice plurality in *Coeur d'Alene* were appropriate, an original action for a writ of mandamus in the Supreme Court of Virginia does not offer petitioner a prompt and effective remedy.

Moreover, the nature and purpose of this action warrants a federal forum. Although this suit is brought by petitioner to obtain records, the ultimate purpose is to protect persons with disabilities and mental illness from abuse and neglect at the hands of state officials. Indeed, the legislative history of the Developmental Disabilities Act and subsequent legislation shows that Congress encouraged the creation of independent Protection and Advocacy Systems because the States were not able to monitor and prevent abuse and neglect in state institutions through existing mechanisms.

Finally, because this is a dispute about federal law, there is an important federal interest in uniformity of interpretation that weighs in favor of a federal court adjudicating the claim. Permitting federal courts to grant "relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

ARGUMENT

STATE-CREATED PUBLIC ENTITIES CAN SUE IN FEDERAL COURT UNDER *EX PARTE YOUNG* TO BRING OTHER OFFICIALS OF THAT STATE INTO COMPLIANCE WITH FEDERAL LAW

The Eleventh Amendment does not bar this action for prospective relief to remedy an ongoing violation of federal law by state officials. *Ex parte Young*, 209 U.S. 123 (1908), authorizes this suit.

Petitioner claims entitlement as a matter of federal law to access certain records. Respondents state officials claim state law prohibits them from releasing those records. Petitioner, in turn, contends that federal law preempts that state law. And petitioner seeks declaratory and injunctive relief from a federal court on the ground that the state law interposed by the state officials is void under the Supremacy Clause. If petitioner were a private entity, as respondents themselves acknowledge, *Ex parte Young* would authorize this suit and "there would be no sovereign immunity issue." Resp. C.A. Opening Br. 26.

But the fact that petitioner is a state-created public entity does not change the analysis of the sovereign immunity inquiry. Allowing a federal court to resolve questions of federal law to guide the future conduct of the state officials on both sides of this controversy does not implicate the fiscal or dignitary interests of the State any more than when only the defendants are state officials.

A. The *Ex Parte Young* Doctrine Reflects A Historical Tradition That Protects The State Sovereignty Interests Animating The Eleventh Amendment While Permitting Vindication Of The Supremacy Clause

1. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has treated the Eleventh Amendment as reflecting a broad vision of state sovereign immunity rooted in common law traditions and federalism that

extends well beyond the text of the Eleventh Amendment.

At the same time, however, this Court has been careful to avoid creating a situation where federal courts lack authority to curb state violations of federal law in contravention of the Supremacy Clause. Thus, well before *Hans*, the Court distinguished between plaintiffs suing the sovereign in its own name and those suing the sovereign's officials. *See, e.g.*, *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 859 (1824); *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220-221 (1873); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *United States v. Lee*, 106 U.S. 196, 219-222 (1882); *Virginia Coupon Cases*, 114 U.S. 270, 288 (1885).

That distinction was consistent with the "notions of sovereignty" prevailing at the time of the Constitution's framing. *Central Virginia Comm'y Coll. v. Katz*, 546 U.S. 356, 389 (2006) (Thomas, J., dissenting); *see Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989) (distinction between State and state officials sued for injunctive relief "would not have been foreign" to those in the Nineteenth Century). That is because it was well-settled doctrine in England that suits could proceed against the King's officials even though a suit could not proceed against the King himself, as sovereign. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); X William Holdsworth, *A History of English Law* 650-652 (1938).

This Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), encapsulated a century's worth of American jurisprudence as well as prior English jurisprudence. And it has become an "essential * * * part of [the Nation's] sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). *Ex parte Young* confirmed that the Eleventh Amendment did not bar a suit in federal court for prospective injunctive relief claiming that a state official was violating federal law. That result 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). To that end, this Court has unwaveringly held that "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004); *see also Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002).

2. While *Ex parte Young* guarantees the enforcement of federal laws against state officials, it does so without offending basic principles of state sovereignty. As this Court has recognized, the Eleventh Amendment was ratified to protect both a State's treasury, *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821), and its dignity, *see Ex parte Ayers*, 123 U.S. 443, 505 (1887).

To address the Eleventh Amendment's concern for protection of state treasuries, *Ex parte Young* does

not permit retroactive damage awards. *See Frew*, 540 U.S. at 437 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). Rather, it permits only "prospective relief as well as measures ancillary to prospective relief." *Ibid*. (citations omitted).

To protect the dignity of the State, *Ex parte Young* suits are further limited in two respects. First, *Ex parte Young* does not permit suits against the State *in eo nomine* – i.e., actions directly against the sovereign in the sovereign's own name – and permits only suits against individual state officials. *See Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). This requirement 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. *See* Jaffee, *supra*, at 18-19.

And second, because *Ex parte Young* is intended to vindicate the Constitution's Supremacy Clause, its scope is limited to the enforcement of federal law. A plaintiff thus must allege that the Constitution or a federal law has been violated and not simply that state officials have violated state law. *See Pennhurst*, 465 U.S. at 121.

3. Petitioner's suit is a classic *Ex parte Young* action. Petitioner alleges that respondents, state officials, are violating federal law by not providing petitioner access to the requested documents, and petitioner seeks only prospective injunctive and declaratory relief. Indeed, respondents have

acknowledged that if this suit had been brought by an entity chartered by the State as a corporation, there would be no Eleventh Amendment bar to this suit being heard in federal court. Resp. C.A. Opening Br. 26 ("If VOPA were a non-profit entity rather than a state agency, there would be no sovereign immunity issue."). That should be the end of the inquiry. *Ex parte Young*'s recognition of federal judicial power in suits against state officers to enjoin ongoing violations of federal law strikes the requisite balance between state and federal interests. Where these conditions are met, no additional "balancing" is required or warranted.[7]

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[7] Whether or not petitioner's claim to access to the records is correct on the merits is irrelevant to whether *Ex parte Young* applies. *See Verizon Maryland*, 535 U.S. at 646 ("the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim"). When VOPA returns to district court, it will show that its claim to the peer review records is meritorious, as every federal court of appeals has found. *See Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365 (7th Cir. 2010) (en banc), petition for cert. filed (U.S. July 21, 2010) (No. 10-131); *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.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.).

B. The Identity Of The Plaintiff As An Independent State Entity Is Not Relevant To Whether *Ex Parte Young* Applies

The Fourth Circuit adopted a per se rule that, because petitioner is a state agency, the Eleventh Amendment does not allow a federal court to adjudicate whether state officials, in contravention of the Supremacy Clause, are violating federal law. That was error. As the Seventh Circuit explained en banc, "the *Ex parte Young* doctrine focuses on the identity of the defendant and the nature of the relief sought, not on the nature or identity of the plaintiff." *Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) ("*IPAS*") (en banc), petition for cert. filed (U.S. July 21, 2010) (No. 10-131).

The Fourth Circuit's opposite holding is unmoored in the purposes underlying the Eleventh Amendment and ignores the contrary historical evidence.

1. Neither the fiscal nor dignitary accommodation achieved in Ex parte Young *is altered when the plaintiff is a public entity*

a. The fiscal interest in protecting the state treasury is unaffected by the nature of the plaintiff. In this case, like all other *Ex parte Young* suits, the requested relief is limited to prospective equitable relief. Petitioner here seeks only access to records.

Nor do any dignitary interests underlying the Eleventh Amendment justify narrowing *Ex parte Young* to exclude suits where public entities are plaintiffs.

This Court has never limited who the plaintiff can be in an *Ex parte Young* suit. Such suits can be brought by individuals, corporations, Indian Tribes, and foreign nations, assuming they can identify an alleged violation of a federal law or the Constitution. It would be incongruous to suggest that an *Ex parte Young* suit by an agency of a foreign country or another State "accord[s] States with the dignity that is consistent with their status as sovereign entities," *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002), while a suit by a state agency that a State has created and given independent litigating authority does not. *See* pages 17-20, *supra*. And there is nothing in the history of the Eleventh Amendment to support such a distinction.

If anything, because the same sovereign created the parties on both sides of a lawsuit such as this one, it is actually less an affront to the sovereign than when a sovereign is sued by a private party or another sovereign (such as a foreign nation or Indian Tribe). This is because, ultimately, the sovereign retains the authority to dissolve the plaintiff it created if it believes the litigation (or the resulting relief) is too onerous.

There is nothing anomalous about permitting an entity created by the State to sue the State's officials in federal court under *Ex parte Young*. To the contrary, this happens regularly with regard to private corporations. The plaintiff in *Verizon Maryland*, 535 U.S. 635, for example, was incorporated by Maryland and sued Maryland state officials. Numerous other cases relying on *Ex parte Young* have the same fact-pattern.

While petitioner is a part of the state government, its independence makes it not unlike a private corporation, for present purposes at least. 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 cause through a judicial proceeding. *See* page 17, *supra*. Further, petitioner's litigation is not subject to the control of Virginia's Attorney General. *See* pages 17-18, *supra*. And none of its funds come from Virginia's general revenues. *See* page 18, *supra*. Neither respondents nor any member of the Virginia executive branch, therefore, can cause petitioner to compromise its federally-established statutory right to records from respondents or its federally-established statutory duty to protect persons with disabilities and mental illness. Petitioner is thus no differently situated for *Ex parte Young* purposes from any corporation chartered by Virginia seeking to enforce federal law against state officials.

As noted above, the federal government required this independence if Virginia wanted to continue accepting federal funds under the Developmental Disabilities Act. *See* pages 8-9, 15-17, *supra*. "Congress thus has provided as a matter of federal law that [petitioner] is insulated from the type of state control over policy, budget, personnel, and governance that could justify treating this as an 'intramural' dispute." *IPAS*, 603 F.3d at 373.

b. Some additional evidence of this lack of indignity is the failure of States to previously object to suits by state entity Protection and Advocacy Systems. In the more than 30-year history of Protection and Advocacy Systems, no defendant ever previously claimed that a state entity Protection and Advocacy System could not rely on *Ex parte Young* to bring a suit against state officials. To the contrary, the federal courts have uniformly and without question adjudicated suits brought by Protection and Advocacy Systems against state officials. *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); *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303 (D. Conn. 2003) (state system).

Indeed, in the suit recently brought by Indiana's state entity Protection and Advocacy System against

Indiana state officials, the state officials did not raise the Eleventh Amendment in either the district court or in their appellate briefs to the panel. The state officials did not press the issue until the en banc proceeding, when they simply defended a panel opinion that had sua sponte relied on that ground based on the Fourth Circuit's decision. *See IPAS*, 603 F.3d at 370-371. In reversing the panel, the en banc Seventh Circuit observed that the state officials' "failure to raise the Eleventh Amendment * * * makes it difficult to see how this lawsuit poses a serious threat to any special sovereignty interest of the state." *Id*. at 373.

This is true of respondents as well. Petitioner has been a plaintiff in three other federal court cases against agencies and officials of Virginia since obtaining its current independent status. Nevertheless, it was not until 2008 in this case that the Attorney General first raised an Eleventh Amendment challenge based on petitioner's status as a state entity.[8]

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[8] *See VOPA v. Virginia Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003); *VOPA v. Reinhard*, No. 04-cv-54 (E.D. Va.) (filed Jan. 22, 2004), rev'd, 405 F.3d 185 (4th Cir. 2005); *VOPA v. Finnerty*, No. 04-cv-587 (E.D. Va.) (filed Aug. 16, 2004). Indeed, in the *Reinhard* action, the Virginia Attorney General acknowledged in the district court that the "doctrine of *Ex parte Young* confers jurisdiction on this Court to enter such an order" that "direct[s] the Commissioner to conform to VOPA's interpretation" of federal law. Def. Br. in Opp. to Pl. Mot. for Attorney's Fees and Costs at 2, *VOPA v. Reinhard*, No. 04-cv-54 (E.D. Va. May 7, 2004); *see also id*. at 3 n.1 ("As explained above, this suit

(Continued on following page)

c. Much of respondents' objection to this suit is rooted in the fact that petitioner claims to have federal rights against components of the State that created it. Br. in Opp. 20; *cf.* Pet. App. 18a (objecting to "[s]plintering a state's internal authority" and "excessive federal meddling with their internal authority"). But that has no bearing on the Eleventh Amendment analysis or application of *Ex parte Young*.

To be sure, a federal law that unilaterally vested one component of a state with federal rights against other components of that State might raise Tenth Amendment concerns because of the possibility of dividing the State against itself. But that is not the case here. In enacting the Developmental Disabilities Act and the PAIMI Act, Congress did not so "turn the State against itself." *Alden*, 527 U.S. at 749. Rather, the federal right to access records that petitioner claims in this case derives from two voluntary choices made by the State. First, Virginia chose to establish a Protection and Advocacy System in order to be eligible to receive certain federal funds under the Developmental Disabilities Act. Br. in Opp. 2 ("Congress encourages the states to create entities like

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is properly characterized as an action under the doctrine of *Ex Parte Young* and the Commissioner does not dispute VOPA's ability to bring an action under the doctrine of *Ex Parte Young*."). On appeal in that action, the Virginia Attorney General, for the first time, indicated that his concession might not apply to future suits. Br. of Appellant at 2 n.4, 11 n.10, *VOPA v. Reinhard*, No. 04-1794 (4th Cir. Sept. 1, 2004).

VOPA"). This is a real choice. Indeed, as noted above, for a period of time, Virginia elected not to participate in that program. *See* pages 12-13, *supra*.

Second, Virginia elected to constitute petitioner as a public entity, rather than as a not-for-profit corporation. This was a choice entirely of its own accord. The federal funds under the Developmental Disabilities Act have always been available regardless of the State's choice in that regard. Br. in Opp. 3 ("States may choose to make their protection and advocacy systems either public agencies or private, nonprofit entities."). Indeed, most States elect to designate private, nonprofit entities as their Protection and Advocacy Systems. When the program first started, sixteen States had public entities as their Protection and Advocacy Systems. Now, based on the States' own choices, that number is eight.

Given these two voluntary decisions by Virginia, only one of which was influenced by the enticement of federal dollars, respondents can hardly complain that it has been splintered by the federal government. *See Alden*, 527 U.S. at 755 (citing with approval *South Dakota v. Dole*, 483 U.S. 203 (1987)). To the contrary, as the Seventh Circuit noted in *IPAS*, it would be "strange" if a State's "own choice to set up an independent state agency * * * shield[ed] 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." 603 F.3d at 373.

d. The sovereign immunity theory espoused by respondents has no logical limit.

Nothing in the decision below would limit that ruling to preclude only enforcement of federal *statutes* in federal court by state agencies against other state officials. Under the Fourth Circuit's rationale, and the arguments advanced by respondents, the decision also would preclude enforcement of any federal constitutional rights a state entity might have.

Such a result would run counter to this Court's suggestion that state-created entities may be imbued with and may enforce federal constitutional rights. For example, this Court has suggested that public universities may have a constitutionally-protected interest in academic freedom and that public libraries may have First Amendment rights. *See Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *United States v. American Library Ass'n*, 539 U.S. 194, 210-212 (2003) (plurality); *see also City of Charleston v. Public Serv. Comm'n of West Virginia*, 57 F.3d 385, 389-390 (4th Cir.) (contract between city and third party may be protected from state interference by Contract Clause), cert. denied, 516 U.S. 974 (1995); *Akron Bd. of Educ. v. State Bd. of Educ.*, 490 F.2d 1285, 1290-1292 (6th Cir.) (school district can sue state officials who were commanding it to violate Equal Protection Clause), cert. denied, 417 U.S. 932 (1974). Yet under respondents' theory, there would be no way those claims could be brought against state officials in federal court under *Ex parte Young*.

2. Denying public entities the right to sue other government officials is contrary to historical practice

The court of appeals was incorrect to view suits by public entities against state officials as "anomalous or unheard of when the constitution was adopted." Pet. App. 15a, 21a (quoting *Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18)). At the time of the Constitution's ratification and the ratification of the Eleventh Amendment, it was already well established in England that courts could entertain suits by governmental entities created by the King against the King's officials or other governmental entities created by the King. Thus, an action with governments (or their officials) on both sides of the proceeding was not "unknown to the law." *Hans*, 134 U.S. at 15.

For example, in England, towns were permitted to sue the county sheriff. In England, the sheriff was an "executive officer of the Crown." *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 793-794 (1997) (quoting C. Wigan & D. Meston, *Mather on Sheriff and Execution Law* 2 (1935)). Towns and other governmental bodies likewise were created by the King. *See* 1 Stewart Kyd, *A Treatise on the Law of Corporations* 28 (Garland Publishing, Inc. 1978) (1793-1794). Yet the courts of England were open to actions by a town claiming that the sheriff was infringing rights granted to it by the King. The leading treatise on the law of corporations declared in 1793 that "[i]f a grant be made to the corporation of a town [by the King] that [the town] shall have the return

of writs within the town, and that the sheriff of the county shall not intromit, [the town] may have an action on the case against the sheriff, if he enter and serve process." 1 Kyd, *supra*, at 190 (citing *Town of Darby v. Foxley*, (1615) 81 Eng. Rep. 370, 1 Rol. Rep. 118 (K.B.)); *accord* 4 Sir John Comyns, *A Digest of the Laws of England* *353 note (m) (Philadelphia, J. Laval & Samuel Bradford & New York, Collins & Hannay 5th ed. corr. 1825) (same).

Another example of governmental parties suing each other in courts in England involved disputes between different political subdivisions created by the King. For example, despite defendants' objection "that the [municipal] corporation ought not to have the action," an "action was held to be maintainable" by "the mayor and commonality of Lincoln" against "the mayor, bailiffs and commonality of Derby." 1 Kyd, *supra*, 191; *see also id*. at 314-315; *Mayor of the City of London v. Mayor of the Borough of Lynn Regis*, (1796) 126 Eng. Rep. 1026, 1040 (H.L.) (House of Lords affirming ability of London to sue other local governments in its own name).[9]

During the Nineteenth Century, moreover, when England adopted an early version of revenue sharing for political subdivisions, the courts entertained suits

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[9] *See also County of Salop v. County of Stafford*, (1665) 82 Eng. Rep. 1051 (K.B.); *County of Worcester v. Town of Evesholm*, (1686) 90 Eng. Rep. 116 (K.B.); *Corporation of London v. Corporation of Liverpool*, (1796) 145 Eng. Rep. 1024 (L.R. Exch.).

by a county against government officials claiming that the officials were not complying with the law. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 17-18 (1963). Although the county lost the suit on the ground that monetary relief could not be obtained, *id.* at 17 & n.52 (citing *R. v. The Lords Commissioners of the Treasury*, (1871-1872) 7 L.R.Q.B. 387, 1872 WL 14191), the propriety of political subdivisions bringing suit against other entities created by the King was not questioned. *Ibid.*

These examples show that two adverse governmental parties could seek and obtain a judicial resolution in the King's court of a dispute as to whether the defendant's conduct was consistent with the supreme law of England. Of course, because England lacked this Nation's federalist system, those cases never had to address questions regarding in which sovereign's court system such a suit should be heard. But that difference is not a bar to relying on such historical practice, because cases like *Alden*, citing *Hans*, have looked to English case law in determining whether the Eleventh Amendment prohibited a particular suit. *See Alden*, 527 U.S. at 715-716.

The adjudication of such suits in England demonstrates that these suits are not new phenomena requiring the development of a new set of rules governing sovereign immunity. Rather, these suits were historically-recognized suits that warrant application of historically-established rules, reflected in *Ex parte Young*. Thus, because the dispute here is

about federal law, adverse parties representing two state-created governmental entities should be able to obtain resolution of their legal dispute in federal court to govern their actions prospectively.

3. This Court's cases addressing suits brought by political subdivisions weigh in favor of applying Ex parte Young

Respondents have cited four cases that they claim establish that "political subdivisions may not invoke *Ex parte Young* against state officials of the same State." Br. in Opp. 16 (citing *Williams v. Mayor & City Council of Baltimore*, 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. 161 (1907)).

As the court below recognized (Pet. App. 23a), those cases did not rely on the Eleventh Amendment. Indeed, none of those cases involved suits against States or state officials.[10] In each case, the municipality did not prevail in its challenge to a state law because of the broad authority States have in organizing and reorganizing their political subdivisions. *See Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960)

[10] In *Williams*, the City of Baltimore was the plaintiff and the defendant was a receiver for a railroad. In *City of Trenton*, New Jersey was the plaintiff and the city was the defendant. In *Stewart*, Kansas City was the plaintiff and the defendant was a county treasurer. And in *Hunter*, the City of Allegheny and its residents were the plaintiffs and the defendant was the City of Pittsburgh.

(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").[11] Those cases thus shed no light on the question whether a state-created public entity that possesses a federal right against its creator may rely on *Ex parte Young* to seek relief against state officials in federal court.

More relevant are this Court's cases in which the Court has resolved disputes on the merits between political subdivisions (or their officials) and state officials brought originally in federal district court. *See Papasan v. Allain,* 478 U.S. 265 (1986) (holding that plaintiffs, including Papasan, a school board superintendent, could rely on *Ex parte Young* to bring federal constitutional claim against state official); *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); *see also Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259-260 n.6 (1985) (criticizing, in dicta, federal court for dismissing earlier suit between

[11] *Accord 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 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).

county and school district for lack of federal jurisdiction). Yet the ruling below apparently would preclude all of those lawsuits.

C. *Coeur d'Alene* Does Not Limit Petitioner's Ability To Rely On *Ex parte Young*

Respondents rest (Br. in Opp. 14-15, 18-20, 28) primarily on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to suggest that the court of appeals was free to engage in an ad hoc balancing of interests to determine whether petitioner could rely on *Ex parte Young*. But *Coeur d'Alene* involved relief that was virtually sui generis. The case thus cannot be read as broadly as respondents urge, particularly in light of the Court's subsequent decision in *Verizon Maryland*. In any event, even if as-applied balancing were appropriate, petitioner should nonetheless be permitted to proceed under *Ex parte Young* in the circumstances here.

1. Coeur d'Alene *focused on the extraordinary relief sought that would have essentially carved territory from the State, while the relief sought here is typical prospective relief*

a. 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. Specifically, the plaintiffs in that case sought an injunction to carve out part of the territory of the State from the control of the State as sovereign. "The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Id*. at 282.

The portions of the opinion in *Coeur d'Alene* joined by a majority of Justices 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*." *Id.* 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").

There is no such proposed violation of the State's territorial integrity in this case. To the contrary, the relief sought here is quite modest – mere access to records. Indeed, state officials' turning over documents is part of the ordinary course of discovery in any *Ex parte Young* suit, which often seeks some significant official action, such as reinstatement of an employee, release of a prisoner, or payment of future benefits. *See, e.g.*, *Edelman*, 415 U.S. at 668; *Ex parte Young*, 209 U.S. at 168. In this case, by contrast, all petitioner wants is certain documents. No other relief is requested. J.A. 21-22. Nothing in

the controlling portions of *Coeur d'Alene* suggests such relief is unavailable under *Ex parte Young*.

b. To be sure, the lead opinion in *Coeur d'Alene*, authored by Justice Kennedy but joined in whole only by then-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." 521 U.S. at 278, 274. That broader inquiry appears to be the approach adopted by the court of appeals below.

But that inquiry was rejected by the other seven justices in *Coeur d'Alene*. And after *Coeur d'Alene,* this Court rejected the balancing approach urged by the plurality in that case. In *Verizon Maryland*, 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." 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment), and citing *id.* at 298-299 (Souter, J., dissenting)). *Verizon Maryland* thus reversed a Fourth Circuit decision that had 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 Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 295 (4th Cir.

2001). Yet that is the approach apparently followed by the Fourth Circuit in this case as well.

2. Even if balancing were appropriate, this suit should still be permitted to proceed under Ex parte Young

In any event, even if balancing akin to that discussed by the two-Justice plurality in *Coeur d'Alene* were appropriate, Virginia courts do not offer a prompt and effective remedy and the nature and purpose of this action warrants a federal forum.

a. Respondents represented that petitioner "is not able to bring this action in a state trial court of general jurisdiction" because the trial courts "lack the authority to issue writs of mandamus against state officials." Br. in Opp. 25 n.10. Instead, according to respondents, VOPA may only bring "an original action for writ of mandamus in the Supreme Court of Virginia." Br. in Opp. 25.

That supposed remedy is neither "prompt" nor "effective." Under Virginia law, the availability of the "extraordinary remedial process" of mandamus is contingent on "judicial discretion" that is exercised with cognizance of its "drastic character." *Gannon v. State Corp. Comm'n,* 416 S.E.2d 446, 447 (Va. 1992).

Writs of mandamus do not have the flexibility of equitable remedies. Interim relief is not available. A temporary or preliminary writ of mandamus is not available. *See IPAS*, 603 F.3d at 374 n.7. Nor is there any evidence that the Virginia Supreme Court could

have ordered respondents, as the district court did in this case (J.A. 36-37), not to destroy or alter the documents sought by petitioner pending resolution of the action. A forum that lacks the authority to prevent such irreparable harm could hardly be considered effective.

Further, if there are any fact disputes, there appears to be no mechanism for factfinding in an original proceeding. The Virginia Supreme Court rules provide for taking depositions in original actions. *See* Va. Sup. Ct. R. 5.7(d). But no other forms of discovery (such as interrogatories) are authorized. And petitioner is aware of no mechanism for the Court to resolve factual disputes that turn on credibility (such as whether particular documents exist) based on deposition testimony alone. *Cf. IPAS*, 603 F.3d at 369 n.2 (factual dispute on whether all records were turned over); Melissa Bowman, Note, *Open Debate Over Closed Doors: The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs*, 85 KY. L.J. 955, 972-974 (1996-1997) (discussing case in which compliance with earlier injunction was disputed). Thus, the Virginia Supreme Court has held that it "is not equipped to determine factual issues." *Stroobants v. Fugate*, 163 S.E.2d 192, 194 (Va. 1968).

b. Another factor discussed by the plurality in *Coeur d'Alene* also weighs in favor of federal court exercising authority over this case. The plurality suggested that when the "ultimate purpose" of a complaint "was to vindicate the plaintiffs' civil

liberties," federal court involvement was more appropriate. 521 U.S. at 279 (plurality opinion). Although this suit is brought by petitioner to obtain records, the ultimate purpose is to protect persons with disabilities and mental illness from abuse and neglect at the hands of state officials. *See, e.g.*, S. Rep. No. 99-109, at 9-10 ("in order to ensure the protection of mentally ill persons," a Protection and Advocacy System has a "need for full access to facilities and clients and to their records" to "help protect currently established rights articulated in Federal and State laws or under the Constitution of the United States"). Such abuse and neglect often constituted actual or incipient violations of the Fourteenth Amendment. *See* pages 2-3, 6-7, *supra*.

Indeed, the legislative history of the Developmental Disabilities Act and subsequent legislation shows that Congress encouraged States to designate entities as independent Protection and Advocacy Systems because the States were not able to properly monitor and prevent such abuse and neglect in state institutions through existing mechanisms. *See* pages 3-5, 7, *supra*. "In a sense, given its unusual independence from state government, the special federal responsibilities it carries out, and the direct federal funding it receives, [petitioner] is closer to being a specialized agent of the federal government for these purposes than it is to being an ordinary state agency." *IPAS*, 603 F.3d at 373. This was, in fact, the view of one of the primary sponsors of these Acts. Senator Weicker explained that "the whole purpose of [the

Protection and Advocacy Systems] was, very simply, that one Congressional oversight hearing every ten years was not adequate protection for persons in mental institutions." *Protection and Advocacy for Mentally Ill Individuals Act: Hearing before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Resources*, 100th Cong. 76 (1988). Thus, Congress "clothed [the Systems] with the indicia of official status" so that they could "get[ ] into the institutions." *Ibid*.

c. Finally, because this is a dispute about federal law, there is an important "federal interest in uniformity" of interpretation that weighs in favor of a federal court adjudicating the claim. *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment). Acknowledgement of that federal interest does not "suggest that state courts are inadequate to apply federal law." *Ibid*.; *see also id*. at 313 (Souter, J., dissenting) (access to federal courts "addresses not the adequacy of a state judicial system, but the responsibility of federal courts to vindicate what is supposed to be controlling federal law"). Instead, it simply accepts that permitting federal courts to grant "relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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