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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,

Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST of *AMICI CURIAE* and SUMMARY OF ARGUMENT[1]

Amici curiae listed in the Appendix are scholars of constitutional law and the federal courts who hold a range of views as to how to understand state sovereign immunity, including whether such immunity is rooted in the Constitution or the common law; the appropriate circumstances in which Congress may abrogate that immunity; the proper application of the Eleventh Amendment; and the nature and scope of relief that should be available under *Ex parte Young*, 209 U.S. 123 (1908). *Amici* come together in this case, though, to explain how the doctrine of *Ex parte Young* strikes a carefully calibrated balance between the supremacy of federal law and the separate sovereignty of the states, a balance that is jeopardized by the Court of Appeals' holding barring a state-created agency —acting under state authority—from pursuing the same relief under *Ex parte Young* that would be available to an otherwise similarly situated private entity.

First, careful review of this Court's jurisprudence reveals that the Supremacy Clause principles for which *Ex parte Young* has come to stand have at their core the assumption that state sovereignty is not implicated whenever state officers are continuing to act in violation of federal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

law. As Justice Peckham explained in *Young*, "[t]he act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159. Put another way, because the state *qua* sovereign has no authority to empower its officers to violate federal law, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), regardless of whether the plaintiff is an individual, a private corporation, or a public agency. Because relief under *Ex parte Young* therefore turns solely on whether the defendant-officer's ongoing conduct violates federal law, all that is required for relief, as Justice Scalia has explained, is a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original)). Thus, where relief under *Ex parte Young* is otherwise appropriate, there is no sovereign whose special interests need protecting on the defendant's side of the lawsuit.

Second, to the extent that VOPA is a "public" agency, its existence reflects Virginia's sovereign (and statutory) choice to create a new "arm of the state." And that conclusion in turn triggers separate strands of this Court's jurisprudence that recognize and protect the special sovereignty interests of the states on *both* sides of the litigation, and not just as defendants. To that end, this Court has recognized that sovereign immunity does not bar suits by *other* states, *see, e.g.*, *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), that different considerations may factor into traditional standing analysis when states are plaintiffs, *see, e.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and that, to protect the unique sovereignty interests of the states, many interstate bodies should be excluded from the sweep of the Eleventh Amendment, *see, e.g.*, *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Lake Country Estates* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979).

In addition, this Court's jurisprudence also recognizes the extent to which state sovereignty is adequately protected by providing the state with meaningful (and wholly volitional) choices in structuring their conduct. *See, e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman* (*Pennhurst I*), 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"). In the specific context of the Eleventh Amendment, this Court has stressed "the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not . . . a State's actual preference or desire, which might,

after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). Here, Virginia chose both to accept funds in the first place, and to use those funds to create a public agency to administer the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801–51, knowing that relief under *Ex parte Young* has always been available to enforce Spending Clause statutes. Sovereign immunity, as this Court has stressed, is designed to protect the states' role in our federal system, not to "permit States to achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. By choosing to accept funds under the PAIMI Act and by creating a state agency with the authority to enforce federal law, Virginia has exercised its sovereignty—an exercise that is itself entitled to respect. Thus, although *amici* agree that states are entitled to special consideration whenever their sovereign interests are implicated in litigation in the federal courts, this Court's jurisprudence suggests that any such interests in this case appear on the plaintiff's side of the litigation, not the defendant's.

ARGUMENT

I. SUITS FOR FEDERAL INJUNCTIVE RELIEF AGAINST STATE OFFICERS DO NOT IMPLICATE STATE SOVEREIGNTY REGARDLESS OF WHETHER THE PLAINTIFF IS A PRIVATE OR PUBLIC ENTITY

a. Ex parte Young Held That the Eleventh Amendment Does Not Bar a Suit for Federal Injunctive Relief Against a State Officer

As then-Justice Rehnquist wrote for this Court 36 years ago,

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

Edelman v. *Jordan*, 415 U.S. 651, 664 (1974). At the heart of *Ex parte Young* and its companion case, *Gen. Oil Co.* v. *Crain*, 209 U.S. 211 (1908), is the premise that "certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land." *Alden* v. *Maine*, 527 U.S. 706, 747 (1999).

As Justice McKenna explained in *Crain*, "Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers." 209 U.S. at 226; *see also Ex parte Young*, 209 U.S. at 159 ("The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.").

Ex parte Young and *Crain* thereby solidified as constitutional law a principle that had been repeatedly suggested in prior cases, *i.e.*, "that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of [the Eleventh A]mendment." *Smyth* v. *Ames*, 169 U.S. 466, 518–19 (1898); *see also Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 389–90 (1894); *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 9 (1891); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824) (Marshall, C.J.) (rejecting the argument that "a void act can afford any protection to the officers who execute it"); *cf. United States* v. *Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and

to observe the limitations which it imposes upon the exercise of the authority which it gives.").

In that regard, *Ex parte Young* was nothing more than an application of the conclusion the Court had already reached in *McConnaughy*, *Reagan*, and *Smyth*, albeit one that was only the more significant in light of the Court's broad construction of the Eleventh Amendment in *Hans* v. *Louisiana*, 134 U.S. 1 (1890). *See generally* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) (highlighting the relationship between *Hans* and *Young*). Nevertheless, the animating idea behind *Ex parte Young* is a "basic principle of federal law," *Coeur d'Alene Tribe*, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment), that "has become bedrock," Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247, 247 (Judith Resnik & Vicki C. Jackson eds., 2009); *see also* Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 908–12 (2000) (describing the significance of *Ex parte Young* in the context of modern doctrine).

More than that, *Ex parte Young* has proved "indispensable to the establishment of constitutional government and the rule of law." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 14 (6th ed. 2002). Simply put, "The doctrine of *Ex parte Young* . . . ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

b. Ex parte Young **Holds That the Supremacy Clause Divests State Officers of Any Authority To Violate Federal Law, and Must Be Prospectively Enforceable**

In recognizing such a "necessary exception to Eleventh Amendment immunity," *id.*, the *Ex parte Young* Court relied, as *Smyth* v. *Ames* had before it, on the Supremacy Clause of Article VI. *See, e.g.*, *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."); *Smyth*, 169 U.S. at 527 ("No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case, for that would make the state legislature the final judge of the validity of its enactment . . . ."). As Justice Peckham explained in *Young*,

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159–60 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)). Thus, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green*, 474 U.S. at 68; *see also* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1154–55 (1989) (explaining the constitutional significance of *Ex parte Young*'s rationale).

That the availability of relief under *Ex parte Young* is required to vindicate the Supremacy Clause is perhaps nowhere better reflected than in those cases in which this Court has declined to apply the 1908 decision. In *Pennhurst II*, for example, the question was whether *Ex parte Young* could be invoked to pursue injunctive relief against state officers for violations of *state* law. Writing for the Court, Justice Powell answered that question in the negative. *See Pennhurst State Sch. & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 103–06 (1984). In his words, "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* at 106; *see also* Jackson, *supra*, at 990 ("[In *Pennhurst II*], it was not history and remedial traditions, but rather the supremacy of federal law, that justified *Ex parte Young* actions for injunctive relief under federal law but not for injunctive relief under state law.").

To similar effect, *Edelman* v. *Jordan*, which reaffirmed *Ex parte Young* within its longstand-

ing, necessary bounds but declined to extend it to claims seeking retrospective relief, was expressly grounded in the Supremacy Clause. *See, e.g.*, *Green*, 474 U.S. at 68; *Edelman*, 415 U.S. at 664–68. As *Ex parte Young* itself suggested, the supremacy of federal law is not as squarely threatened in cases where an ongoing violation of federal law was not at issue. *See, e.g.*, *Ex parte Young*, 209 U.S. at 192 ("There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state." (emphasis omitted)).

In short, none of these cases disrupt the analytical heart of *Ex parte Young*—that a state's "special sovereignty interests" are not implicated when plaintiffs seek federal injunctive relief against state officers.[2]

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[2] The conclusion that it is these fundamental principles—and only these—that govern the scope of *Ex parte Young* is not called into question by this Court's decision in *Coeur d'Alene*. Although Justice Kennedy's opinion in that case suggested that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction," 521 U.S. at 270 (opinion of Kennedy, J.), the three other Justices whose votes formed the majority declined to endorse such an approach.

Subsequent cases confirm that *Young*'s central principles survived *Coeur d'Alene* intact. In *Verizon*, for example, Justice Scalia specifically rejected Maryland's suggestion that

c. Thus, There is No Basis for Conditioning Relief Under *Ex parte Young* on Whether the Plaintiff is a Private or Public Entity

Because *Ex parte Young* stands for the Supremacy Clause-based principle that states have no authority to empower their officers to continue to act in violation of federal law in any circumstance, this Court has never suggested that its applicability turns on case-specific considerations such as the identity of the plaintiff. Rather, as Justice Scalia has explained, "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon*, 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) (alteration in original)).

To that end, this Court has routinely applied the rule of *Ex parte Young* without any special

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Coeur d'Alene had fundamentally altered the nature of *Ex parte Young* actions, reiterating that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim," 535 U.S. at 646, and instead turns only on the traditional factors. *See also Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431 (2004) (holding that an action to enforce a consent decree could be brought under *Ex parte Young*, without citing *Coeur d'Alene*). *See generally* Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene*,* Breard*, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 42–51 (1998) (arguing for, and justifying, a limited reading of *Coeur d'Alene*).

comment where the plaintiff is a private corporation. *See, e.g.*, *Verizon*, 535 U.S. 635; *S. Covington & Cincinnati St. Ry. Co.* v. *City of Covington*, 235 U.S. 537 (1915). Such decisions reflect and enforce the principle underlying the *Ex parte Young* doctrine, *i.e.*, that it is the need to enjoin ongoing violations of federal law—and not any concern with whom the plaintiff might be—that warrants treating persons responsible for such ongoing violations as private individuals, not alter egos of the state.

"Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." *Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 293 ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar."). This Court's rejection of any notion that only natural-born persons may invoke *Ex parte Young* makes eminent good sense, because the threat to federal supremacy has nothing to do whatsoever with the identity of the plaintiff. Any ongoing violation of federal law by a state officer threatens the supremacy of that law—and of federal authority writ large. *See, e.g.*, Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126–32 (1996) (noting the continuing significance—and vitality—of *Ex parte Young* after *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996)). In the same vein, the state *qua* sovereign is unaffected by any distinction with regard to the nature or legal status of the plaintiff; *any* "special sovereignty interest" is

vitiated by the *defendant*'s ongoing violation of the plaintiff's federal rights, regardless of who the plaintiff is.

II. AS A PUBLIC, STATE-CREATED AGENCY, VOPA ACTS AS THE SOVEREIGN, AND EXERCISES THAT SOVEREIGNTY IN CHOOSING TO PURSUE RELIEF UNDER *EX PARTE YOUNG*

To the extent that VOPA is a "public" agency, its existence reflects Virginia's sovereign (and statutory) right to create a new "arm of the state." That conclusion, in turn, triggers separate strands of this Court's jurisprudence that recognize and protect the special sovereignty interests of the states on both sides of the litigation, and not just as defendants.

a. As a "Public" Agency, VOPA Acts With Sovereign Authority

In ascertaining whether individual actors are in fact the "state," this Court has been careful to distinguish between the different constitutional provisions for which that determination matters. Thus, whereas this Court's jurisprudence has recognized a relatively broad definition of "state action" sufficient to trigger the constraints of the Fifth and Fourteenth Amendments, *see, e.g.*, *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–98 (2001); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383–91 (1995), the test under the Eleventh Amendment has been considerably more exacting. As Justice Stevens explained in *Lake Country Estates*,

> It is true, of course, that some agencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."

440 U.S. at 400–01 (footnote omitted).

Thus, this Court has refused to extend sovereign immunity to counties, *see, e.g.*, *N. Ins. Co. of N.Y., Inc.* v. *Chatham County*, 547 U.S. 189, 193 (2006), municipalities, *see, e.g.*, *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003), and most inter-state agencies, *see, e.g.*, *Hess*, 513 U.S. 30; *Lake Country Estates*, 440 U.S. 391. Instead, an entity must be an "arm of the state," at least partly as a matter of *state* law, to qualify for Eleventh Amendment protection. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (noting that whether an entity is an "arm of the state" for Eleventh Amendment purposes "depends, at least in part, upon the nature of the entity created by state law"); *see also Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997) ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law.

But that federal question can be answered only after considering the provisions of state law that define the agency's character.").

The narrower standard this Court has embraced under the Eleventh Amendment specifically reaffirms the relationship between sovereign immunity and the special sovereignty interests of the states, which are not implicated in suits against other actors, no matter their connection to state authority or their treatment as state actors under other constitutional provisions. *See, e.g.*, *N. Ins. Co. of N.Y.*, 547 U.S. at 193 ("A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law."). The negative implication of these cases is that entities that *are* "arms of the state," and therefore entitled to Eleventh Amendment protections, are entities with their own special sovereignty interests.

Notwithstanding this conclusion, the Court of Appeals did not even consider whether VOPA *is* an "arm of the state" under Virginia law, and, how, if at all, that conclusion might factor into its ability to pursue federal injunctive relief against state officers under *Ex parte Young*. *Cf. Cash* v. *Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir. 2001) (analyzing whether a county school board is an "arm of the state" under North Carolina law). In short, in focusing on the special sovereignty interests of the state through its defendant-officers, the Court of Appeals neglected the equally—if not more—significant possibility

that the plaintiff-agency also has special sovereignty interests worth vindicating.

b. This Court Has Consistently Recognized the Special Sovereignty Interests of States and State Agencies as Plaintiffs

If VOPA is in fact an "arm of the state," it would follow that it, too, is protected by the same special sovereignty interests that this Court has repeatedly recognized in cases where the states themselves are litigants. And, although the Fourth Circuit did not consider this possibility, it bears emphasizing that such interests often arise in cases in which states are *plaintiffs*, and not just defendants.

For example, this Court has consistently held that the Eleventh Amendment does not protect states from suits by other states. *See, e.g.*, *Texas* v. *New Mexico*, 482 U.S. 124, 130–31 (1987); *see also Rhode Island*, 37 U.S. (12 Pet.) 657. Although the Court has never had occasion to address the issue, the same logic would presumably apply where the plaintiff was an "arm of the state" for Eleventh Amendment purposes, rather than the state itself. And whatever the underlying rationale for these decisions, it cannot be gainsaid that the special sovereignty interests of the states cut both ways in such litigation.

To similar effect, this Court recently reiterated the time-honored principle that "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 U.S. at 518. As Justice Stevens there explained, "there is a

critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what [*Massachusetts* v.] *Mellon*[, 262 U.S. 447 (1923)] prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Id.* at 520 n.17 (quoting *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 447 (1945)).

Whatever the sweep of this Court's decision in *Massachusetts* v. *EPA*, it reflects at a minimum the notion that special sovereignty interests follow states—and the arms thereof—regardless of the side on which they appear in litigation. It is therefore necessarily incomplete to account for the special sovereignty interests of the state through an official *qua* defendant, without taking into account the very real possibility that equally strong—if not stronger—interests appear on the plaintiff's side, as well. Indeed, the irony of the Court of Appeals' analysis in this case is its invocation of sovereignty considerations on the part of a defendant official (who, according to *Ex parte Young*, does *not* act as the state), concomitant with its failure to consider those concerns on the part of the plaintiff (who, under Virginia law, may well be the state). In short, with regard to the special sovereignty interests of the states, more thoroughgoing analysis suggests that the Court of Appeals might have had the relevant considerations backwards.[3]

[3] In addition, the Fourth Circuit's decision did not consider the potentially invasive role federal courts would have to play in deciding, on a case-by-case basis, whether individual entities are "public" or not under state law. *Cf. Hughes* v. *Region VII Area Agency on Aging*, 423 F. Supp. 2d

c. Virginia Exercised its Sovereignty Both by Accepting Funds Under the PAIMI Act and by Creating a Public Agency Empowered to Enforce the Federal Statute

It is beyond question that Spending Clause statutes are enforceable under *Ex parte Young* to the exact same extent as any other federal law—and always have been. *See, e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 346–49 (1979); *see also Frazar* v. *Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002) (expressly rejecting the argument that Spending Clause statutes are not enforceable to the same extent as other federal laws under *Ex parte Young*), *rev'd on other grounds sub nom. Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431 (2004); *Mo. Child Care Ass'n* v. *Cross*, 294 F.3d 1034, 1040–41 (8th Cir. 2002) (same); *Westside Mothers* v. *Haveman*, 289 F.3d 852, 861 (6th Cir. 2002) (same); *Antrican* v. *Odom*, 290 F.3d 178, 188 (4th Cir. 2002) (same). As such, "once a State elects to participate, it must comply with the requirements of [the statute]." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). By accepting funds under the PAIMI Act, Virginia knowingly subjected its officers to prospective compliance with the federal law. Moreover, Virginia's concession that the PAIMI Act would be enforceable against state officers in

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708 (E.D. Mich. 2006) (undertaking exhaustive analysis of the facts and of Michigan state law in ascertaining whether an area agency on aging (AAA) is public or private under a federal statute similar to the PAIMI Act); *Tex. Boll Weevil Eradication Found., Inc.* v. *Lewellen*, 952 S.W.2d 454 (Tex. 1997) (noting the inherent complexities in determining whether certain entities are public or private entities under state law).

an *Ex parte Young* action brought by *private* plaintiffs further buttresses the conclusion that the state understood the consequences of accepting federal funds—that its officers would be bound to abide by the statute, and would be subject to injunctive relief if they failed to do so.

Thus, whether or not acceptance of federal funds under the PAIMI Act constituted a waiver of Virginia's sovereign immunity (a point that is not at issue in this case, and on which *amici* express no view), there is no question that Virginia knew that, under extant doctrine, its officers would be subject to injunctive relief under *Ex parte Young* were they to violate the Act.

In addition, and separate from the threshold decision whether to accept funds under the Act, the PAIMI Act also invests states with a choice of how to use those funds, *i.e.*, whether to create a public or private agency to monitor the state's compliance with the statute. In an analogous context, this Court has held that sovereign immunity is not meant to "permit States to achieve unfair tactical advantages," emphasizing that "an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides*, 535 U.S. at 620. To be sure, choosing to create a public—rather than private—agency is not the kind of litigation choice on which the Court relied in finding a waiver of sovereign

immunity in *Lapides*.[4] Nonetheless, the considerations are comparable, for this Court in *Lapides* rejected the possibility of a regime where a state might manufacture sovereign immunity simply by choosing among alternative forums. The same should hold for the choice whether to create a public or private agency with federal funds to enforce a federal statute.

* * *

The Court of Appeals' decision represents an arbitrary and ill-conceived variation on well-established, workable doctrinal rules, and jeopardizes the careful balance that this Court's sovereign immunity jurisprudence has struck between the supremacy of federal law and the sovereignty of the states. *Amici* agree that states are entitled to special consideration whenever their sovereign interests are implicated in litigation in the federal courts. In this case, though, any such interests appear on the plaintiff's side of the litigation, not the defendant's.

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[4] Perhaps ironically, there is no reason to believe that Virginia chose to create a public agency (rather than a private one) *because* that entity would have less authority and less of an ability to effectuate the goals of the PAIMI Act. Although in one sense that fact further distinguishes this case from *Lapides*, it simultaneously reinforces the extent to which the Court of Appeals did not pay proper respect to Virginia's sovereign interests.

Conclusion

For the foregoing reasons, *amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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APPENDIX

Appendix

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