No. 09-529

IN THE
Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,
Petitioner,
v.

JAMES W. STEWART, III, COMMISSIONER,
DEPARTMENT OF BEHAVIORAL HEALTH AND
DEVELOPMENTAL SERVICES OF THE
COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

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

BRIEF FOR AMICUS CURIAE RHODE ISLAND OFFICE OF THE CHILD ADVOCATE IN SUPPORT OF PETITIONER

JOSEPH J. MUELLER
Counsel of Record
SYDENHAM B. ALEXANDER, III
RACHEL I. GURVICH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
joseph.mueller@wilmerhale.com

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*.

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INTEREST OF AMICUS CURIAE

The Rhode Island Office of the Child Advocate ("Child Advocate") is an independent state agency that is required by state law to "take all possible action including… formal legal action, to secure and ensure the legal, civil, and special rights of children" involved with the Department of Children, Youth and Families of the State of Rhode Island ("DCYF"). R.I. Gen. Laws §§ 42-73-5, 42-73-7(6).[1] The Child Advocate's stated mission is "to protect the legal rights of children in State care and to promote policies and practices which ensure that children are safe; that children have permanent and stable families; and that children in [and] out of home placements have their physical, mental, educational, emotional, and behavioral needs met." Rhode Island Office of the Child Advocate, *Mission Statement of the Office of the Child Advocate*, at http://www.child-advocate.ri.gov/index.php (last visited Aug. 30, 2010). The Child Advocate strives to bring safety, security and, ultimately, permanency, into the lives of children in state care.

In pursuing its statutory mission, the Child Advocate has availed itself of the federal court system and sought declaratory and injunctive relief against state officials. This practice is consistent with the longstanding doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Indeed, in 2004, a federal court recognized that a suit brought by the Child Advocate against the director of the DCYF "fit[] squarely within" the *Ex parte Young* exception to state sovereign immunity. *See Office of Child Advocate* v. *Lindgren*, 296 F. Supp. 2d 178, 188 (D.R.I. 2004).

The Fourth Circuit's erroneous ruling that a federal forum is not available to state plaintiffs seeking to enjoin state officials from violating federal law threatens the enforcement work of both the Child Advocate and other independent state agencies throughout the country. The Child Advocate submits this brief to offer the Court its perspective on how the Fourth Circuit's decision, though purporting to respect the dignity and sovereignty of states, actually frustrates the purpose of state legislative enactments like the ones that created the Petitioner (the Virginia Office for Protection and Advocacy or "VOPA") and the Child Advocate itself.

SUMMARY OF ARGUMENT

The decision below turned state sovereign immunity principles on their head, jurisdictionally restricting states in the name of respecting these same states. The Fourth Circuit held that the longstanding doctrine of *Ex parte Young*, 209 U.S. 123 (1908), is not available to states in circumstances where that same doctrine unquestionably would be available to private plaintiffs. This holding directly curtailed the enforcement powers of a state protection and advocacy agency established by the Commonwealth of Virginia, and it endangers the work of other state-created agencies like the Child Advocate of Rhode Island.

This Court has described the purpose of "[t]he principle of sovereign immunity" as "'accord[ing] the

States the respect owed them as members of the federation,'" *Alden* v. *Maine*, 527 U.S. 706, 748-49 (1999) (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). The Fourth Circuit's decision did the opposite. The Child Advocate respectfully argues that the decision below should be reversed.

ARGUMENT

I. RHODE ISLAND AND OTHER STATES CHOSE TO CREATE STATE AGENCIES WITH THE POWER TO SUE STATE OFFICIALS IN FEDERAL COURT—AND AFFIRMING THE FOURTH CIRCUIT'S DECISION WOULD NEGATE THAT STATE CHOICE

The Child Advocate is empowered by the State of Rhode Island to safeguard vulnerable children in Rhode Island, and it has done so in part by bringing federal claims against state officials in federal court. If affirmed, the Fourth Circuit's decision would remove powers that agencies like the Child Advocate and VOPA have properly been given by their states.

A. The Rhode Island Office Of The Child Advocate

Understanding the potential impact of the Fourth Circuit's decision on the Child Advocate must begin with an examination of the authorization, purpose, and powers of the Child Advocate—all of which reflect choices made by Rhode Island as a state sovereign.

1. Establishment and purpose of the Child Advocate

"The Office of the Child Advocate was enacted by statute to protect the civil, legal and special rights of all children involved with the Department of Children

Youth and Families." *See* Office of the Child Advocate Annual Report, *Children—Why We Care* 7 (2008-2009), Public Document No. 09-01, *available at* http://www.child-advocate.ri.gov/documents/2008-2009%20OCA%20Annual%20Report-3.pdf ("2009 Annual Report"). Rhode Island created the Child Advocate in 1979 in response to the findings of a study commissioned by the General Assembly to examine the needs of the child welfare system. *See* Finn & D'Ambra, *Lawyering for Children in the Care of the State*, 42 R. I. Bar J. 7, 7 (Mar. 1994); *see also* 1979 R.I. Pub. Laws 911.

Rhode Island was the first state to legislatively enact an ombudsman-like office devoted to child welfare. Davidson et al., *Establishing Ombudsman Programs for Children and Youth: How Government's Responsiveness to Its Young Citizens Can Be Improved* 65 (ABA Center on Children and The Law 1993)[2] The American Bar Association identified the Child Advocate as a model child welfare ombudsman program, (*id.* at 98), and it "is often cited as one of the most successful child welfare ombudsman programs in the United

[2] The term "ombudsman" is a Swedish word dating back to the 19th century which literally means an investigator of "citizen" complaints. *Id.* at vi. The primary functions of a child welfare ombudsman are to "address complaints related to government services for children and youth, to provide a system accountability mechanism, and to protect the interests and legal rights of children and their families who are parties in the child welfare and juvenile justice arenas." D'Ambra, *Appendix E: Survey of Ombudsman Offices for Children In the United States*, *in* United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* (Jan. 1998), at E1, *available at* http://www.ncjrs.gov/pdffiles/164727.pdf.

States." Marzick, *The Foster Care Ombudsman: Applying An International Concept to Help Prevent Institutional Abuse of America's Foster Youth*, 45 Fam. Ct. Rev. 506, 515 (July 2007). Other states have modeled their own similar programs after the Child Advocate. *See, e.g.*, D'Ambra, *Commentary: What The Child Advocate Does*, Providence Journal-Bulletin, Feb. 17, 2000, at 7B; D'Ambra, *Appendix E: Survey of Ombudsman Offices for Children In the United States*, *in* United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, at E-1 (Jan. 1998), http://www.ncjrs.gov/pdffiles/164727.pdf.

2. Duties and responsibilities of the Child Advocate

"Under Rhode Island law, the Child Advocate is endowed with the responsibility of protecting the interests and rights of children who are placed under DCYF custody." *Sam M. ex rel. Elliott* v. *Carcieri*, 608 F.3d 77, 82 (1st Cir. 2010). The Child Advocate is appointed by the Governor. R.I. Gen. Laws § 42-73-2. Funding for the Child Advocate is appropriated annually by the General Assembly. *Id.* § 42-73-4. The Advocate "acts independently of the department of children, youth, and families in the performance of his or her duties." *Id.* at 42-73-5.

The Child Advocate's statutory duties include:

- ensuring that children involved with DCYF are apprised of their rights under Rhode Island law;
- conducting periodic inspections of DCYF residential facilities and their practices;

- reviewing DCYF policies and procedures that implicate children's rights, and making recommendations regarding legislative reform;
- investigating a wide variety of complaints alleging neglect or abuse, including reports of institutional abuse;
- investigating all fatalities among children that have received DCYF services; and
- providing training and assistance to guardians *ad litem* in Family Court and reviewing Family Court orders relating to juveniles.

R.I. Gen. Laws §§ 42-73-7, 42-73-9.1.[3]

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[3] In a given year, the role of the Child Advocate encompasses a broad spectrum of matters. For example, in 2008-2009, the Child Advocate conducted public education and outreach campaigns to promote public awareness of issues impacting children and also to ensure that children in state care were apprised of their rights. *See* 2009 Annual Report 11. The Advocate participated in policy reviews and legislative initiatives involving issues affecting Rhode Island's children and families, and served on various governmental and non-governmental boards and advisory panels tasked with proposing and reviewing potential changes in the law. *Id.* at 11-12, 17. The office investigated institutional abuse allegations and other complaints of abuse or neglect, sometimes at the direction of the Family Court, *id.* at 13-15, and inspected the facilities and procedures of various institutions or residences, licensed or unlicensed, where a child had been placed by the Family Court or DCYF, *id.* at 16. The Advocate also administered the state's Victim's Services fund, and although it was not statutorily required, served as a guardian ad litem for children voluntarily placed in the care of DCYF. *Id.* at 19-21. Finally, the Advocate pursued federal class action litigation on behalf of youth in state care. *Id.* at 19.

In addition to these specifically-enumerated duties, Rhode Island has also broadly directed the Advocate to "*[t]ake all possible action* including, but not limited to, programs of public education, legislative advocacy, and *formal legal action*, to secure and ensure the legal, civil, and special rights of children subject to the provisions of § 42-73-9.1 and chapter 72 of this title." R.I. Gen. Laws § 42-73-7(6) (emphases added). In furtherance of these duties, the Child Advocate is entitled to access a variety of DCYF, family court, law enforcement, and other agency records, over which it also has subpoena power, and to freely and confidentially communicate with any child receiving state services. *Id.* §§ 42-73-8 to -10.

3. The Child Advocate and the courts

"Probably the most powerful tool of the Child Advocate is the ability to bring legal action … to ensure that the rights of children are observed by DCYF." Davidson, *supra*, at 66. To fulfill its statutory mandate, the Child Advocate has engaged in litigation in state and federal courts. *See, e.g.*, *id.* at 97-98, 116-117; Finn & D'Ambra, *supra*, at 10-11. For example, in 1982, the Child Advocate brought suit in federal court against the directors of DCYF and the state Department of Education to ensure that children without parents to represent them in special education matters were afforded an educational advocate in accordance with the provisions of 20 U.S.C. § 1415(b)(1)(A)-(E) (1976). *See* Finn & D'Ambra, *supra*, at 11 & nn.46-49 (describing *Office of the Child Advocate* v. *Pontarelli*, C.A. No. 82-0091P (D.R.I.)). Consent decrees were entered in 1983 and 1989 laying out the scope of the Departments' legal duties. *Id.*

In 1986, the Child Advocate brought a landmark suit against the director of DCYF in federal court, asserting both federal constitutional claims and statutory claims under the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 620 & 670 *et seq.* *See Office of Child Advocate* v. *Lindgren*, 296 F. Supp. 2d 178, 181-182 (D.R.I. 2004). The Child Advocate alleged that DCYF had instituted a practice of placing children under state care in residences without regard to the children's needs, and moving them nightly until finally placing them in more stable placements. *Id.* In addition to these "night-to-night" placements, the Complaint alleged that DCYF failed to provide the children with other needed services and suitable placements, and sought declaratory and injunctive relief. The court entered a consent decree in 1988, which was subsequently amended in 1989 and then again 2001. *Id.*

In 2002, the Child Advocate moved to hold the DCYF director in contempt, citing her continuing noncompliance with the decree. In response, DCYF moved to dismiss the complaint and asked the court to relieve DCYF of its obligations under the consent decree, arguing, *inter alia*, that DCYF enjoyed sovereign immunity. 296 F. Supp. 2d at 182, 187. The district court denied DCYF's motion in its entirety and held that since the Advocate had sued a state official seeking declaratory and injunctive relief, the suit fit "squarely" within the doctrine of *Ex parte Young*. *Id.* at 188; *see also id.* ("The *Ex parte Young* exception simply stated is that the Eleventh Amendment does not bar a suit for prospective injunctive relief against a named state official for ongoing federal law violations."). In fact, the court rejected a *Couer d'Alene* argument similar to that relied on by the Fourth Circuit in this case, stating that Rhode Island's "interest in the administration of its

child welfare system ... [did] not rise to the level of a special sovereignty interest" that would justify a new exception to *Ex parte Young*. *Id.* at 188-189.

B. The Child Advocate, Like State-Operated Protection and Advocacy Agencies, Would Be Adversely Affected By The Fourth Circuit's Rule

As explained in VOPA's merits brief (at 2-11), the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 15043(a)(2)(A)(i)) ("DD Act") and the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. § 10805(a)(1)) ("PAIMI Act"), were enacted to ameliorate the deplorable conditions at state-operated facilities for individuals with developmental disabilities and psychiatric conditions, respectively. *See, e.g.*, *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996) (stating that the DD Act was a response to "inhumane and despicable conditions" at a state facility for the developmentally disabled); S. Rep. No. 99-109 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1361, 1361 (noting that PAIMI Act resulted from inquiry into state-operated psychiatric facilities). Many states and territories, including Virginia, have freely chosen to establish independent state agencies to carry out the protection and advocacy functions.[4]

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[4] The states and territories that have established state agencies to carry out the protection and advocacy functions include: Alabama (established by unpublished Governor's directive), American Samoa (Am. Samoa Code Ann. c. 14, §§ 4.1401 *et seq.*), Connecticut (Conn. Gen. Stat. §§ 46a-7 *et seq.*), Indiana (Ind. Code §§ 12-28-1-1 *et seq.*), Kentucky (Ky. Rev. Stat. Ann. §§ 31.010 *et seq.*), New York (N.Y. Mental Hyg. Law §§ 45.01 *et seq.*), North

Much like the state P&A systems, the Child Advocate was established to serve one of the state's most vulnerable populations. And like the state P&A agencies, the Child Advocate is empowered to take legal action in order to do so. R.I. Gen. Laws Ann. § 42-73-7(6). If the question presented by this case—"[w]hether the Eleventh Amendment *categorically precludes* an independent state agency from bringing an action in federal court against state officials … under the doctrine of *Ex parte Young*"—is answered in the affirmative, the Child Advocate, like VOPA and every other state agency in this country, would be barred from bringing federal claims against state officials in federal court, even though Rhode Island chose to give it that power.

Such a result would undermine a core purpose of the Child Advocate—to serve as an independent ombudsman reviewing state officials' treatment of children, to ensure full compliance with federal and state law. As the United States emphasized in its brief in support of certiorari, the Fourth Circuit's decision "overlooked a key feature" of the DD and PAIMI acts, pursuant to which the P&A systems were created: namely, that the Acts require that the state-agency P&A systems "must sometimes take an adversarial position vis-à-vis other state entities." Br. 14 (citing 42 U.S.C. §§ 10805(a)(2), 15043(a)(2)(G), 15044(a)). Just so, the Child Advocate must sometimes hold other state agencies—notably, DCYF—accountable for ongoing violations of the state and federal rights of children. *See, e.g.*, *In re R.J.P.*, 445 A.2d 286, 288 (R.I. 1982)

Dakota (N.D. Cent. Code §§ 25-01.3-01 *et seq.*), Ohio (Ohio Rev. Code Ann. §§ 5123.60 *et seq.*), Puerto Rico (P.R. Laws Ann. tit. 3, ch. 24A, §§ 532 *et seq.*), and Virginia (Va. Code Ann. § 51.5-29.2A).

("[T]he legislature has specifically stated that the Child Advocate in performing his duties, one of which is the bringing of formal legal action on behalf of children, must act independent of DC[Y]F"); Davidson, *supra*, at 65 ("The most important aspect of the Child Advocate's role, as set out by the enabling legislation, is the independence of the office.")

The choice to create the Child Advocate, and to vest it with the power to litigate against state officials as necessary, was made by the state of Rhode Island itself—yet the Fourth Circuit's theory would repudiate this choice, in the name of state's rights. This reasoning is self-defeating and runs counter to longstanding doctrine, as discussed below.

II. THE FOURTH CIRCUIT RULING DEMEANS STATE SOVEREIGNTY BY DISADVANTAGING STATES AS COMPARED TO PRIVATE PLAINTIFFS, CONTRARY TO PRECEDENT

Because the Fourth Circuit's rule treats state agencies as inferior to private parties in their ability to invoke *Ex parte Young*, it conflicts with the animating purpose of sovereign immunity: respecting the dignity of states. At bottom, the Fourth Circuit's decision requires states that wish to empower state agencies to enforce prospective compliance with federal law—like Virginia and Rhode Island have done, with VOPA and the Child Advocate—to enact waiver provisions of the sort that traditionally have been necessary only for authorizing suits for damages. If this Court agrees with the Fourth Circuit, the result would upset legislative choices made by states, the avowed beneficiaries of state sovereign immunity. This backwards result is contrary to a hundred years of precedent.

A. VOPA's Suit Is Permitted Under *Ex Parte Young*

Until this case, a state would have no reason to enact a waiver provision in the circumstances present here. This is because such waivers of sovereign immunity are, under this Court's prior Eleventh Amendment decisions, relevant only to *damages* suits. *See, e.g.*, *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985) ("absent waiver by the State or valid congressional override, the Eleventh Amendment bars a *damages* action against a State in federal court" (emphasis added)). Waivers are unnecessary for suits for *injunctive* relief, under the century-old rule of *Ex parte Young*, which holds that a suit against a state officer, seeking prospective compliance with federal law, is not to be treated as a suit against the state. As this Court held, "[T]he use of the name of the state to enforce an unconstitutional act to the injury of the 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 159-160. [5] The purpose is simple: to "ensure[]

[5] *See also Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("The landmark case of *Ex parte Young* created an exception to [sovereign immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State."); *Graham*, 473 U.S. at 169 n.18 ("In an injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants."); *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) ("[T]he Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials[.]"); *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State."); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Petitioner's right to maintain this action in a federal court

that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The *Ex parte Young* logic and holding applies with equal force where the state is the plaintiff, and the Fourth Circuit erred by holding otherwise.

Indeed, precedent dictates that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to a 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 Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (alteration in original, internal citation omitted). Here, that "straight-forward inquiry" compels the conclusion that VOPA's suit can proceed: it alleges an ongoing violation of federal law and seeks

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depends[,] first, upon whether the action is against the State of Indiana or against an individual.... Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932) ("The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief."); *Truax* v. *Raich*, 239 U.S. 33, 37 (1915) ("As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of state, are about to proceed wrongfully to the complainant's injury ... it is established that the suit cannot be regarded as one against the state.")

prospective relief. The sovereign-immunity analysis should have ended there.

B. The Fourth Circuit Wrongly Departed From This Court's Sovereign Immunity Precedent

The Fourth Circuit's primary justification for not applying *Ex parte Young*—the alleged "intramural exception"—lacks any support in prior precedent. By treating VOPA as having less ability to invoke *Ex parte Young* than a private plaintiff, the Fourth Circuit departed from the letter and the purpose of long-standing doctrine set out by this Court. Again, the articulated rationale for state sovereign immunity is respecting the dignity of states, and where—as here—a state has chosen to vest a state agency with the authority to sue state officials to enforce prospective compliance with federal law, that state choice deserves respect.

1. No "intramural exception" applies

The Court of Appeals found *Ex parte Young* inapplicable, on the ground that this suit presents an "intramural state dispute," *Virginia* v. *Reinhard*, 568 F.3d 110, 113 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 3493 (2010) (No. 09-529), or "intramural contest," *id.* at 119, or "internecine feud," *id.* at 121, in which the plaintiffs seek "to turn the State against itself," *id.* at 120, 121, and have a federal court "referee contests between [state] agencies," *id.* at 121. But *Ex parte Young* makes clear that the state is not a defendant in this suit. VOPA seeks to enforce federal requirements against individual state officers who have allegedly deviated from these binding requirements. The suit presents a contest between VOPA and allegedly law-

breaking individual defendants—not the state against "itself."

Correctly identifying the defendant in this case removes the false premise supporting the court of appeals' decision, and with this premise removed the decision collapses. No decision of this Court bars a state protection and enforcement agency from carrying out its state-authorized mission of suing individuals who violate federal (and state) law and thereby harm vulnerable state citizens.

Indeed, the decision below cited no precedent explicitly recognizing an "intramural" exception to *Ex parte Young*. Instead, the court of appeals sought to extrapolate this exception from loose language and unrelated holdings. This effort fails—the cited cases do not support the new rule the Fourth Circuit attempts to extract from them.

To begin, this Court's decision in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 258 (1997) recognized only that in certain unusual circumstances, the nature of the *relief* sought against a state-official defendant may be qualitatively different from conventional injunctive relief, such that the *Ex parte Young* rule may not apply. *See, e.g.*, *id.* at 281-282 (barring suit seeking title to state land). The instant case does not present such an unconventional request for relief: the Fourth Circuit itself recognized that a private plaintiff could invoke *Ex parte Young* in precisely the circumstances present here. *See Reinhard*, 568 F.3d at 119 ("*Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system."). *Coeur d'Alene* is thus inapposite.

Equally inapposite are several cases involving municipalities in which the Court rejected plaintiffs' claims

as a matter of substantive law. *See Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (plaintiff has no federal constitutional rights against state); *City of Trenton* v. *New Jersey*, 262 U.S. 182, 191 (1923) ("no substantial federal question is presented"); *Stewart* v. *City of Kansas City*, 239 U.S. 14, 15 (1915) ("no Federal question was raised"); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 179-180 (1907) (no violation of federal law); *Reinhard*, 568 F.3d at 122 (plaintiffs in those cases "could not obtain relief under federal law"). This Court determined as a matter of substantive law that no federal rights were violated in those four disputes and did not hold, as a jurisdictional matter, that otherwise-well-pleaded claims were jurisdictionally barred from federal court under sovereign-immunity principles.

These cases are both irrelevant to the Fourth Circuit's jurisdictional holding, and distinguishable on their own terms—as VOPA plainly pleaded an actionable claim for access to records improperly withheld by individual state officials. *See, e.g.*, *Protection & Advocacy for Persons with Disabilities* v. *Mental Health & Addiction Servs.*, 448 F.3d 119, 121 (2d Cir. 2006) (Sotomayor, J.) ("[W]e hold that PAIMI unambiguously grants OPA [a state protection and advocacy agency] access to peer review records and affirm the district court's entry of a declaration and injunction requiring the Department to disclose to OPA the peer review records" regarding two deaths); *Pennsylania Prot. & Advocacy, Inc.* v. *Houston*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.) (PAIMI "requires that an organization such as a PP & A be given access to peer review reports such as those at issue [regarding patient's death] irrespective of state law"); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 499 (11th Cir. 1996) enjoining defendant from

failing to release records to state protection and advocacy program). Indeed, the court of appeals stated that "VOPA can enforce federal law in state court," *Reinhard*, 568 F.3d at 124, but failed to recognize that the existence of an enforceable federal right is inconsistent with every case it cited for the "intramural" rule.

Nor is the Fourth Circuit's intramural exception—used here to divest a federal court of hearing a case raising a claim seeking *prospective* compliance with *federal* law—supported by decisions addressing *damages* requests (*Alden* v. *Maine*, 527 U.S. 706 (1999)) or injunctions seeking to enforce *state* law (*Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)), and the Circuit erred by relying on such authority.

2. The state choice to authorize suits by a state plaintiff is consistent with state sovereignty

Not only is the Fourth Circuit's decision unsupported by the holdings of the cited cases, it is also inconsistent with the theme of these decisions: respecting state sovereigns. The Circuit's articulated justification for its decision—*i.e.*, to protect the states from "excessive federal meddling with their internal authority"—runs aground on the simple fact that here Virginia itself chose to vest VOPA with the authority to litigate federal claims in federal court; again, this state choice is entitled to respect, and distinguishes this case from cases such as *Alden* and *Pennhurst*.[6]

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[6] When a defendant state official who is sued under *Ex parte Young* asserts state sovereign immunity as a bar to suit, this self-interested litigation defense is not a relevant "state choice"—the critical state choice is the creation of state agencies that are em-

Since the founding, the ability to bring a suit as a plaintiff has been understood as component of state sovereignty, not a threat to sovereignty. *See* 3 *Debates on the Federal Constitution* 556 (J. Elliot 2d ed. 1854) (John Marshall stating "I see a difficulty in making a state defendant, which does not prevent its being plaintiff"), *quoted in Alden*, 527 U.S. at 718 (1999). In its standing decisions, this Court has confronted directly the comparison between state plaintiffs and private plaintiffs and held that sovereignty entitles state plaintiffs to "special solicitude" when they seek access to federal courts—which is exactly the opposite of how the Fourth Circuit treated a Virginia state agency. *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007); *see also id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not … a private individual.").

Indeed, the Fourth Circuit's decision cannot be reconciled with the basic principle that "[a]t the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., joined by Marshall, Blackmun, Stevens, J.J., concurring) (emphasis in original)). By installing a new procedural impediment to states exercising the right to sue, the Fourth Circuit undermined the very sovereigns it professed to protect.

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powered to bring *Ex parte Young* suits in federal court. If a defendant state official believes that the state legislature did not make this choice—*i.e.*, did not statutorily authorize state agencies to bring *Ex parte Young* suits—such official may move to dismiss on this ground. But that is an issue of interpreting state law, not the federal constitution.

3. *Ex parte Young* makes no distinction between individual and state plaintiffs

In the end, the Fourth Circuit's critical doctrinal error was creating a rule based on the character of the *plaintiff*—when precedent focused on the character of the *relief* sought. As noted above, the Fourth Circuit conceded that a private plaintiff could bring suit here—but not, according to the Circuit, a state plaintiff. To support this discrimination against state plaintiffs like VOPA, the court of appeals cited isolated statements in two Supreme Court footnotes: *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.14 (1996) ("an *individual* can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law) (emphasis added); *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (referring to *Ex parte Young* suits by "private individuals"). From these references, the court of appeals concluded that a private, individual plaintiff limitation was a "basic element" of *Ex parte Young* doctrine. *Reinhard*, 568 F.3d at 118.

Not so: these footnotes refer to the use of *Ex parte Young* by "individuals" for the simple reason that sovereign immunity concerns have typically arisen in the context of private suits against states, and the decisions thus spoke of the need to protect states against the "indignity" of being sued in certain circumstances without their consent. *See, e.g.*, *Ex parte Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."); *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."). But nothing in these

decisions—or their supporting rationale—limits states as plaintiffs, and the Circuit's wooden reading of the language in these cases subverts their basic goal of safeguarding the dignity and sovereignty of states. If a state chooses to make its officials subject to an *Ex parte Young* suit in federal court by a state agency, state sovereign immunity is no bar to such a suit.[7] To the contrary, "respecting states" requires respecting the state choice to make its officials amenable to suit—not contorting the *Ex parte Young* cases to limit their application to private plaintiffs.

Indeed, if the court of appeals were correct that a limitation to private plaintiffs were "a basic element of the [*Ex parte Young*] doctrine," *Reinhard*, 568 F.3d at 118, then the Supreme Court's extensive and divided analysis in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 258 (1997) would have been unnecessary because the plaintiff was not a private plaintiff but a sovereign tribe, a party analogous to a sovereign state. *See id.* at 268. Instead of resolving the case by reference to the plaintiff's identity, however, this Court held that the outcome depended on "the difference between the *type of relief* barred by the Eleventh Amendment and that permitted under *Ex parte Young*." *Id.* at 281 (emphasis added); *see also Verizon Md., Inc.*, 535 U.S. at 645 ("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

[7] This choice need not be expressed as a "waiver"—again, under this Court's state sovereign immunity cases, waiver is necessary only for damages claims, and states thus have had no legal need to draft statutory provisions using waiver language, where the only intended federal suits against state officials are *Ex parte Young* suits.

whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.").

As the *en banc* Seventh Circuit explained in rejecting the Fourth Circuit's analysis in a parallel case, "the threshold problem with these arguments is that the *Ex parte Young* doctrine focuses on the identity of the defendant and the nature of the relief sought, not the nature of identity of the plaintiff." *Indiana Protection & Advocacy Servs.* v. *Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) (en banc), *petition for cert. filed*, 79 U.S.L.W. 3063 (U.S. July 21, 2010) (No. 10-131).

The critical *Ex parte Young* question is this: is the relief requested either conventional damages or another remedy that implicates damages-like considerations (in which case *Ex parte Young* does not apply) or rather is injunctive relief (in which case *Ex parte Young* applies)? This is the requisite "straightforward" inquiry which the Fourth Circuit failed to conduct. The Fourth Circuit instead pursued a separate inquiry—who seeks the relief?—that both lacked precedential support and effectively undermined the very beneficiaries of state sovereign immunity: states.

CONCLUSION

The decision of the Fourth Circuit should be reversed.

Respectfully submitted.

JOSEPH J. MUELLER
Counsel of Record
SYDENHAM B. ALEXANDER, III
RACHEL I. GURVICH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
joseph.mueller@wilmerhale.com

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