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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

On the question presented, respondents offer no reason why a suit brought by an independent state agency against state officials to vindicate federal rights does not naturally fall within the scope of *Ex parte Young*, 209 U.S. 123 (1908).

There is no dispute that this is a justiciable controversy involving the federal rights of petitioner. None of the branches of the Commonwealth of Virginia can definitely resolve this controversy. Indeed, respondents agree that if this controversy were resolved by a state court, it could be reviewed by this Court because it involves an issue of federal law. Resp. Br. 8; Br. in Opp. 25. Because the action arises under federal law, does not name the State, and does not seek money damages from the state treasury, it does not implicate any of the rationales underlying Eleventh Amendment immunity.

Respondents also ignore that their voluntary decision to constitute petitioner as a state agency (rather than as a corporation or a political subdivision) mitigates any burden on their sovereignty. Instead, they raise the specter that reversal of the Fourth Circuit would allow multiple agencies to bring suits like this one. But neither respondents nor their amici point to even one example of another federal statute that can confer federal rights on a state agency against another state agency.

I. *EX PARTE YOUNG* IS AVAILABLE TO PUBLIC ENTITIES LIKE PETITIONER TO BRING STATE OFFICIALS INTO COMPLIANCE WITH FEDERAL LAW

A. This Case Falls Squarely Within The Scope Of *Ex parte Young*

Petitioner's suit satisfies the straightforward inquiry adopted by this Court. "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 Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ. concurring in part and concurring in judgment) and citing *id*. at 298-299 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting)).

Moreover, this suit is justified by the same rationale that underlies all *Ex parte Young* cases: to provide a federal forum to vindicate federal rights. Respondents' efforts to suggest otherwise draw into question *Ex parte Young* itself.

1. Ex parte Young *is a necessary corollary to the Eleventh Amendment*

At points, respondents appear to question whether state officials may *ever* be sued in federal court for prospective relief. Resp. Br. 28-32. Respondents

suggest that, because such relief binds the State itself, it is contrary to the purpose of the Eleventh Amendment. *Ibid.* But suits against state officials are "indispensable to the establishment of constitutional government and the rule of law." Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* 314 (6th ed. 2002); *see also* Law Professors Amicus Br. 7, 12.

Ex parte Young provides the primary "means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause." *Alden v. Maine*, 527 U.S. 706, 757 (1999). This Court consistently has explained that *Ex parte Young* is "necessary" so that federal courts can vindicate the Supremacy Clause. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984); *see also Alden*, 527 U.S. at 748 (describing *Ex parte Young* as forming "an essential part of our sovereign immunity doctrine").

Respondents attempt to diminish *Ex parte Young* by describing it as a "fiction" or a "formalism." Resp. Br. 9-10, 16-17. But the *Ex parte Young* doctrine is rooted in the same history on which respondents rely. The historic tradition that shaped the doctrine of sovereign immunity also sanctioned suits for relief against state officials. As respondents themselves previously explained, "[a]t the time of the Framing, English common law allowed private parties to obtain injunctive relief against royal officials who were violating the law." Br. in Opp. 23-24 (emphasis omitted).

2. Ex parte Young *is not equivalent to abrogation or waiver of the State's immunity*

Contrary to respondent's assertion, the power of federal courts to enjoin state officials to bring them into compliance with federal law is not equivalent to abrogation or waiver of immunity. Resp. Br. 14, 23, 24, 32-34, 36.

Abrogation or waiver would permit retroactive monetary relief. Such relief is not available under *Ex parte Young*. *See Alden*, 527 U.S. at 712, 757; *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

Further, abrogation or waiver would allow the suit to be brought directly against the State or its agencies—thus impugning the dignity of the State. Opening Br. 35. In *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), this Court recognized that suits directly against the State affected its dignity in a way that suits against its officials did not. In that case, the United States contended that claims in administrative proceedings for injunctive relief should be allowed against the State in its own name, because the *Ex parte Young* distinction between suits against the State and the state's officials was not critical to maintaining sovereign immunity. This Court firmly rejected that argument. It held that allowing the State to be named as a party would not "afford the States the dignity and respect due sovereign entities." *Id*. at 769. The Court reiterated that no relief is

available against the State in its own name absent abrogation. *Ibid*.

By contrast, this Court repeatedly has permitted *Ex parte Young* suits even when Congress lacked the power to abrogate sovereign immunity. *See Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (even though Americans with Disabilities Act did not validly abrogate immunity, it "can be enforced * * * in actions for injunctive relief under *Ex parte Young*"); *Alden*, 527 U.S. at 757 (same under Fair Labor Standards Act).[1]

3. The relief sought here is permissible under Ex parte Young *even if it is characterized as redressing inaction*

While the remedies available under *Ex parte Young* are different than those available under abrogation or waiver, they are not as limited as respondents contend.

a. Respondents argue *Ex parte Young* is limited to prohibiting state officials from taking actions that would violate federal law, and does not allow a court to mandate that state officials take action to comply

[1] Respondents assert without explanation (Resp. Br. 11, 20) that petitioner did not honor the dignitary interest of the State in its pleading. But it did. No state agency is sued. All of the defendants are sued only in their official capacities, as this Court has long sanctioned. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Prout v. Starr*, 188 U.S. 537, 543-544 (1903).

with federal law. Resp. Br. 10, 12, 18-23. Respondents are incorrect.

Many of this Court's modern *Ex parte Young* cases would need to be overruled if respondents' argument were accepted. In *Frew*, this Court unanimously relied on *Ex parte Young* to hold that a federal court could enforce a consent decree that "implement[ed] the Medicaid statute in a highly detailed way, requiring the state officials *to take some steps* that the statute does not specifically require." 540 U.S. at 439 (emphasis added); *see also Quern v. Jordan*, 440 U.S. 332 (1979) (order requiring state official to send notice to members of plaintiff class fell within scope of *Ex parte Young*); *Milliken v. Bradley*, 433 U.S. 267 (1977) (order requiring state officials to pay one-half of programs needed to restore schoolchildren to position they would have enjoyed absent constitutional violations fell within scope of *Ex parte Young*).

Respondents' theory would apparently bar federal courts from compelling state officials to provide minorities and women access to state universities. *Compare Meredith v. Fair*, 305 F.2d 343 (5th Cir.) (Wisdom, J.) (ordering members of Board of Trustees to admit James Meredith to the University of Mississippi), stay denied, 83 S. Ct. 10 (1962). And respondents' theory would suggest that federal courts could not require state officials to provide reasonable accommodations for applicants for state employment in wheelchairs (as required by the Americans with Disabilities Act) or to pay prospectively minimum

wages (as required by the FLSA), because those orders would require affirmative acts on the part of state officials. *Compare Garrett*, 531 U.S. at 374 n.9; *Alden*, 527 U.S. at 757.

Contrary to respondents' assertion (Resp. Br. 20-21), cases prior to *Ex parte Young* were not so limited. They expressly authorized injunctive relief or mandamus to require state officials to take certain actions. *See Rolston v. Crittenden*, 120 U.S. 390 (1887) (ordering state officer to assign liens to plaintiffs); *Virginia Coupon Cases*, 114 U.S. 270 (1885) (ordering return of personal property in possession of state official). In *Board of Liquidation v. McComb*, 92 U.S. 531 (1875), the Court explained that "the writs of *mandamus* and injunction are somewhat correlative to each other" because "if the officer plead the authority of an unconstitutional law for the non-performance or violation of his [federal] duty, [immunity] will not prevent the issuing of the writ." *Id*. at 541; *see also Rolston*, 120 U.S. at 411 (suit not barred by Eleventh Amendment because "the suit is to get a state officer to do what a statute requires of him").[2]

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[2] Thus, respondents are correct when they acknowledge that "mandamus is the traditional exception to sovereign immunity." Resp. Br. 14 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). But it is an exception for exactly the same reason as in *Ex parte Young*—because the relief is sought against the official and not against the government itself. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 888 (1970).

Ex parte Young itself followed *McComb* and rejected the idea that a state official's refusal to act could not be remedied. This Court stated that a federal court can "direct affirmative action where the officer * * * refuses or neglects to take such action" required by federal law. 209 U.S. at 158 (citing *McComb*, 92 U.S. at 541). The Court has continued to reject the action/inaction rule proposed by respondents. *See Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (in a suit by a territory against a state official, holding that the power of federal courts to "enjoin unconstitutional action by state officials" includes the power to "compel[] the performance of such duties" that are imposed by federal law). Instead, the measure of the constitutional remedy is the prospective/retroactive standard of *Edelman v. Jordan*, 415 U.S. 651 (1974) most recently affirmed in *Verizon*.

Moreover, a distinction between action and inaction would be difficult to apply in many cases, as shown by respondents' suggestion that the supposed distinction is potentially inapplicable "if state actors are already dealing with someone." Resp. Br. 22. Petitioner is already in an on-going relationship with respondents and regularly receives access to records (although not the type of records at issue in this case).

In addition, petitioner's demand can be characterized as seeking inaction. Indeed, one of petitioner's requests for relief is an order enjoining respondents from "interfering, in any way, with VOPA's access to records." J.A. 22. Petitioner seeks

access to records, *i.e.*, to inspect records in respondents' possession and copy them (with petitioner paying to offset any duplicating costs). *See* 42 C.F.R. § 51.41(e); 45 C.F.R. § 1386.22(d). The only thing preventing petitioner from inspecting and copying records is that respondents will not stand aside.

b. Respondents also suggest (without elaboration) that because petitioner is seeking access to documents, *Ex parte Young* is inapplicable. Resp. Br. 11, 19. But petitioner does not want to divest respondents of title or even possession of the documents. It simply wants to inspect and copy them.

If the Eleventh Amendment barred a court from ordering inspection and copying of records in the possession of state officials, then *all* discovery of documents in any civil actions brought against state officials (in their official or individual capacities) would be prohibited by the Eleventh Amendment. *Compare* Fed. R. Civ. P. 34(a)(1) (requiring a party to "produce and permit the requesting party or its representative to inspect, copy, test, or sample [any designated documents or electronically stored information] in the responding party's possession, custody, or control"). That simply has never been the law. *See Barnes v. Black*, 544 F.3d 807, 809 (7th Cir. 2008) (Posner, J.); *In re Missouri Dep't of Natural Res.*, 105 F.3d 434, 436 (8th Cir. 1997).

4. The voluntary nature of participation by States in federal Spending Clause statutes weighs in favor of authorizing Ex parte Young *actions*

The fact that the two statutes that authorize petitioner's access to respondents' records are exercises of the Spending Clause authority does not diminish the role of *Ex parte Young*. Respondents' contrary argument (Resp. Br. 11, 15, 35-36) would require this Court to overrule decisions expressly applying *Ex parte Young* to Spending Clause statutes. *See*, *e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (Medicaid Act); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Aid to the Aged, Blind, and Disabled Act).

The Court also would have to overrule numerous cases holding that, once a recipient voluntarily accepts federal funds, the Supremacy Clause requires state officials to obey the statutory conditions attached to those funds, and any contrary state laws are preempted. *See, e.g., Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (per curiam); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Blum v. Bacon*, 457 U.S. 132 (1982); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 29 (1981) (citing *Carleson v. Remillard*, 406 U.S. 598 (1972)).

If anything, the fact that the statutes here are Spending Clause statutes diminishes any burden on the dignity of the State from having its officials sued for prospective relief. The State is free to negate any injunction by electing not to receive additional federal funds. "Although a court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money, the recipient has the option of withdrawing and hence terminating the prospective force of the injunction." *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 596 (1983) (opinion of White, J.); *see Pennhurst*, 451 U.S. at 29, 30 n.23. Thus, the State has the last say about whether and for how long its officials must comply prospectively with a federal court's order.

B. The Nature Of Petitioner As A State Agency Does Not Alter The *Ex parte Young* Balance

1. Respondents experience no additional fiscal or dignitary burden due to the public-entity status of the plaintiff

Respondents articulate no additional fiscal or dignitary burden they experience due to the public-entity status of the plaintiff, and there is none.

As to the state treasury, they assert (Resp. Br. 14) that the cost of prospectively complying with federal laws that *might* in the future be enforceable by state agencies *could* exceed the costs of potential

tort damages claims. Even setting aside the speculative nature of that assertion, the argument is misplaced. Sovereign immunity protects state treasuries from damages awards, not the costs of complying with federal law. Thus, this Court has affirmed suits under *Ex parte Young* that have required large expenditures going forward to redress violations of federal law. *See Milliken,* 433 U.S. at 289-290. Likewise, *Ex parte Young* would not permit a damage award, no matter how nominal.

Respondents assert an affront to their dignity in only a single paragraph. They assert that the "indignity" they will experience is "at least as great as the indignity that Florida would have experienced" in *Seminole Tribe*. Resp. Br. 35. But *Seminole Tribe* involved a suit against the State in its own name. As discussed above, *see* page 4, *supra*, that is a critical distinction with regard to the State's dignity interests.

The dispute between petitioner and respondents is not, as respondents claim (Resp. Br. 34), a dispute over "policy" that is properly resolved within the sovereign. Congress gave petitioner a federal right to access certain records in federal statutes that respondents have never suggested are unconstitutional. Accepting petitioner's contentions as true, respondents are violating that federal right. If petitioner is correct, the Supremacy Clause itself bars respondents from adopting any other course than to provide access. "The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is

acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Respondents assert (Resp. Br. 14-15, 23) that suits by state agencies against state officials in federal court would entail a significant disruption in state government. But they do not explain—nor could they—why such suits would be more disruptive than suits that they acknowledge are permitted, i.e., federal suits by individuals, corporations, political subdivisions, Indian Tribes, the federal government, and foreign nations; and state suits by state agencies.

If anything, petitioner's status as an independent state agency lessens any dignitary burden. Because both petitioner and respondents' state agency are arms of the sovereign state and both are subject to federal law, federal court is an appropriate forum to resolve their federal controversy. *Cf. United States v. Texas*, 143 U.S. 621, 646 (1892).

To be clear, the conferral of this federal right on an agency of the Commonwealth of Virginia was not itself a unilateral decision made by the federal government and imposed on the States. Indeed, there is a serious Tenth Amendment question whether Congress could unilaterally grant federal rights to a state agency. *Cf. Printz v. United States*, 521 U.S. 898 (1997). Under the statutes at issue here, Congress provided the State an incentive, in the form of federal funds, to establish an independent Protection and Advocacy System. But Congress did not require (or even encourage) that the entity be part of the State

government. It is the Commonwealth of Virginia that elected to establish petitioner as a state agency (a choice made by a small minority of States). Virginia could have received the federal funds even if it had designated a private entity as its Protection and Advocacy System (like the vast majority of States). And if it had done so, the Eleventh Amendment would not bar this suit, as respondents have previously acknowledged. *See* page 23, *infra*.

Further, respondents' arguments are premised (Resp. Br. 23, 34, 40) on the speculative assertion that, if the Fourth Circuit is reversed, *Ex parte Young* suits by state agencies against other state agencies will become common. But respondents and their amici offer no examples of any other federal statutes that vest in a state agency rights sufficient to provide standing to bring federal suits against other state officials.[3] Congress enacted the Developmental

[3] Amici Indiana et al. point to Title VII of the Civil Rights Act and suggest (at 13-14) that it authorizes state agencies to enforce federal law. But, in fact, Title VII simply defers federal enforcement until a state agency considers complaints under state laws. *See* 42 U.S.C. § 2000e-5(c) (when a State has a "law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice * * *, no charge may be filed [with the federal EEOC] * * * before the expiration of sixty days after proceedings have been commenced under the State or local law * * *."). The Connecticut law cited by amici authorizes a state commission to sue other state agencies, but other provisions make clear the state commission only addresses violations of state law. *See, e.g.,* Conn. Gen. Stat. § 46a-51(8) (defining "discriminatory practice" as a violation of state law).

Disabilities Act and the PAIMI Act decades ago because States were not addressing abuse and neglect in their own institutions of a particularly vulnerable population. Opening Br. 2-8; National Disability Rights Network Amicus Br. 9-21. These are important statutes, but they are unique in their design: they address a problem in which the mistreatment of vulnerable individuals occurred outside public scrutiny and the individuals directly affected could not advocate for themselves.

2. Public-entity suits are supported by historical practice

Respondents do not dispute that, in English courts prior to this Nation's Founding, various political entities created by the King were able to sue the King's agents and each other. Opening Br. 45-48.

Respondents suggest (Resp. Br. 13, 30) that this history is irrelevant because these are simply examples of a sovereign's officials being sued in the courts of that sovereign. But this Court in *Hans* (like Justice Iredell in *Chisholm*) looked to English precedents in determining the breadth of a State's immunity in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 12 (1890); *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 435 (1793) (Iredell, J.). The same analysis is appropriate here and demonstrates that this suit is consistent with historical practice.

Second, respondents argue (Resp. Br. 12-13, 26-27) that some of the historical examples are inapposite because cities were then viewed as equivalent to

private corporations. But status as a "corporation" does not explain the distinction between those who could sue and those who could not. Some of the examples involved suits by counties, which were never incorporated entities but were merely auxiliaries of the Crown. *See Barnes v. District of Columbia*, 91 U.S. 540, 552 (1875); 1 John F. Dillon, *The Law of Municipal Corporations* § 10a, at 96-97 (New York, James Cockcroft & Co. 2d ed. 1873); *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.).

3. *Cases involving suits brought by political subdivisions support applying* Ex parte Young

Notably, although respondents describe (Resp. Br. 7-8) the Fourth Circuit's reliance on this Court's so-called *Williams*/*Trenton* line of cases, respondents do not rely on them. This is presumably because none of those cases involved a suit against a State or state officials. Opening Br. 48-49.

Instead, respondents seek support (Resp. Br. 23-26) in dismissals by lower courts of suits brought by political subdivisions against state officials. But all but one of them did so on the ground that the dispute involved no federal claim (either because the federal Constitution did not provide the political subdivision a right or because the claim arose only under state law). Those holdings are thus inapposite, as petitioner here seeks to enforce a federal statutory right.

In the one case cited by respondents that addressed the Eleventh Amendment—*Harris v. Angelina Cnty., Tex.*, 31 F.3d 331 (5th Cir. 1994)—a county filed a third-party action against the State and its officials seeking "monetary and injunctive relief." *Id*. at 336-337. The court simply concluded that "we are not inclined to extend [*Ex parte Young*] to cover the County's claim for contribution here." *Id*. at 339. The court's reasoning, like that of respondents and the court below, elided the doctrine of abrogation into the *Ex parte Young* analysis. *Id*. at 340.

Moreover, other courts of appeals have authorized suits by political subdivisions to proceed when federal claims were at issue. *See Rogers v. Brockette*, 588 F.2d 1057, 1068-1071 (5th Cir.), cert. denied, 444 U.S. 827 (1979); *Allegheny Cnty. Sanitary Auth. v. EPA*, 732 F.2d 1167, 1173 n.3, 1175 n.5 (3d Cir. 1984); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998), cert. denied, 526 U.S. 1068 (1999). These decisions recognize that *bona fide* federal claims by governmental entities against state officials will be rare. But when such claims exist, federal courts should be open to hear them. This Court's cases reflect the same conclusion. Opening Br. 49 (citing, inter alia, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)).

C. *Coeur d'Alene* Offers No Solace To Respondents

1. Suits for prospective relief against state officials are not subject to case-by-case balancing

Respondents acknowledge (Resp. Br. 16) that a majority of the Court in *Coeur d'Alene* rejected a "case-by-case balancing test." They nonetheless urge (Resp. Br. 9-10, 16-17) that a "federalism analysis" is appropriate. They then point (Resp. Br. 18-40) to six "considerations relevant to a federalism analysis," some of which relate to the nature of the plaintiff, some of which relate to the relief sought, and some of which relate to the particular statutes being enforced. That is case-by-case balancing by another name.

The majority in *Coeur d'Alene* examined the extraordinary relief sought in that case and concluded that it fell outside the prospective relief permitted by *Ex parte Young* because it would divest the State of regulatory jurisdiction and title to property. Opening Br. 50-51; *see* AARP et al. Amicus Br. 8-13. In contrast, this suit—seeking access to records—shares none of those characteristics.

2. Remedies in state court are both irrelevant and inadequate

Respondents are unclear about the role state court remedies play in their *Ex parte Young* analysis. Under *Alden*, the constitutional protection of state sovereign immunity applies to federal causes of actions against States in state courts just as it applies

to federal courts. *See* 527 U.S. at 757. Thus, if respondents were correct that *Ex parte Young* is not available for this suit in federal court, it is unclear under *Alden* whether it would be available in state court. *Cf. id*. at 749 (suggesting that requiring a state court to hear a federal action against the State might "be even more offensive to state sovereignty" than authorizing such suits in federal court). That might lead to the federal right being unenforceable by petitioner in any forum. "If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a State to its courts, * * * it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution * * * ." *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908).

a. Respondents attempt to avoid the consequences of their argument by asserting (Resp. Br. 14, 39-40) that the Virginia Supreme Court will provide petitioner "prompt and sure" relief on its federal claim through a state cause of action—an original action for mandamus. But respondents offer no rationale or authority for the proposition that the availability of a state cause of action is relevant to whether *Ex parte Young* is available.

Previously, in their brief in opposition in this Court, respondents relied solely on Justice Kennedy's plurality opinion in *Coeur d'Alene*. Br. in Opp. 28. But, as explained in the opening brief, a majority of Justices in *Coeur d'Alene* rejected that plurality view, and *Verizon* subsequently quoted and cited those

Justices' opinions as articulating the governing standard. Opening Br. 52-53.

Indeed, measuring federal jurisdiction based on the relief available in state court would be contrary to the intent of Congress. In response to *Ex parte Young*, Congress enacted two statutes that limited federal court jurisdiction in particular areas where Congress thought suits in federal court against state officials were particularly disruptive. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 n.28 (1981). Those statutes bar federal litigation raising federal claims only if the State provides a "plain, speedy and efficient remedy." 28 U.S.C. §§ 1341 (Tax Injunction Act), 1342 (Johnson Act regarding public utility rates). Notably, Congress did not extend that requirement to *all* suits under *Ex parte Young*. Congress thus made clear that it did not intend plaintiffs to have to make such a showing about state remedies to seek relief in federal court in *Ex parte Young* cases outside the areas of taxes and rate setting.

This conclusion is consistent with decisions of this Court recognizing a strong interest in having federal courts resolve questions of federal law. Opening Br. 56; AARP et al. Amicus Br. 14-16. This is not to suggest that such federal court jurisdiction is exclusive, but rather Congress allowed either plaintiffs or defendants to have a case arising under federal law heard in federal court. *See* 28 U.S.C. §§ 1331 (district court jurisdiction), 1441 (removal of cases by defendants); *cf. Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (State cannot prohibit or otherwise

discourage corporation from resorting to federal court in lieu of state court). Respondents offer no reason why this choice should not be available in this case.

b. In any event, an original action for mandamus in the Virginia Supreme Court is not an adequate substitute for a federal district court action.

First, interim relief is not available—the Virginia Supreme Court cannot offer anything equivalent to a preliminary injunction or an order to preserve records during the pendency of the litigation. Opening Br. 53-54. That alone makes the state remedy inadequate. *See Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 109-110 (1939) (no "plain, speedy, or efficient" remedy in state court for purposes of Johnson Act where it was unclear whether state court possessed authority to grant preliminary injunctive relief).

Respondents do not dispute the unavailability of interim relief. Rather, they suggest the lack of such interim relief is unimportant because original proceedings for mandamus "are resolved in a matter of months." Resp. Br. 39. But the federal statutes make clear that Congress intended a Protection and Advocacy System to gain access to the records in a period measured in days, not months. U.S. Br. 28.

Second, the Virginia Supreme Court has no mechanism for factfinding. Opening Br. 54. Respondents do not address, and thus apparently concede, this infirmity.

Finally, respondents assert that mandamus "is always granted to compel the performance of some duty which has not been done." Resp. Br. 39 (quoting *Board of Supervisors of Amherst Cnty. v. Combs*, 169 S.E. 589, 593 (Va. 1933)). When read in context, that case simply identifies when mandamus is appropriate (always to compel a duty and never to undo a past action). It does not call into question more recent Virginia Supreme Court cases that characterize the decision whether to issue the writ as based on "judicial discretion." Opening Br. 53 (quoting *Gannon v. State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992)); *see also In re Commonwealth of Virginia*, 677 S.E.2d 236, 242-243 (Va. 2009) (refusing the grant of mandamus because it would not promote "substantial justice").

II. RESPONDENTS' INVOCATION OF SUPPOSED CONGRESSIONAL LIMITS TO *EX PARTE YOUNG* IN THE STATUTES INVOKED BY PETITIONER ARE BELATED AND MISGUIDED

For the first time in this long-running dispute, respondents argue that Congress in the Developmental Disabilities Act and the PAIMI Act intended to prohibit plaintiffs from relying on *Ex parte Young*. Resp. Br. 11, 37-39. Respondents' new argument is contrary to their arguments below and in their brief in opposition. And it is incorrect.

a. In the Fourth Circuit, respondents repeatedly asserted that the status of petitioner as a state

agency was the only reason *Ex parte Young* did not apply. In their opening brief, respondents conceded: "If VOPA were a non-profit entity rather than a state agency, there would be no sovereign immunity issue." Resp. C.A. Opening Br. 26.

In respondents' reply brief below, they likewise acknowledged: "If the office for protection and advocacy is an independent non-profit entity, then it is not a sovereign entity and, thus, there is no barrier to the application of the *Ex parte Young* doctrine." Resp. C.A. Reply Br. 7. The Fourth Circuit agreed with respondents and held that petitioner cannot rely on *Ex parte Young*, "because VOPA is a state agency." Pet. App. 28a.

And in respondents' brief in opposition in this Court, they sought to distinguish federal cases brought against state officials by other Protection and Advocacy Systems as involving "suits by protection and advocacy entities organizes as *private* entities, not as state agencies." Br. in Opp. 13. Having failed to press this statutory argument (as opposed to their constitutional argument) at any point previously, it is waived. *See Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2861 & n.14 (2010); *Astrue v. Ratliff*, 130 S. Ct. 2521, 2525 n.2 (2010).

b. In any event, respondents are simply wrong. In *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), this Court explained that a statute must reflect an "intent to foreclose jurisdiction under *Ex parte Young*." *Id.* at 647.

The statute in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), manifested such an intent by authorizing private suit directly against the State and by imposing remedial limits on prospective relief that were inconsistent with *Ex parte Young*.

In *Verizon*, by contrast, there was an express private cause of action (47 U.S.C. § 252(e)(6)) for challenging some state conduct in federal court, but the Court assumed that cause of action was not applicable to the suit before it. 535 U.S. at 642-644. The Court held that any additional cause of action could be enforced through *Ex parte Young*. The fact that Section 252(e)(6) made "some other actions by the state commissions reviewable in federal court" did not "eliminate jurisdiction" for a federal court to review commission actions that were not covered. *Id*. at 643 (emphasis removed). The congressional creation of the other cause of action did "not without more 'impose upon the States a liability that is significantly more limited than would be the liability imposed upon the state officers under *Ex parte Young*.'" *Id*. at 647-648.

In this case, likewise, Congress gave no textual indication that it sought to limit the relief available to a Protection and Advocacy System. To the contrary, both acts authorize the Protection and Advocacy System to "pursue administrative, legal, and other appropriate remedies." 42 U.S.C. §§ 10805(a)(1)(B), 15043(a)(2)(A)(i). None of the courts of appeals that have heard cases brought by Protection and Advocacy Systems against state officials has ever suggested

that Congress intended to bar such suits. Opening Br. 36 n.7, 40.

Respondents suggest (Resp. Br. 11, 37-39) that the federal government could enforce compliance with the duty to provide access to records by withholding federal funds from Virginia if respondents did not comply. But respondents' funds are not at risk. Instead, the statutes "provide[] for remedies *only against a protection and advocacy system*" if it fails to comply with its obligations under federal law. *Indiana Protection & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 379 n.12 (7th Cir. 2010) ("*IPAS*") (en banc), petition for cert. filed (U.S. July 21, 2010) (No. 10-131).[4]

Under respondents' view, Congress intended to bar petitioner from using *Ex parte Young* to assure access to records, even though petitioner is the entity at risk of fund reduction if respondents do not provide such access. There is nothing in the statutes that reflects such an unlikely congressional intent, and the governing regulations state otherwise. *See* 45

[4] Arguably, if the federal government withholds money from a Protection and Advocacy System, that may also trigger a withholding of federal funds under Part B of the Developmental Disabilities Act, 42 U.S.C. §§ 15021-15029. *See* 42 U.S.C. § 15043(a); 45 C.F.R. § 1386.21(a). Part B pays for a Council on Developmental Disabilities in each State that prepares a state five-year plan identifying the most pressing needs of people with developmental disabilities in that State and then works to implement that plan. In fiscal year 2011, Virginia will receive approximately $1.5 million in Part B funds.

C.F.R. § 1386.25 (providing that federal funds "may be used to pay the otherwise allowable costs incurred by a Protection and Advocacy System in bringing lawsuits in its own right * * * to obtain access to records").

CONCLUSION

For the foregoing reasons and those in the opening brief, the judgment should be reversed.

Respectfully submitted,

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