No. 09-529

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, by the VIRGINIA 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 RESPONDENTS

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QUESTION PRESENTED

As restated by the Virginia defendants, the Question Presented is whether this Court should extend *Ex parte Young* to empower state agencies to sue their parent States through state officers in federal court without a congressional abrogation of sovereign immunity and without obtaining the consent of the States through waiver.

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Virginia Attorney General Kenneth T. Cuccinelli, II, submits this Brief of Respondents on behalf of the Virginia defendants.

I.

STATEMENT OF THE CASE

This suit was filed in the United States District Court for the Eastern District of Virginia on December 3, 2007 in the name of the "Commonwealth of Virginia, Virginia Office for Protection and Advocacy." (J.A. at 10). The defendants were "JAMES S. REINHARD, in his official capacity as Commissioner, Department of Mental Health, Mental Retardation and Substance Abuse Services, of the Commonwealth of Virginia, DENISE D. MICHELETTI, in her official capacity as Director, Central Virginia Training Center, and CHARLES M. DAVIS, in his official capacity as Director, Central State Hospital."[1]

The Virginia Office for Protection and Advocacy (VOPA) is a Virginia state agency that serves as the Commonwealth's protection and advocacy system. *Va. Code Ann.* §§ 51.5-39.2—51.5-39.12 (statutory establishment of VOPA). It is independent in the sense that no one of the three appointing authorities

[1] With the recent change in administration in Virginia, James W. Stewart, III, in his official capacity, was substituted for Reinhard and Vicki Y. Montgomery, in her official capacity, was substituted for Davis.

(Speaker of the House, Senate Committee on Rules, and Governor) appoint a majority of VOPA's governing board. (Pet. at 75a-76a). Congress encourages the States to create entities like VOPA by providing federal funding to protection and advocacy systems that meet the requirements of the Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("PAIMI Act"), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. §§ 15001-15115. Under these acts, States may choose to make their protection and advocacy systems either state agencies or private, nonprofit entities. *See* 42 U.S.C. §§ 10805(c)(1)(B), 15044(a). *See also* 45 C.F.R. § 1386.20.

Consistent with federal law, VOPA has the authority to engage in various pursuits on behalf of individuals with mental illness and other disabilities, such as investigating complaints of discrimination, abuse, and neglect. *Va. Code Ann.* § 51.5-39.4 (2009). *See also* 42 U.S.C. §§ 10805(a)(4), 15043(a)(2)(I)-(J). As part of its investigation into the death of two persons, and the serious injury of another, in facilities operated by the Department, VOPA requested certain "peer review" records. VOPA contends that the PAIMI Act and the DD Act require the Virginia Officials to produce the records.

The Virginia Official Defendants disagreed. Two federal regulations, 42 C.F.R. § 51.41(c)(4)[2] and 45 C.F.R. § 1386.22(c)(1),[3] explicitly exempt peer review

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[2] This federal regulation, which implements the PAIMI Act, provides in pertinent part:

> (c) Information and individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records, which shall be available to the P&A system under the Act shall include, but not be limited to:
>
> (4) Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.*

42 C.F.R. § 51.41(c)(4) (emphasis added).

[3] This federal regulation, which implements the DD Act, provides in pertinent part:

> (c) Information in the possession of a facility which must be available to P&A systems in investigating instances of abuse and neglect under section 142(a)(2)(B) (whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records) shall include, but not be limited to:
>
> (1) Information in reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for a facility by its staff, contractors or related entities, *except that nothing in this section is intended to preempt State*

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materials from disclosure if such records are privileged under state law.[4] Because Virginia has a state law protecting the disclosure of peer review material, *Va. Code Ann.* §§ 8.01-581.16 (2007) and 8.01-581.17 (Supp. 2010), and a state law that specifically prohibits VOPA from obtaining these records, *Va. Code Ann.* § 51.5-39.4(4), the federal regulations facially permit the Virginia defendants to refuse to disclose the materials.

When the two state agencies were unable to resolve their dispute,[5] and after VOPA sued the

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law protecting records produced by medical care evaluation or peer review committees.

45 C.F.R. § 1386.22(c)(1) (emphasis added).

[4] Five Circuits have declared that one or both of the regulations are invalid. *See Indiana Prot. & Advocacy Servs. v. Indiana Family & Social Servs. Admin.*, 603 F.3d 365, 382-83 (7th Cir. 2010) *en banc*, *pet. for cert. filed*, No. 10-131 (filed July 21, 2010); *Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Connecticut Dep't of Mental Health & Addiction Servs.,* 448 F.3d 119, 125-26 (2d Cir. 2006) (Sotomayor, J.); *Missouri Protection & Advocacy Services v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1024 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 427-28 (3d Cir. 2000) (Alito, J.). The United States has neither withdrawn the regulation nor conceded its invalidity, although it has been under regulatory review since 2008. 73 Fed. Reg. 19176, 19708-09, 19731-32. Virginia agrees that the merits question of entitlement to records is not before the Court. (U.S. Amicus Br. at 5 n.3.)

[5] Virginia offered to turn over the documents, provided they are not disclosed to third parties or used in litigation against the

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Virginia defendants in district court seeking declaratory and injunctive relief, the Virginia defendants moved to dismiss for failure to state a claim and on the basis of sovereign immunity. The district court denied the motion on both grounds. (*Id.* at 30a-46a).

First, the district court held that VOPA had stated a claim for violation of federal law. In doing so it ruled that the claim of a peer review privilege could not be reached on a Fed. R. Civ. P. 12(b)(6) motion because it was an "affirmative defense to the merits." (*Id.* at 34a-35a).

Second, the district court held that sovereign immunity did not bar VOPA's suit. (*Id.* at 35a-45a). After noting that abrogation of sovereign immunity was not at issue in this case (*id.* at 35a), the court also rejected the argument that Virginia had waived its sovereign immunity. (*Id.* at 36a-40a). Nonetheless, the district court found that *Ex parte Young*, 209 U.S. 123 (1908), applied (*id.* at 40a-42a), overruling the objection that *Young* does not permit a suit in federal court by one state agency against officials of another agency of the same State. (*Id.* at 43a-45a).

Because a denial of sovereign immunity is a final order under the collateral order doctrine, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506

Department of Behavioral Health and Developmental Services. VOPA rejected this offer. J.A. at 44.

U.S. 139, 143-44 (1993), the Virginia defendants appealed. Because the denial of a motion to dismiss for failure to state a claim is not, that aspect of the ruling was not appealed.

On appeal, the Fourth Circuit reversed (*id.* at 1a-29a), agreeing that Congress had not abrogated Virginia's sovereign immunity (*id.* at 8a-10a), and that Virginia had not waived its sovereign immunity. (*Id.* at 10a-13a). Turning to *Young*, Judge Wilkinson's opinion for a unanimous panel made five points.

First, VOPA's status as a state agency is critical to the question whether it can invoke *Young*. (*Id.* at 13a-17a). Although *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland,* 535 U.S. 635 (2002), establishes that the invocation of *Young* ordinarily requires nothing more than an allegation of an on-going violation of federal law and a prayer for prospective relief, the inquiry is more complex when a state agency seeks to sue state officials in federal court. (*Id.* at 14a). Characterizing the question as novel, the panel decision relied on those portions of the principal opinion in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 281 (1997), in which five justices joined, and on Justice O'Connor's concurrence, in which Scalia, J., and Thomas, J., joined. (*Id.* at 16a).

Second, the panel held that principles of dual sovereignty prevent federal courts from adjudicating this dispute. Relying on *Alden v. Maine,* 527 U.S. 706 (1999), and *Pennhurst State Sch. & Hosp. v.*

Halderman, 465 U.S. 89 (1984), the Fourth Circuit found that "a federal court, without the imprimatur of Congress or the consent of the state, [is not allowed] to resolve a dispute between a state agency and state officials." (*Id.* at 19a). As the court of appeals explained:

> Recognizing an inherent power in the federal courts to settle this sort of internecine feud—"to turn the State against itself"—would disparage the status of the states as sovereigns. Moreover, just as *Pennhurst* observed that states and their officials have an interest against appearing in federal court over issues of state law, states have a similar interest in not having a federal court referee contests between their agencies. Further, allowing a state agency to decide on its own accord to sue officials of another state agency and to obtain relief from an Article III judge would create difficult questions of political accountability.

(*Id.* at 19a-20a) (citations omitted).

Third, the Fourth Circuit was persuaded that this Court's "cases related to the political subdivisions of the states [recognize] that alleging a violation of federal law does not itself override the states' interest in maintaining their sovereignty with respect to internal state conflicts." (*Id.* at 22a). While those cases did not involve sovereign immunity, the opinion stated that "these decisions are nonetheless relevant to our sovereign immunity inquiry because the Court made clear that, even in the presence of an alleged

violation of federal law, the *nature of the party* making the federal claim implicated the state's interest in keeping its internal authority intact." (*Id.* at 23a) (emphasis in original).

Fourth, the court of appeals noted that "[t]he state officials concede, and VOPA does not dispute, that VOPA may bring this suit in state court and obtain the same relief that it seeks here." (*Id.* at 25a). Litigating the issues in state court would not lead to inconsistent or erroneous applications of federal law (*id.* at 25a-26a), because this Court could review any decision of the Supreme Court of Virginia interpreting federal law, and VOPA's mere convenience in seeking a forum did not justify diminishing Virginia's sovereignty. (*Id.* at 26a).

Fifth, the Fourth Circuit held that VOPA's status as an independent state agency does not empower VOPA to sue state officials in federal court. The Fourth Circuit also noted that allowing state agencies to sue state officials in federal court might result in numerous lawsuits involving public universities and, conceivably, every agency that receives federal funds. (*Id.* at 26a-28a).

In sum, the Fourth Circuit believed that "allowing a state's officials to be called before a federal court by one of the state's own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states." (*Id.* at 29a). Hence, the court held that "expanding *Ex Parte Young* to permit a suit in these circumstances cannot be

reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." (*Id.* at 29a) (citation omitted).

Although VOPA sought rehearing *en banc*, the court of appeals denied the petition (*id.* at 47a-48a), and this Court granted certiorari.

II.

SUMMARY OF ARGUMENT

Whether a state agency can sue state officials under *Ex parte Young* to obtain access to state papers lawfully held by other state agencies is a novel issue of first impression. Of course, VOPA in this case, and the Seventh Circuit in *Indiana Protection & Advocacy Servs.,* 603 F.3d 365, disagree, viewing such claims as a garden variety application of the *Young* exception. But the issue is far more complex.

In the first place, Part II-A of *Coeur d'Alene Tribe*, 521 U.S. at 267-70, is a majority opinion which establishes the following propositions:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh

> Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application 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. *See, e.g.*, *Pennhurst, supra*, at 102-103, 114, n.25 (explaining that the limitation in *Edelman v. Jordan*, 415 U.S. 651 (1974), of *Young* to prospective relief represented a refusal to apply the fiction in every conceivable circumstance).[6]

(*Id.* at 270). Because *Verizon Maryland*, 535 U.S. at 645-47, does not purport to overrule these principles, the Fourth Circuit correctly undertook a federalism analysis.

When such a review is undertaken, it becomes immediately apparent that the parties and issues are not aligned in the normal or usual fashion where *Young* has been applied. The state officials are not the aggressors seeking to enforce an illegal state law in a way that is analogous to a constitutional tort. Nor are they alleged to have any personal duties under the federal statutes. Instead the federal commands—to the extent there are commands—run against the State itself. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994) (*Young* inapplicable

[6] The Law Professor Amici mistakenly assert that the "obvious fiction" language is found in the plurality portion of Justice Kennedy's lead opinion. (Law Prof. Br. at 10 n.2).

when suit is really against the State and suit is really against the State when a law commands no state official by name or title to act but rather commands the State *qua* State to act.). Here, the requirement for access to records is not even a command. It is instead a condition for obtaining federal funds under a qualified plan. Not only could the federal government enforce its interpretation of what is required of the state by withholding funds, 42 C.F.R. § 51.4 (incorporating by reference 45 C.F.R. Part 92), but the statutes themselves contain federal oversight, reporting, and evaluation procedures intended to protect the federal interest. 42 U.S.C. § 10805(a)(5), (a)(7), (b); 42 U.S.C. § 15043(a)(2)(C); 42 U.S.C. § 15044(d), (e). This Court has refused to extend the reach of *Young* when Congress has provided statutory enforcement provisions. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996). Additionally, the fact that state papers are at issue makes the fiction that the Virginia defendants are not really acting on behalf of the State embarrassingly thin. (*See* U.S. Amicus Br. at 14) (*Young* not available "for divestiture of state property interests"). Furthermore, in this case, VOPA did not even honor the fiction. This is an official capacity suit on both sides of the "v." *See Duckworth v. Franzen*, 780 F.2d 645, 649 (7th Cir. 1985) (naming a defendant's office raises a presumption that suit is against the State).

There are a number of other considerations that support the conclusion that the Fourth Circuit correctly resorted to a federalism analysis to conclude

that *Young* should not be extended to permit suits of this character. Permitting one state agency to sue another truly is an extension of *Young* because this "Court has never used *Ex parte Young* to let one arm of a state sue another." *Indiana Prot. & Advocacy Servs. v. Indiana Family & Social Servs. Admin.*, 573 F.3d 548, 553 (7th Cir. 2009) *rev'd en banc*, 603 F.3d 365 (2010). *See also Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3159 (2010) ("'Perhaps the most telling indication of the severe constitutional problem . . . is the lack of historical precedent. . . .'") (citation omitted). Not only is there an absence of affirmative precedent, there is an actual presumption against such an extension. This Court recognizes "a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the Constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

Historically, *Young* allowed independent targets of state action, not state government agencies, to vindicate federal rights when officials threatened illegal acts against them. *Seminole Tribe*, 517 U.S. at 71 n.14; *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001). VOPA's English examples do nothing to make the practice of the State suing the State less anomalous and unheard of. For example, English cities and towns in the seventeenth and eighteenth centuries were not units of government

in the American sense. They were chartered corporations against which a *quo warranto* would lie for forfeiture of their charters, making them more like private parties than States. *See, e.g.*, John Miller, *James II* at 113 (Yale Univ. Press 2000) (London's charter was declared forfeit on "legal pretexts" after "[t]he City's Whig sheriffs returned juries which acquitted Shaftesbury and other leading Whigs. . . ."). Furthermore, the crown's sovereign immunity protected "the dignity and . . . sovereignty of the royal person" from the "setting up" of "some superior power with authority to call him to account." 3 William Blackstone, *Commentaries on the Laws of England* at 254-55 (Clarendon Press Oxford 1768) (University of Chicago Press Facsimile 1979). When the doctrine of sovereign immunity was transported to America, it became an incident of state sovereignty. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 446 (1793) (Iredell, J., dissenting). Because in the United States sovereign immunity became a federalism issue, examples involving the unitary British government are simply inapt; as VOPA half-heartedly recognizes. (Pet'r's Br. at 47) ("Of course because England lacked this Nation's federalist system, those cases never had to address questions regarding in which sovereign's court system such a suit should be heard.").

Although VOPA (*id.* at 30, 53), and its amici the United States (U.S. Amicus Br. at 12, 25-28), AARP, *et al.* (AARP Br. at 4, 14-17), and the National Disability Rights Network (NDRN Br. at 33-35), make the policy

argument that a federal district court is a superior forum to the original mandamus jurisdiction of the Supreme Court of Virginia, mandamus is the traditional exception to sovereign immunity, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the state forum provides an adequate remedy without raising the grave federalism issues associated with the extension of *Young* that VOPA and its amici seek.

The most serious implication that arises from state-agency-on-state-agency suits in federal court is that it would confer a power on Congress tantamount to the power to abrogate state sovereign immunity without the present doctrinal limitations and protections for state sovereignty. Similarly, it creates informal waiver where actual waiver under existing doctrine does not exist.

Although the direct financial costs of compelled compliance here are relatively slight, that is not true in principle across the spectrum of likely applications. If Congress is able to defeat sovereign immunity simply by conferring a right on any state agency that is prospectively enforceable in federal court, the resulting costs could greatly exceed the cost from direct exactions from the state Treasury based upon traditional tort claims; something clearly forbidden by the Eleventh Amendment. VOPA's sweeping argument that *Verizon Maryland* automatically provides the rule of decision whenever a state agency sues state officials would create significant disruption in state governance. The power to control the relationship between quarreling agencies in its own

courts, with the resulting political accountability that that ensures, is an attribute of sovereignty which should not be lost through a mechanical application of an historically and doctrinally inapplicable fiction.

For all of these reasons, and those stated below, the Fourth Circuit correctly refused VOPA's invitation to extend the *Young* exception to suits between a state agency and state officials in their official capacity. The decision is particularly sound when it is remembered that the suit is founded upon a federal law enacted pursuant to the spending power that creates no individual right and directs no command to the officials being sued. In such a circumstance, the Federal Supremacy Clause interests are too weak to justify the extension of *Young* sought here, while Virginia's federalism interest is particularly strong.

III.

ARGUMENT

A. The Fourth Circuit Did Not Err In Conducting A Federalism Analysis.

Whether a state agency can sue state officials under *Young* is an issue of first impression in this Court. *Indiana Prot. & Advocacy Servs.*, 573 F.3d at 553 ("the Supreme Court has never used *Ex Parte Young* to let one arm of a state sue another."), *rev'd en*

banc, 603 F.3d 365.[7] The novel and unprecedented nature of the claim not only triggers the need for a federalism review, but it also foreshadows the conclusion to be reached. Simply put, this Court recognizes "a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the Constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18). *See also Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (applying presumption); *Free Enterprise Fund*, 130 S. Ct. at 3159 ("'Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.'") (citation omitted).

That a federalism review can be conducted without adopting a case-by-case balancing test of the sort rejected by the concurrence in *Coeur d'Alene Tribe*, 521 U.S. at 288-97, and by the Court in *Verizon Maryland*, 535 U.S. 635, is demonstrated by the fact that Part II-A of *Coeur d'Alene Tribe*, 521 U.S. at 267-70, is a majority opinion. It forbids "empty formalism" in applying *Young*, and instead counsels

[7] The two examples offered by the United States (U.S. Amicus Br. at 24), *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 460 n.1 (1967), and *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1441-42 (2009), are easily distinguished. Both were commenced and decided in state court before being appealed to this Court.

"that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." (*Id.* at 270). This in turn means that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings." (*Id.*). To the contrary, "[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." (*Id.*).

When it is remembered that "the Eleventh Amendment does not define the scope of the States' sovereign immunity," and instead "is but one particular exemplification of that immunity," *Fed. Maritime Comm'n*, 535 U.S. at 753, it becomes apparent why this Court is called upon to perform a federalism analysis whenever it encounters a proposal to widen the scope of State amenability to suit. *See*, *e.g.*, *Alden*, 527 U.S. 706; *Blackford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Ex parte New York*, 256 U.S. 490 (1921); *Smith v. Reeves*, 178 U.S. 436 (1900); *Hans,* 134 U.S. 1. Accordingly, the Fourth Circuit was correct in engaging in a federalism analysis.

B. All Considerations Relevant To A Federalism Analysis Favor Sovereign Immunity In This Case.

1. *Young* Does Not Apply by Its Own Logic.

The rule in *Young* was originally stated as this: "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity. . . ." 209 U.S. at 155-56. The rule was supported by these considerations:

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. 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. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. 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.

(*Id.* at 159-60).

Where, as here, the individual defendants are not initiating any action, have no personal interest in the subject of the suit, and are being sued in their official capacity in federal court only for the purposes of challenging state policies and procedures (authorized by federal regulations) with respect to state property, the reasons for the *Young* exception are at their weakest. Indeed, as framed by *Young* itself, the triggering events justifying the exception are simply not present. (*Id.* at 159). ("It is simply an illegal act upon the part of a state official attempting by the use of the name of the State to enforce a legislative enactment . . . "). The only party coercively using the name of the State in this case is VOPA.

In the usual *Young* case, defendants are seeking to regulate or are affirmatively dealing with the plaintiff. The Virginia defendants in contrast have merely asserted a generally lawful privilege in refusing VOPA's demand. In any event, the fact that state papers are at issue makes the fiction that the state is not the true party in interest particularly thin.

It should also be noticed that VOPA did not even honor the fiction. Instead, VOPA sued defendants in their official capacities in the name of the Commonwealth of Virginia. *See Duckworth*, 780 F.2d at 649 (presumption that State is real party where official titles are used in complaint.). This is inconsistent with the rationale underlying *Young*.

The difference between action and inaction can rise to constitutional dimensions. For instance officers of the State cannot be ordered to perform contracts under *Young* because the real party in interest is then the State. *Louisiana v. Jumel*, 107 U.S. 711, 721-28 (1883). Indeed, "it is . . . well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is in effect a suit against a State itself." *Pennoyer v. McConnaughly*, 140 U.S. 1, 9 (1891). There are two classes of contract cases. "The first class is where the suit is brought against the officers of the State, as representing the State's action and liability" making the state the real party in interest. (*Id.* at 10). "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State." (*Id.*).

The principle is larger than the field of specific performance of contracts. In *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899), this Court said: "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." (*Id.*) (emphasis added). This distinction between action and inaction was noticed early in our history and was considered important by commentators. 2 John Randolph Tucker, *The Constitution of the United States*, § 376 at 791 (Chicago: Callaghan & Co. 1899) (edited by Henry St. George Tucker) ("The decisions cited in the note hold that no suit against a State or its officers is allowed to compel any affirmative action against a State or its officers. The State cannot be so enforced; but where the State through its officers is taking affirmative action against a citizen, contrary to his constitutional right, he may either prevent it by injunction or redress it by an action against the officer, and, because the officer is without constitutional authority from the State to do the act, judgment will be allowed against the officer.").

It is true that, in *Young*, the mere threat posed by the severe penalties of an unconstitutional act were deemed sufficient to support suit against the state officer having an intention to enforce them. *Young*, 209 U.S. at 148-49. *Fitts v. McGhee* was distinguished in *Young* on the ground that "[t]he officers in the *Fitts* case occupied the position of having no duty at all with

regard to the act, and could not properly be made parties to the suit for the reason stated." (*Id.* at 158).

Since *Young*, the ordinary case for its application has more or less fit the constitutional tort model. The State, through its officials, is acting or threatening to act unconstitutionally. *Young* may even extend to neglect if state actors are already dealing with someone through a benefit program, *Edelman v. Jordan*, 415 U.S. 651 (1974), or incarceration, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), or employment. *Russell v. Dunston*, 896 F.2d 664 (2d Cir. 1990). Indeed, in an ordinary *Young* action, any conflict between a State acting under state law and contrary federal law may trigger the exception in order to vindicate the Supremacy Clause. But it remains true that the suit is against the State and not the named officials when "'the essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, **or interfere with the public administration**." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (citation omitted and emphasis added). At least one commentator has recently maintained that the distinction between action and inaction is the overarching explanation of *Young* jurisprudence. Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 491, 557-58 (2001) (". . . the Court's holdings in this area form a pattern. In a suit against an officer, a plea of sovereign immunity is disallowed when the immunity

would operate offensively, but not when it would operate defensively.").

This is not an ordinary *Young* suit and nothing requires that the exception be extended to this case. *Pennhurst*, 465 U.S. at 114 n.25 ("the authority-stripping theory of *Young* is a fiction that has been narrowly construed."). Instead, because the categorical rule sought by VOPA—that every state agency seeking prospective relief to vindicate a federal right can always sue its parent State through its officers—would interfere with the public administration, the extension sought by VOPA should be refused. This case, far from being an ordinary application of *Young*, looks more like a failed abrogation case such as *Seminole Tribe*. As was the case there, this Court should refuse to extend *Young*.

2. Virginia Has a Sovereign Interest in Resolving Conflicts between the State and Its Agencies or Political Subdivisions without Interference from the Federal Courts.

Virginia has a long recognized sovereign interest in resolving conflicts between the State and its agencies or political subdivisions, without interference from the federal courts. As the Fourth Circuit has noted:

> A State has near plenary authority to allocate governmental responsibilities among its political subdivisions. This power to

> structure its internal government is among those reserved to the Commonwealth by the Tenth Amendment. Needless to say, the federal court must in turn respect a State's division of responsibility.

Bacon v. City of Richmond, 475 F.3d 633, 641 (4th Cir. 2007) (citation omitted). "It would be an unfathomable intrusion into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine" issues that are "uniquely an exercise of state sovereignty." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996).

Here, a State has been financially encouraged to create VOPA, but no abrogation or waiver of immunity has occurred under the law of the case because the findings of no abrogation and no waiver made by both the district court and the Fourth Circuit have not been appealed. Furthermore, Congress's requirement that VOPA have the power to sue is satisfied by the traditional state writ of mandamus. In these circumstances, Virginia's sovereign interests are undiminished.

The recognition of a sovereign interest with respect to subdivisions applies with even greater logical force when an agency of the State attempts to set up "some superior power with authority" over the State. 3 Blackstone, *supra*. Hence, subdivision cases are instructive. "[A] political subdivision, 'created by the state for the better ordering of government, has no privileges or immunities under the federal

constitution which it may invoke in opposition to the will of its creator.'" *Ysursa v. Pocatello Education Ass'n*, 129 S. Ct. 1093, 1101 (2009) (citations omitted). There are "few greater intrusions on state sovereignty than requiring a state to respond, in federal court, to a claim . . . by one of its own counties." *Harris v. Angelina County, Texas*, 31 F.3d 331, 340 (5th Cir. 1994). Furthermore, federal courts should not "adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelly v. Metropolitan County Bd. of Educ.,* 836 F.2d 986, 998 (6th Cir. 1987). Even where there is a constitutional claim, a political subdivision, because of its character and identity, has been found to lack the capacity to sue the State that created it. *Bd. of Levee Comm'rs v. Huls*, 852 F.2d 140, 142 (5th Cir. 1988).[8] While these decisions involve political subdivisions rather than agencies or institutions, the reasoning "extends logically to other creatures of the

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[8] Although the Fifth Circuit described the issue as a "state agency" suing the State, *Huls* actually involved a political subdivision suing the State. As the Fifth Circuit later explained:

> *Huls* did *not* hold that the levee board could not sue the State of Louisiana because the levee district was an arm of the state. Instead, *Huls* held that the levee board was a creature or agency of the state, and, like other creatures of a state—including municipalities—the levee board could not prevent the state, in the exercise of its police power, from revoking a prior delegation of authority.

Vogt v. Bd. of Comm'rs of Orleans Levee Dist., 294 F.3d 684, 691 (5th Cir. 2002).

state such as state universities." *United States v. Alabama*, 791 F.2d 1450, 1456 (11th Cir. 1986). Thus, VOPA's proposed suit in federal court against the State that created it offends traditional notions of state sovereignty.

3. VOPA's Historical Examples Are Inapposite while the True Historical Record Favors the Virginia Defendants.

English municipal corporations at the time of the founding were not subdivisions of the royal government. They were corporations with the right to sue and be sued—not different in kind from the two English universities, insurance companies and the East India Company, *see* 1 Steward Kyd, *A Treatise on the Law of Corporations*, 28-29 (London 1793) (Google Books); although those municipal corporations that were boroughs had a right of parliamentary representation. As chartered corporations against whom a writ of *quo warranto* would lie for forfeiture of their charters, they were more like private parties than states. Miller, *supra* (English governments sometimes moved against charters for partisan political reasons). These circumstances render VOPA's citation of *Corporation of London v. Corporation of Liverpool*, (1796) 145 Eng. Rep. 1024 (L.R. Exch.); *Mayor of the City of London v. Mayor of the Borough of Lynn Regis*, (1796) 126 Eng. Rep. 1026, 1040 (H.L.); *County of Worcester*

v. Town of Evesholm, (1686) 90 Eng. Rep. 116 (K.B.) (Pet'r's Br. at 46, 46 n.9), unremarkable;[9] although it might also be observed that the first two cases in the series post-date the adoption of the Eleventh Amendment. Similarly, *R. v. The Lords Commissioners of the Treasury*, 7 L.R.Q.B. 387 (1872) (WL 14191) (*id.* at 47), comes from too late in the nineteenth century to have American precedential value.

While it is true that English sheriffs were executive officers of the crown (Pet'r's Br. at 45) (citing *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 793-94 (1997)), VOPA's use of *Darby v. Foxley*, (1615) 81 Eng. Rep. 370, 1 Rol. Rep. 118 (K.B.) (Pet'r's Br. at 46), is not instructive. As a source cited by VOPA makes clear, suits for damages against individual officers at this time did not seek payment from the king, and in any event, could be removed by the crown into the privy council if it desired to protect the officer. Louis L. Jaffe, *Suits Against Governments and Officers; Sovereign Immunity*, 77 HARV. L. REV. 1, 9-10 (1963). *County of Salop v. County of Stafford*, (1665) 82 Eng. Rep. 1051 (K.B.), was an action prosecuted without apparent objection with the design of ascertaining which taxing authority had physical jurisdiction over a manor. It is unlikely that

[9] *Cf. Bank of the United States v. The Planters Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 907 (1824) ("The State does not, by becoming a corporator, identify itself with the corporation.").

Foxley or *County of Salop* were much in the minds of the founders being only short notices in law French.

The true state of English law is that, by 1786, there was no generally effective judicial remedy against the crown. First, "[i]t bears remembering that the common law had nothing akin to modern public-law litigation, which holds the government accountable for broad constitutional violations." Paul F. Figley and Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1238 n.252 (2009). With respect to contract, "Blackstone argued that contract actions succeeded not as a matter of legal right but only because 'no wise prince will ever refuse to stand to a lawful contract.'" (*Id.* at 1214). Nor was there liability in tort. (*Id.* at 1214-15).

As a consequence, "nearly all of the cases in which the Crown was amenable to suit involved 'real actions.'" (*Id.* at 1215). But there were special reasons to permit suits of that character, and they were so hedged about with limitations that they amounted only to suits by consent. Prior to the abolition of the last incidents of feudal tenure in 1660, the crown had an interest in actions real, "for otherwise it might be impossible to determine proper feudal relationships." (*Id.*). The "more generally useful remedy" in real actions—the petition of right—required consent. (*Id.* at 1214). Although the *monstrans de droit* did not, it was subject to tacit consent because the crown could always abate it through the writ of *rege inconsulto*. (*Id.*). *See Black's Law Dictionary* at 1282 (6th ed. 1990)

("a writ issued by the sovereign to the judges, not to proceed in a cause which may prejudice the Crown until advised.").

During the eighteenth century, parliament acquired complete control over state finances through the appropriation power. It also put the crown on a legally or practically inalienable allowance. Figley and Tidmarsh, *supra*, at 1234-38. These developments led Lord Mansfield to conclude in *Macbeath v. Haldimand*, (1786) 1 T.R. 172, 99 Eng. Rep. 1036 (K.B.), that money judgments against the king could have no practical benefit. Although Lord Mansfield recognized that the House of Lords had ruled in 1700 in the *Banker's Case* that suit could be brought to enforce annuities backed by the king's private revenue, he also observed that the ruling had done the bankers no good. The only satisfaction they ever received was by way of parliamentary appropriation. (*Id.* at 1234-38). In recognition of the practical limitations on the *Banker's Case*, the eighteenth century is barren of "common-law sovereign immunity decisions." (*Id.*).

Not only are VOPA's English examples unconvincing on their own terms, they are inapposite for an overarching doctrinal reason as well. The crown's immunity served to protect "the dignity and . . . sovereignty of the royal person" from the "setting up" of "some superior power with authority to call him to account." 3 Blackstone at 254-55. When the doctrine of sovereign immunity was transferred to America, it became an incident of state sovereignty.

Chisholm, 2 U.S. (2 Dall.) at 446 (Iredell, J., dissenting). Because sovereign immunity became a federalism issue early in our history, examples from Britian's unitary system of government are not on point. VOPA itself recognizes the problem. (Pet'r's Br. at 47) ("Of course because England lacked this Nation's federalist system, [the English] cases never had to address questions regarding in which sovereign's court system such a suit should be heard."). For the English examples to have salience, they would have to involve suits against the crown in the courts of some other sovereign. However, that would have been a violation of the customary law of nations outside of the context of a federal union.

Having recognized the issue, one would expect VOPA to turn to American examples. Its failure to do so cannot hide the clear expectation of the founding generation that states would not be generally subject to suit in federal court. Alexander Hamilton observed in Federalist No. 81 that "'[i]t is inherent in the nature of sovereignty not to be amenable to suit of an individual *without its consent*.'" *Alden*, 527 U.S. at 716. At the Virginia ratifying convention, James Madison argued that Article III would not operate against a state unless it "'should condescend to be a party.'" (*Id.* at 717) (citation omitted). In this he was supported by John Marshall: "'It is not rational to suppose, that the sovereign power shall be dragged before a court.'" (*Id.* at 718) (citation omitted). This indeed was the settled law of nations. Caleb Nelson, *Sovereign Immunity As a Doctrine of Personal*

Jurisdiction, 115 HARV. L. REV. 1559, 1574-76 (2002) (citing *Coolbaugh v. Comm.*, 4 Yeates 493, 494 (Pa. 1808) (no sovereign power amenable to suits either in its own courts or those of a foreign country without its consent)). That the States continued to enjoy this immunity under the Articles of Confederation was never in doubt. Nelson, *supra*, at 1577-79.

It is, of course, true that anti-federalists worried that this law of nations immunity might not survive ratification. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 265-68 (1985) (Brennan, J., dissenting). The emphatic and immediate rejection of *Chisholm* by the whole country through the immediate adoption of the Eleventh Amendment is the proof that Americans believed that law of nations immunity had not been generally abrogated.[10] Hence, the State is deemed immune except in those circumstances which this Court has identified. As the law now stands, "States are subject to suit by both their sister States and the United States" and where *Young* applies. *Nevada v. Hall*, 440 U.S. 410, 420 n.19 (1979).

It is apparent in light of the historical record that permitting one part of the State to sue the State through its officials **in federal court** in order to produce a judgment binding on the State itself would

[10] *See* Nelson, 115 HARV. L. REV. at 1558-59 (citing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)), for the proposition that, when law of nations immunity exists, disputes otherwise within the jurisdictional grant of Article III cease to be justiciable cases and controversies).

have been regarded as "anomalous or unheard of when the constitution was adopted." VOPA's argument to the contrary (Pet'r's Br. at 45-48) is wholly implausible.

4. Acceptance of VOPA's Position Would Create Abrogation and Waiver without the Existing Limits and Safeguards.

VOPA's argument that *Verizon Maryland* should be mechanically applied to permit agency-on-agency suits would effectively eliminate existing doctrine for abrogation and waiver in such cases. Although Congress may abrogate the sovereign immunity of States under certain circumstances, it may not do so based upon powers enumerated in Article I. *Bd. of Trustees v. Garrett*, 531 U.S. 356. With respect to abrogation, as with other sovereign immunity issues, "this Court has long 'understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000) (citing *Seminole Tribe*, 517 U.S. at 54). To accomplish abrogation, Congress must do two things. First it must "'mak[e] its intention unmistakenly clear in the language of the statute.'" (*Id.* at 73) (citations omitted). Then, Congress must have the power to legislate under § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 72-73. The requirement for abrogating sovereignty before a State can be sued in federal court applies not only to claims for money damages, but also to claims for equitable

relief not within the ambit of *Young*. *Seminole Tribe*, 517 at U.S. at 58, 74-75.[11]

Here, no one thinks that Congress intended to abrogate Virginia's sovereign immunity directly and that issue is not even before the Court given VOPA's decision not to appeal that portion of the decision. (Pet. at 9a-10a) (With respect to abrogation "Congress has not even tried."). But VOPA's sweeping interpretation of *Young* and *Verizon Maryland* would create the same result anytime Congress confers a right exercisable by a state agency. *See Fed. Maritime Comm'n*, 535 U.S. at 761 ("it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, *see Seminole Tribe*, 517 U.S. at 72, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.").

The results VOPA advocates might be tolerable in this case if Congress had satisfied the standards for waiver. But both the district court and the Fourth Circuit expressly held that there has been no waiver (Pet. at 11a), and those rulings are not part of this appeal. (Pet. at 13a) ("We hold only that Congress has not provided a sufficiently explicit statement to produce a waiver here.").

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[11] The argument by the Rhode Island Child Advocate that sovereign immunity does not apply in equity is clearly mistaken under *Seminole Tribe* (Br. of R.I. Child Advocate at 12).

Congress has conferred an uncountable number of rights and interests on state agencies receiving federal funds. Permitting every state agency to sue in federal court to resolve policy disputes with the State would mean that a State, contrary to existing doctrine, would lose its sovereign immunity through its mere receipt of federal funds. Despite the obvious potential to channel a torrent of state agency litigation into federal court, *see* Part III (B)(6) below, the Law Professor Amici and R.I. Child Advocate actually argue for this version of informal waiver. (Law Prof. Br. at 4, 18-19); (R.I. Child Advocate Br. at 17).

5. The Indignity of a State Being Sued by One of Its Own Agencies Is at Least as Serious as Other Dignity Interests Giving Rise to State Sovereign Immunity.

VOPA recognizes that sovereign immunity protects a State's dignity interests and not merely its fisc. (Pet'r's Br. at 26). VOPA contends, however, that those dignity interests are fully accommodated by the rule against suing the State *eo nomine* and by the rule against suing over a question of state law. (*Id.*). Less generously, the AARP *et al*., put the word dignity in scare quotes. (AARP Br. at 5, 7-8, 10-11, 13).

"The preeminent purpose of state sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities."

Fed. Maritime Comm'n, 535 U.S. at 760. The indignity suffered by the Commonwealth of Virginia in being hailed into federal court by VOPA to subject it, without its consent, to the enforcement of an administrative scheme is at least as great as the indignity that Florida would have suffered from having the same thing done in *Seminole Tribe*. Indeed, the harms are indistinguishable because they are the same.

6. Federal Supremacy Clause Interests Are Too Well Protected by Other Means and State Federalism Interests Are Too Strong to Justify Extending *Young* to Cover This Case.

Young is a legal fiction created by this Court to vindicate the Supremacy Clause. Nothing in this case compels this Court to extend that fiction where the usual Supremacy Clause interests are not implicated in the usual way because no individual right has been created and no specific command has issued from the federal government. Instead, the statutes impose conditions that must be met to entitle a system to receive federal funding.

VOPA characterizes this dispute as one implicating "'civil liberties.'" (Pet'r's Br. at 54-55). But PAIMI, 42 U.S.C. §§ 18001 *et seq.*, and the D.D. Act, 42 U.S.C. §§ 15001 *et seq.*, as they relate to VOPA's investigative powers, create no "rights" at all in the usual sense. They are exercises of Congress's

spending power under which States may obtain federal funding if they meet certain conditions. One of those conditions is that VOPA have the authority to "pursue administrative, legal and other appropriate remedies" in the discharge of its responsibilities. 42 U.S.C. § 10805(a)(1)(B); *id.* § 15043(a)(2)(A)(i). To implement this authority, Virginia law authorizes VOPA to engage special counsel to represent it in litigation. *Va. Code Ann.* § 2.2-510(5) (2008). There is no specific statutory requirement that VOPA have the capacity to sue a state agency in federal as opposed to state court. There is no statutory treatment of sovereign immunity.[12] In short, nothing in the statute purports to abrogate sovereign immunity or require Virginia to waive sovereign immunity as a condition for the receipt of federal funds. *Cf.* 42 U.S.C. § 2000d-7. To receive federal funds under 42 U.S.C. § 10803, 42 U.S.C. § 10805(a)(4) requires VOPA to have access to certain records. "45 C.F.R. § 1386.22(b) [does specify] that VOPA is authorized to have access" to certain records (J.A. at 18) (Compl. ¶ 40), and 42 U.S.C. § 15043(a)(2)(I)(J) also provides that for a system to receive funds it must have access to certain records.

Virginia does not argue that federal laws supported by the spending power cannot create individual rights which are capable of being

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[12] 42 U.S.C. § 15044(b) does provide: "Nothing in this sub chapter shall preclude a system from bringing a suit on behalf of **individuals** with developmental disabilities against a state, or an agency or instrumentality of a state."

vindicated in a garden variety *Young* proceeding. What Virginia does argue is that permitting a state agency to sue state officers in federal court to compel them to adopt its view of what federal funding conditions require is a novel application of *Young* that is not necessary to preserve any strong Supremacy Clause interest. Indeed, the statutes themselves contain federal oversight, reporting, and evaluation procedures intended to protect the federal interest. 42 U.S.C. §§ 10803, 10805(a)(5), 10805(b); 42 U.S.C. § 15043(a)(2)(C). There is also a regulatory regime through which the federal government can decide to withhold all or a part of funds due a State if it does not satisfy the requirements of the federal scheme. 42 C.F.R. § 51.4 (incorporating by reference as applicable to PAIMI grants the standards of 45 C.F.R. Part 92); 45 C.F.R. § 1386.81 (D.D. Act) (providing for hearings under 42 U.S.C. § 6042, currently codified at 42 U.S.C. § 15043).

This Court has refused to extend *Young* where Congress has provided other remedies. *Seminole Tribe*, 517 U.S. at 73-76. *See also Seminole Tribe of Fla.*, 11 F.3d at 1028-29 (*Young* inapplicable when a suit is really against the State and a suit is really against State when law commands no official by name or title but rather commands the State *qua* State.). Here, the federal oversight of the funds is quite elaborate. First, before disbursing any funds, the Secretary must be satisfied that State's system meets the requirements of federal law. 42 U.S.C. § 10803 (PAIMI Act); 42 U.S.C. § 15042(a)(1)

(D.D. Act). Grantees must submit annual performance reports. 45 C.F.R. § 92.40. Once granted, funds are subject to remedies for noncompliance. 45 C.F.R. § 92.43(a). These remedies include temporarily withholding cash payments pending correction of the deficiency, or suspending or terminating the current award for the grantee's or subgrantee's program in whole or in part. The agency must provide the grantee with an opportunity for a hearing, appeal or an administrative proceeding. 45 C.F.R. § 92.43(b). The proper conclusion to be drawn from the availability of these remedies was stated in *Seminole Tribe* in these terms:

> Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has

> prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

517 U.S. at 74.

Here, in addition to the administrative remedies available to the Secretary, followed by potential judicial review under the APA, VOPA has an adequate judicial remedy through mandamus in state court to reach the documents it seeks. Despite arguments to the contrary, if VOPA's claim is valid on the merits, the state mandamus procedure would offer prompt and sure relief. In Virginia, such proceedings are resolved in a matter of months. Nor is the writ uncertain where it is properly available. "A mandamus is always granted to compel the performance of some duty which has not been done." *Bd. of Supervisors of Amherst Cty. v. Combs*, 169 S.E. 589, 593 (Va. 1933) (citation omitted). "'Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law.'" *In re: Horan*, 634 S.E.2d 675, 676 (Va. 2006) (quoting *Richlands Med. Ass'n v. Commonwealth*, 337 S.E.2d 737, 739 (Va. 1985)); *accord Griffin v. Bd. of Supervisors*, 124 S.E.2d 227, 233 (Va. 1962). "A ministerial act is an act that one performs in obedience to a legal mandate and in a prescribed manner, without regard to his own judgment as to the propriety of the act to be done."

City of Richmond v. Hayes, 184 S.E.2d 784, 785 (Va. 1971) (citing *Dovel v. Bertram*, 34 S.E.2d 369, 370 (Va. 1945)); *accord In re: Horan*, 634 S.E.2d at 676; *Richlands Med. Ass'n*, 337 S.E.2d at 739. Furthermore, the Virginia courts are "presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). *See also Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (no intrinsic reason why state adjudication of federal law would be less competent.) (citation omitted).

Permitting VOPA's suit would have potentially dire consequences for the States and for federal court dockets. All States presumably have independent agencies. Even agencies subject to some political control through the appointment process sometimes have the capability of being independent because they have fixed, staggered terms. Permitting such agencies to sue state officials in federal court whenever they can claim some federal administrative or procedural interest under a spending act would be a heavy burden on state sovereignty and would flood the federal district courts with disputes that, under principles of comity, they should have no institutional desire to hear.

CONCLUSION

Wherefore, the opinion of the Fourth Circuit ought to be affirmed.

Respectfully submitted,

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