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 THE STATES OF INDIANA, ALABAMA, FLORIDA, HAWAII, LOUISIANA, MAINE, MICHIGAN, NEW HAMPSHIRE, NEW JERSEY, PENNSYLVANIA, SOUTH CAROLINA, UTAH AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

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INTEREST OF THE *AMICI* STATES

The *Amici* States respectfully submit this brief in support of the Respondents, who are various state officials in charge of Virginia agencies and hospitals that provide care and services to the disabled and mentally ill. The Petitioner is a Virginia state agency charged with providing "protection and advocacy" services to the disabled and mentally ill. Hence, this case is about whether federal courts may entertain lawsuits brought by one state agency against officials of another agency of the same state, or whether the integrity of state sovereignty precludes that from happening. The *Amici* States have a compelling interest in protecting their sovereignty by seeing to it that any intramural legal disputes are resolved in their state courts (if in any court) rather than the courts of another sovereign.

Two federal programs directed at the same objectives are in play—the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677 (codified at 42 U.S.C. §§ 15001-115 (2000)) ("DDA Act"), and the Protection and Advocacy for Individuals with Mental Illnesses Act, Pub. L. No. 99-319, 100 Stat. 478 (codified as amended at 42 U.S.C. §§ 10801-851) ("PAIMI").[1] The DDA Act authorizes a grant

[1] This statute was originally known as the "Protection and Advocacy for Mentally Ill Individuals Act of 1986," but a 1991 amendment substituted "individuals with mental illness" for "mentally ill individuals" wherever appearing in text. 1991 Amendments Subsec. (a). Pub.L. 102-173, § 10(2). Thus, the statute is now known as the "Protection and Advocacy for Individuals with Mental Illness Act" or PAIMI.

program to assist states in providing services to individuals with disabilities. *See* 42 U.S.C. § 15001(b). The Act requires states receiving these federal grants to designate or establish "protection and advocacy systems" devoted to the needs of the disabled. 42 U.S.C. § 15001(b)(2). For its part, PAIMI, 42 U.S.C. §§ 10801 to 10851, provides funding for these "P&A systems" and expands the mission of the DDA Act to encompass services for, and P&A system protection of, the mentally ill.

Under PAIMI, states may choose either to create a P&A system that is a state agency or to designate a private, non-profit entity to serve that function. Along with Virginia and Indiana, Alabama (via gubernatorial directive), Connecticut, Kentucky, New York, North Dakota, and Ohio have created state agencies to be their P&A systems. *See* Conn. Gen. Stat. § 46a-7 *et seq.*; Ind. Code § 12-28-1-1 *et seq.*; Ky. Rev. Stat. Ann. § 31.010 *et seq.*; N.Y. Mental Hyg. Law § 45.01 *et seq.*; N.D. Cent. Code § 25-01.03-01 *et seq.*; Ohio Rev. Code § 5123.60 *et seq.*; Va. Code Ann. § 51.5-39.2(A). All other states participate in the DDA Act/PAIMI program, but have designated non-profit corporations to fulfill their P&A system obligations. *See* Administration on Developmental Disabilities, U.S. Dep't of Health & Human Services, *State Protection and Advocacy Agencies*, http://www.acf.hhs.gov/programs/add/states/pas.html (last visited Oct. 21, 2010) (listing state P&A systems).

Regardless of the nature of their P&A systems, potentially all states have a stake in this litigation. Many states, if not all, have created a variety of

"independent" agencies—that is, agencies that are not subject to the control of the governor or his appointees—that may initiate their own litigation without the approval of, or representation by, the state's attorney general. In such a situation, no internal mechanism exists to prevent such an independent agency from suing another agency of the same state in federal court. Thus, if federal courts may entertain intramural state lawsuits, potentially all states (or nearly all) will be vulnerable to such suits.

SUMMARY OF THE ARGUMENT

This case is about preserving the integrity of a state's sovereign immunity by refusing to allow a state to sue its own officials in federal court. If the Fourth Circuit's ruling is overturned, it is not only P&A systems that would be affected. Any state agency that is not controlled by the governor or his appointees and is not subject to attorney general approval or representation in filing lawsuits would gain the ability to file lawsuits in federal court against fellow-state officials. Many, if not all, states have such agencies and would, thus, be vulnerable to intramural lawsuits in federal courts.

Further, the Petitioner's attempt to expand the *Ex parte Young* exception to sovereign immunity here would radically expand that doctrine. This unprecedented expansion of *Young* would divide state governments against themselves and subvert the core justifications for sovereign immunity. Such a result would defy both historic and modern understandings of the nature of sovereignty.

ARGUMENT

I. Allowing a State to Sue Itself in Federal Court Would Have Far-Reaching Implications on State Governments

In both Virginia and Indiana, state agency P&A systems have recently filed suit against sister agencies in federal court. In Indiana's case, the Indiana Protection and Advocacy System (IPAS) sued officials of the Indiana Family and Social Services Administration and two of its agencies, the Division of Mental Health and Addiction and Larue Carter Hospital, seeking documents relating to two IPAS clients. *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 368-70 (7th Cir. 2010) (en banc), *petition for cert. filed,* No. 10-131 (July 21, 2010). Non-profit corporation P&A systems have also frequently sued state officials, typically seeking documents relating to their clients. *See, e.g., Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1264 (10th Cir. 2003); *Penn. Prot. & Advocacy v. Houstoun*, 228 F.3d 423, 425 (3rd Cir. 2000) (Alito, J.). While questions linger as to whether the DDA Act and PAIMI actually afford P&A systems (of whatever stripe) a cause of action, *see Indiana Protection & Advocacy Services*, 603 F.3d at 388-94 (Easterbrook, C.J., dissenting), there is no doubt that all P&A systems, non-profits and government agencies alike, view federal court litigation as a viable and potent tool.

It is not only P&A systems that would be able to sue their sister agencies' leaders in federal court if the decision below is overturned. Any state agency that is (1) not controlled by the governor or made up of appointees accountable to the governor, and (2) not subject to attorney general approval or representation in filing lawsuits, would be on the same footing as VOPA and IPAS.

1. With respect to agencies controlled by a governor, it is reasonable to expect the governor to resolve inter-agency disputes rather than permit litigation of any sort. Where agencies are controlled either by independently elected officials or fixed-term appointees, however, the governor is not in position to unify state policy, and the potential for inter-agency legal conflict exists.

Every state has some variant of the divided executive model. In all but one, executive power is not concentrated in the governor, but rather split among other officials such as lieutenant governors, secretaries of state, auditors, treasurers, secretaries of education, insurance commissioners, and attorneys general, who are separately elected by the voters or appointed by the legislature (if not appointed by the governor). *See* G. Alan Tarr, *Understanding State Constitutions* 17 (1998). The remaining state is New Jersey, which elects its governor and lieutenant governor in tandem and then allows the governor to appoint both the secretary of state and attorney general. *See* N.J. Const. art. V, § 4. But even there, these appointees have independent constitutional authority and serve

for fixed terms (rather than at the pleasure of the governor). *Id.* No state, that is, has adopted the unified executive model of the federal government.

Over the last two centuries, multiple political philosophies have prompted state efforts to establish executive power directly accountable to the electorate, and then to divide it among multiple independently elected officials. In the immediate post-colonial period, legislatures reigned supreme in terms of state constitutional power, appointing most governors and other executive officers. *See* Laura J. Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820-1850* 7-8 (1999); Tarr, *supra*, at 87. In the decade leading to the adoption of the U.S. Constitution, however, several states began electing their governors, a trend that continued after 1787. Tarr, *supra*, at 87-89.

Once state executive power became directly accountable to the electorate, the divided-executive model became popular during the "Era of Jackson," when states sought to expand the democratic ideal through the concept of "rotation in office." *See The History of Indiana Law* 258 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006); *see also* John D. Dinan, *The American State Constitutional Tradition* 4, 9 (2009). By 1853, all states selected their governors by direct popular election "as well as previously appointed, low-level executive officers, such as the attorney general and treasurer." Scalia, *supra*, at 7-8. By 1880, over two-thirds of states elected the secretary of state, treasurer, auditor and attorney general. Tarr, *supra*, at 121-22. As

professor Albert Sturm has observed, during the Jacksonian era "the policy of frequent elections and rotation in office resulting in a multiheaded executive department diminished the governor's administrative power . . . ." Albert Sturm, *The Development of American State Constitutions*, Publius 12, No. 1, 65 (1982).

In the wake of the Civil War, the growing impact of the Second Industrial Revolution prompted states to turn their attention to regulating railroads, utilities, banks and other corporations. *Id.* at 68. "Generally, the new agencies were not controlled by the governor. *** [H]is administrative control diminished as independent state agencies proliferated with consequent further dispersion of executive power." *Id.*

Furthermore, while the Jacksonian democratic philosophy yielded more elected officials who could act independently, it simultaneously blessed expanded patronage. *See* Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 Am. U. L. Rev. 11, 15-16 (1989). Abusive patronage practices eventually inspired a backlash in favor of even *more* independent administrative officials—not elected, but appointed with fixed terms. During the Progressive and New Deal Eras, such independent government agencies became popular as a means of achieving "good government" devoid of political strife and excessive patronage. *See, e.g.,* Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 588 (2d ed. 2001); Tarr, *supra*, at 151 (observing that Progressive reformers "proposed the creation of a

bureaucracy that, freed from politics, would have broad discretion to use its neutral expertise to administer policy in the public interest"). Thus did a Jacksonian tenet favoring more executive officials with greater democratic accountability give way to a Progressive impulse empowering a larger administrative state with less political dependence.

Consequently, independent state agencies and commissions have proliferated throughout the country. States have even enshrined a variety of independent agencies and commissions in constitutional text, ranging from such nineteenth-century creations as railroad commissions (Mo. Const. art. 4, § 29), and mine inspectors (Wy. Const. 1889 art. 9, § 1), to modern-day judicial nominating and qualifications commissions (*see, e.g.,* Ind. Const. art. 7, § 9), and ethics commissions (*see, e.g.*, Ok. Const. art. 29, § 1). *See generally* Tarr, *supra*, at 116, 160. Of course, states have also placed many independent agencies and commissions on far less permanent footing. Indiana, for example, has by statute established several independent state boards, commissions and agencies whose members have fixed terms and thus are not accountable to the governor for official actions. These include the Auctioneer Commission (Ind. Code §§ 25-6.1-2-1, -3); the Board of Pharmacy (Ind. Code § 25-26-13-3); the Lobby Registration Commission (Ind. Code §§ 2-7-1.6-1, -2, -4); the Medical Licensing Board (Ind. Code § 25-22.5-2-1); and the Real Estate Commission (Ind. Code §§ 25-34.1-2-1, -2). Indiana is hardly unique in creating independent state boards, commissions, and agencies with fixed-term appointees. *See, e.g.,* Md.

Code § 10-205 (Maryland Food Center Authority); 34 Pa. Cons. Stat. Ann. § 301 (Pennsylvania Game Commission); Tenn. Code. Ann. § 11-4-201 (Tennessee Forestry Commission).

Since World War II, some states have attempted to consolidate executive power, *see* Sturm, *supra*, at 91, Tarr, *supra*, at 153-156, but the larger historical trend plainly favors multiple executive and administrative officials that function independently of one another. That megatrend is significant for this case. Splintered executive authority plants the seeds for inter-agency disputes. When no single executive official (such as a governor) is in a position to resolve such disagreements, courts (state and federal) become an alluring forum for arbitration.

2. The expansion of government-by-independent-agency notwithstanding, states largely (though not completely) avoid intramural litigation through the use of attorneys general, who often function as the exclusive representatives of state agencies and officials in court. *See State Attorneys General Powers and Responsibilities* 53-54, 92, 99 (Emily Myers & Lynne Ross, eds., 2d ed. 2007). That is, one advantage of having an attorney general who serves as the exclusive legal counsel for state government agencies and officials is that such an official can be the choke-point for inter-agency legal disputes. If the attorney general is unwilling to file a lawsuit by one agency against another, the division of executive power does not genuinely threaten intramural litigation. At the very least, when the attorney general has such exclusive authority, a single state

official remains electorally accountable for the decision whether to permit such lawsuits.[2]

State attorneys general, however, are not always in a position to prevent inter-agency disputes from heading to court. Indeed, the attorney general's litigation function "is not securely established in all offices, particularly in those states where agencies are free to retain independent counsel." *State Attorneys General Powers and Responsibilities*, *supra*, at 12.

The potential for inter-agency litigation arises with respect to state agencies that, like VOPA and IPAS, are neither controlled by a governor nor required to use (or obtain the consent of) a state attorney general to file a lawsuit. Both VOPA and IPAS by statute have the right to hire outside legal counsel without seeking the authorization of the attorney general. *See* Ind. Code §§ 12-28-1-2(2), (4); Va. Code Ann. § 51.5-39.2(A). The same is true in at

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[2] Often, state agencies may not even hire outside counsel without the Attorney General's consent, which is another means by which the attorney general exercises control over inter-agency legal disputes. *See, e.g.,* Ga. Code Ann. § 45-15-34; Ind. Code § 4-6-2-1; Ind. Code § 4-6-5-3; Va. Code Ann. § 2.2-507; Wash. Rev. Code Ann. § 43.10.067; *see also Banta v. Clark*, 398 N.E.2d 692, 693 (Ind. Ct. App. 1979) ("[A]gencies and officers may not hire outside counsel unless the Attorney General has consented in writing"); 1995 Va. Op. Atty. Gen. No. 241, April 3, 1995 (a Virginia state agency without specific authorization to employ legal counsel must receive prior approval from attorney general to hire private legal counsel, pursuant to statute mandating attorney general's office provide all legal services in civil matters).

least five of the other six states where the P&A system is a state agency. *See* Conn. Gen. Stat. Ann. § 46a-11; Ky. Rev. Stat. Ann. § 31.030; N.Y. Mental Hyg. Law § 47.03; N.D. Cent. Code § 25-01.3-06; Ohio Rev. Code § 5123.60.[3] This arrangement is arguably required by the DDA Act and PAIMI, which require that P&A systems have the authority to pursue "administrative, legal, and other appropriate remedies" in furtherance of their mission. *See* 42 U.S.C. §§ 10805(a)(1)(B), 15043(a)(2)(A)(i).

Protection and Advocacy systems are not unique in this respect. Across the country, *many* state agencies are neither accountable to the governor nor beholden to the attorney general for legal representation. States create such doubly independent agencies to address a multitude of problems.

Some agencies are independent of the attorney general to insulate their executives from political pressure as they ensure that other government actors behave legally and ethically. *See, e.g.,* Cal. Gov. Code §§ 11041-11043 (exempting California's Office of Legislative Counsel from attorney general control); Fla. Stat § 11.42(2)-(3) (Florida Auditor General); Miss. Code §§ 25-4-5, 25-4-19(g) (Mississippi Ethics Commission); Nev. Rev. Stat. § 218F.720 (Nevada Legislative Counsel Bureau); 65

[3] Alabama's Protection and Advocacy agency appears to have been established by an unpublished governor's directive; it is unclear what powers the agency possesses.

Pa.C.S. § 1106, 71 P.S. § 732-401 (Pennsylvania State Ethics Commission); Maryland Office of People's Counsel, *Who We Are,* http://www.opc.state.md.us/opc/Home/AboutUs/WhoWeAre.aspx (last visited Oct. 21, 2010).

Others oversee the behavior of non-government professionals. *See, e.g.,* Ga. Code Ann. §§ 17-12-1, 17-12-3, 17-12-4, 17-12-6 (Georgia Public Defender Standards Council); Idaho Code Ann. §§ 54-1805, 67-1406(2) (Idaho State Board of Medicine); N.M.R.A. §§ 17-101, 17-105 (New Mexico Disciplinary Board); Utah Code Ann. §§ 54-1-1, -6(1)(a)(i) (Utah Public Service Commission); La. Sup. Ct. Rule 19 (Louisiana Lawyer Disciplinary Board).

Still others provide services necessary to the public good that implicate the interests of all state officials, including attorneys general, such as the protection of civil rights, *see, e.g.,* Conn. Gen. Stat. §§ 46a-52, -54(3), -55 (Connecticut Commission on Civil Rights); representing citizen interests in crafting agency regulations, *see, e.g.,* Mo. Ann. Stat. §§ 386.700, 386.710 (Missouri Office of the Public Counsel); or resolving citizen complaints about state agencies, *see, e.g.,* Neb. Rev. Stat. §§ 81-8,241, 81-8,245 (Nebraska Office of Public Counsel). Texas uses an independent agency to ensure the effective prosecution of high-level criminal appeals. *See* Tex Gov't Code Ann. §§ 42.001, 42.003 (Texas State Prosecuting Attorney). Arizona has even created an independent agency dedicated to "restoring, maintaining, and advancing the state's sovereignty and authority over issues that affect this state and

the well-being of its citizens by taking any action it deems appropriate." *See* Ariz. Rev. Stat. Ann. § 41-401 (Arizona Constitutional Defense Council).

If *Ex parte Young* permits it, any number of circumstances could arise to lead such agencies to sue their sister agencies' leaders in federal court. State agencies, after all, already find reasons to sue sister agency officials (including their state's attorney general) in state court. *See, e.g., Perdue v. Baker*, 586 S.E.2d 606, 607 (Ga. 2003) (petition for writ of mandamus by Governor of Georgia against Georgia Attorney General); *Sec'y of Admin. and Fin. v. Attorney Gen.*, 326 N.E.2d 334, 335 (Mass. 1975) (suit by Secretary of Administration and Finance against Attorney General); *People ex. rel. Bd. of Tr. of Univ. of Ill. v. Barrett*, 46 N.E.2d 951, 953 (Ill. 1943) (mandamus suit by Board of Trustees of University of Illinois against Illinois Attorney General and Auditor of Public Accounts); *Roe v. Kervick*, 199 A.2d 834, 837 (N.J. 1964) (suit by Treasurer of New Jersey against New Jersey Area Redevelopment Commission); *Rhode Island Tpk. and Bridge Auth. v. Nugent*, 182 A.2d 427, 427 (R.I. 1962) (suit by state agency Mount Hope Bridge Authority against Rhode Island Turnpike and Bridge Authority dismissed on sovereign immunity grounds).

With regard to potential federal court claims, one can easily imagine an auditor suing a state official for violating limits on the uses of federal grants, or even to enjoin implementation of federal grant programs it believes inadequately rooted in the United States Constitution. Or, a state civil rights commission might see fit to sue a state official in

federal court for violating federal civil rights laws. *See, e.g.*, Conn. Gen. Stat. § 46a-55 ("The executive director. . . shall assign a commission legal counsel to represent the commission in any proceeding wherein any state agency or state officer is an adversary party. . . [and may represent the commission] in such other matters as the commission and the Attorney General may jointly prescribe."); 42 U.S.C. § 2000e-5(c) (providing that a state civil rights agency can bring action to enforce federal statutes).

This is but a sampling of the types of federal court claims that a ruling in favor of VOPA might enable. Such a result could frustrate the historical trend in favor of multiple administrative officials and independent agencies. States would, in short, face decisions about whether to jettison some agencies and restructure others to protect themselves from intramural federal court lawsuits. The ultimate effect would be to fetter state efforts to pursue independent, non-partisan governmental solutions to complex problems that maximize public confidence and trust. This would be particularly problematic where federal grant programs require the sort of independence that has enabled this lawsuit. States should not be faced with having to reject federal programs as the price of protecting their officials from being dragged into federal court by fellow state officials.

II. Extending *Ex Parte Young* to Allow Federal Adjudication of Intramural State Agency Disputes is Contrary to the Logical Underpinnings and Historical Background of Sovereign Immunity

VOPA has been unable to cite even one case where one state agency was permitted to sue another agency of the same state in federal court. Such cases would divide state governments against themselves and subvert the core justifications for sovereign immunity, and, as such, they are prohibited by the Eleventh Amendment.

VOPA ignores the historic and modern understandings of the nature of sovereignty by formulating the issue in this case as being whether the identity of the plaintiff should determine whether *Ex parte Young*, 209 U.S. 123 (1908), is applicable in a particular case. Pet'r's Br. at 37. It is far from clear that this is the proper way to view the issue. VOPA identifies the *Ex parte Young* solution—to name a state official rather than a state agency as the defendant in a federal court complaint—and erroneously proceeds as if the defendant's proper identity *simpliciter* was the only issue in need of resolution before federal courts could intercede in state affairs. What the *Young* conceit represents, however, is not a full resolution of a meaningless, formalistic federal pleading problem, but a limited means of addressing a profound limit on federal court jurisdiction. The real question is not the broad generality of whether *Young* turns on the identity of the plaintiff, but instead whether *Young*'s

tolerance for limited federal court intrusion into state affairs can even plausibly extend to cases where a state is suing itself. Considered in that way, and in light of the history of sovereign immunity, the question very nearly answers itself.

1. The constitutionally presupposed doctrine of sovereign immunity provides states with "nearly absolute immunity from civil lawsuits" in recognition of the special status of states in our federal system. *See* Justin Donoho, *Achieving Supreme Court Consensus: An Evolved Approach to State Sovereign Immunity*, 88 Neb. L. Rev. 760, 760 (2010). In *Young* this Court created an exception where an individual citizen sued a government official seeking prospective relief from an ongoing violation of federal law. *Young*, 209 U.S. at 167-68. In designing this exception, the court reasoned that a suit challenging the actions of state officials taken to uphold or advance an unconstitutional state statute was not really a suit against the state at all; because the state could not provide the official with the authority to perform an unconstitutional act, the act must be personal, and thus not within the ambit of sovereign immunity. *Id.* at 159-60.

Since that time, this court has repeatedly and explicitly recognized that this core justification of *Young*—that a suit against a state official for violating federal law is distinct from a suit against the state itself—is a complete fiction. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269-70 (1997); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984). As a result, the Court has declined to apply the exception broadly,

recognizing that to do so would magnify the fiction and conceivably allow it to consume the rule of immunity. *See, e.g., Coeur d'Alene Tribe,* 521 U.S. at 269-70; *Pennhurst*, 465 U.S. at 114 n.25.

More specifically, courts should take account of the particular impact created by allowing any given case to proceed against a defense of sovereign immunity. *Young* "requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). *Young* does not "permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer" because that "would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Coeur d'Alene Tribe*, 521 U.S. at 270. Rather, "[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.* Instead of resorting to "empty formalism," courts must "examine the effect of the . . . suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable." *Id.* at 281.

Here, VOPA's claims manifestly implicate the "special sovereignty interests" of states. As this court held in *Alden v. Maine*, 527 U.S. 706, 749

(1999), and the Fourth Circuit held below, one of these interests is "avoiding excessive federal meddling with [state] internal authority." *See* Pet. App. at 18a. Indeed, while the Founders split the atom of sovereignty, they did not smash it to smithereens. *See Hans v. Louisiana*, 134 U.S. 1, 14 (1890). That is to say, at the state level there is but one sovereign. State sovereignty cannot be further subdivided such that one component of state government can drag another into federal court as if the two agencies were separate states seeking to resolve a dispute in a neutral forum. As the Fourth Circuit recognized, for a federal court to referee a dispute between state agencies under *Young* would impugn the dignity of the state and raise difficult questions of political accountability. *See* Pet. App. at 19a-20a.

Along these lines, this Court held in *Pennhurst*, 465 U.S. at 106, that *Ex parte Young* does not permit suits in federal court to enjoin state officials from violating state law. The Court in *Pennhurst* sought to avoid the significant "intrusion on state sovereignty" that would result "when a federal court instructs state officials on how to conform their conduct to state law." *Id.* As the Fourth Circuit observed, "the Court recognized that federal court resolution of internal state disputes would 'conflict [] directly with the principles of federalism that underlie the Eleventh Amendment.'" Pet. App. at 19a (quoting *Pennhurst*, 465 U.S. at 106). The same conflict arises in federal-court suits by P&A systems against non-consenting state agencies under PAIMI. *See* Pet. App. at 18a-19a. Indeed, the conflict is

more pronounced when a state agency seeks federal resolution of an intramural conflict with another state agency, as it insults a state's ability to determine internal policy while raising "difficult questions of political accountability." *See id.* at 19a-20a.

2. The need to respect the special sovereignty interests of states arises from the core of the Anglo-American tradition, where the doctrine of sovereign immunity dates at least as far back as 1268, when it was considered settled that the sovereign could not be sued *eo nomine* in its own courts. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 2 (1963). The doctrine has been justified by reference to the logical anomaly that would result from the sovereign issuing or enforcing a writ against itself. *See id.* at 3 (citing 1 Pollock & Maitland, *The History of English Law* 518 (2d ed. 1898)).

The need to protect the sovereign's subjects from abuse by the sovereign and its servants eventually led to the creation of a number of exceptions to this general principle: petitions of right during the reign of Edward I, traverse during the reigns of Edward III and Edward VI, mandamus in 1615, and suits against Crown officers individually in 1703. *See id.* at 5-18 (surveying the development of exceptions to sovereign immunity in English law). Thus, an individual, a private corporation, a public corporation (such as a town), or a local government (such as a county) were permitted to seek these remedies. *See, e.g., Town of Darby v. Foxley,* (1615)

81 Eng. Rep. 370 (K.B.) (town may sue sheriff to vindicate rights granted by sovereign); Jaffe, *supra*, at 8-15 (discussing the development of suits against officers in English law to vindicate the rights of a subject); William Holdsworth, *A History of English Law* 650-55 (1938) (discussing the rights of private individuals and corporations against servants of the Crown sounding in tort and contract). Being situated as subjects of the sovereign, these groups were all capable of suing each other, entirely apart from suits against officers of the Crown. *See, e.g., County of Worcester v. Town of Evesholm,* (1686) 90 Eng. Rep. 116 (K.B.).

Notably, these remedies vindicate the rights of individuals against the sovereign, not the rights of one portion of the sovereign *vis-à-vis* another. *See generally id.* (discussing exceptions to the doctrine of sovereign immunity in terms of private individuals being able to vindicate their rights against the King and his officials); *see also* Holdsworth, *supra*, at 655-58 (discussing the relationship of the servants of the Crown to each other and to the Crown in the eighteenth century); *see generally* Jaffe, *supra*, at 1. Nor is this surprising, as English courts recognized that protecting the public from oppression "must not fetter unduly the free action of the executive government." *See* Holdsworth, *supra*, at 657. Subjecting the sovereign's internal disputes to judicial control would clearly have fettered the executive and interfered with effective government.

When the several states won their independence from England in the American Revolution, they each

individually acceded to the full measure of this immunity. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[T]he States entered the federal system with their sovereignty intact"). Indeed, one of the core concerns of the ratification debates dealt with whether the creation of a federal sovereign "above" the states would subject the states to suit. *See Alden v. Maine*, 527 U.S. at 717-19. The Constitution's proponents assured the states that their sovereign immunity to suit would not be damaged by the extension of Article III jurisdiction to suits between a state and a citizen of another state. *See The Federalist* No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.") (emphasis added).

Despite these assurances, a mere five years after ratification the Court read the Constitution to negate the states' sovereign immunity in federal suits brought by citizens of other states. *See Chisholm v. Georgia*, 2 Dall. 419 (1793) (holding that the language granting the Supreme Court jurisdiction in controversies between a state and a citizen of another state was inconsistent with sovereign immunity to such suits). This decision provoked an immediate backlash culminating in the enactment of the Eleventh Amendment, which prevented the judicial power of the United States from extending to suits in law or equity against a

state by a citizen of another state. *See Alden*, 527 U.S. at 720-24 (discussing the public condemnation of the majority decision in *Chisholm* and the enactment of the Eleventh Amendment). The Court has since recognized that, while the states share some of the full authority of sovereignty with the federal government, each state retains the full dignity of a sovereign, including immunity to suit. *See Blatchford*, 501 U.S. at 779.[4]

After the Eleventh Amendment overruled *Chisholm*, *see Alden*, 527 U.S. at 723, the Court allowed suits by private individuals and corporations to proceed against state officials in their individual capacities under limited circumstances. *See, e.g., Poindexter v. Greenhow (Virginia Coupon Cases)*, 114 U.S. 170 (1885) (allowing private individual to sue state officer based on the reasoning that unconstitutional law could not provide sovereign immunity); *Bd. of Liquidation v. McComb,* 92 U.S. 531 (1875) (suit by private individual compelling performance of a non-discretionary duty by a state

[4] The Court has consequently given a broad reading to state sovereign immunity and upheld immunity claims outside of the literal text of the Eleventh Amendment. Sovereign immunity has thus barred suits against states by their own citizens, federal corporations, foreign nations, and Indian tribes. *See generally Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (sovereign immunity applicable to suits by Indian tribes); *Principality of Monaco v. Mississippi,* 292 U.S. 313 (1934) (sovereign immunity applicable to suits by foreign nations); *Smith v. Reeves*, 178 U.S. 436 (1900) (sovereign immunity applicable to suits by federal corporations); *Hans v. Louisiana,* 134 U.S. 1 (1890) (sovereign immunity applicable to suits by citizens of sued state).

official via mandamus*); Osborn v. Bank of United States*, 22 U.S. 738 (1824) (allowing private tort suit to proceed against state official who committed tort pursuant to unconstitutional law).

These exceptions were eventually synthesized in *Ex parte Young* to allow suits against state officials for prospective relief. *See Young*, 209 U.S. at 150-58 (discussing nineteenth century cases allowing and disallowing suit against state officials). *Young* must be understood in context, *i.e.*, with reference to the English doctrine of sovereign immunity confirmed by the Eleventh Amendment. *Cf. Alden*, 527 U.S. at 720-24 (discussing the public condemnation of the majority decision in *Chisholm* and the enactment of the Eleventh Amendment to preserve the sovereign immunity of the states). To read *Young* in context is to understand that, for all its fiction, *Young* does not enable lawsuits that would have been "anomalous and unheard-of" to the Founders, *Hans,* 134 U.S. at 16, a characterization which most certainly applies to suits by a state agency against officials of another agency of the same state.

3. Ignoring this tradition, Petitioner characterizes this suit as a "classic example" of the narrow *Young* exception. Pet'r's Br. at 35-36. VOPA cannot, however, cite to a single case allowing a state sovereign to sue itself in federal court. *See* Pet'r's Br. at 44. Nor can Petitioner even cite any English cases supporting such a bizarre result. *See* Pet'r's Br. at 45-48. Instead, VOPA cites cases allowing suits against state officials in federal court by cities, corporations, counties, or individuals, and

intramural suits between the same.[5] These cases are not relevant because they do not implicate the unique sovereign dignity of states. VOPA seeks to dodge the difficult issues that state sovereignty implies by arguing that, because it was created by the state like a town or corporation, it should be treated like a political subdivision for purposes of suing state officials. *See* Pet'r's Br. at 44-50. But if anything is clear in this case, it is that VOPA *is* the state, period—as VOPA itself has conceded elsewhere. *See* Pet'r's Br. at 17 ("Virginia legislatively established petitioner VOPA in its current form as an 'independent state agency'"); *see also Ind. Prot. & Advocacy Servs.*, 603 F.3d at 367 (confirming that Indiana's VOPA analogue, Indiana Protection and Advocacy Services, is a state agency). It should be equally clear that sovereign immunity would lose all significance if federal courts were to treat state agencies as political subdivisions whenever sovereignty interferes with federal jurisdiction.

VOPA, as an arm of state government, cannot use rights designed to protect the people from their government against another arm of state

[5] Petitioner's references to other federal cases it has been involved in are irrelevant. *See* Pet'r's Br. at 41 n.8. All such cases took place in the Fourth Circuit, and the Fourth Circuit has rejected Petitioner's expansive reading of *Young*. Pet. App. at 18a-21a. *Amici* are aware of only one other case in which a state agency has sued another state agency in federal court, which is also on appeal to this court. *See Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 368-70 (7th Cir. 2010) (en banc), petition for cert. filed, No. 10-131 (July 21, 2010).

government without injuring the state's sovereign dignity. *Cf.* Jaffe, *supra*, at 8-15 (discussing the development of suits against officers in English law to vindicate the rights of the governed against the government). It is hard to see how the Eleventh Amendment could be said to create "real limitations" on a federal court's jurisdiction if a state may be haled into court not only by citizens, corporations, and local governments, but also by its own appendages. *See Coeur d'Alene Tribe*, 521 U.S. at 269-70. VOPA's claim is merely another attempt to convert the *Young* exception into an "empty formalism" sacrificing the Eleventh Amendment to the "elementary mechanics of captions and pleading" of the sort this court has historically rejected. *See id.*

If it was anathema to the Founders for states to be dragged by their own citizens into the courts of the "higher sovereign," *see Nevada v. Hall*, 440 U.S. 410, 418 (1979), it surely would have been beyond all conception that political rivals within state governments could drag one another into federal court. *Cf. Hans,* 134 U.S. at 16 (rejecting a suit in federal court against Louisiana by a citizen of Louisiana on sovereign immunity grounds because the Constitution did not enable such "anomalous and unheard-of" proceedings). If the Founders thought to the contrary, presumably they would have made express provision for such suits in Article III, as they did for "Controversies between two or more states." U.S. Const. art. III, sec. 2.

It is inherent in the principle of sovereign immunity embodied by the Eleventh Amendment that a state may not sue itself in federal court. If sovereign immunity and the Eleventh Amendment impose real limits on federal jurisdiction, then *Young* cannot be extended to allow federal adjudication of intramural disputes between state agencies. To allow such a lawsuit would ignore not only the logical underpinnings of both doctrines, but also the historical backgrounds informing their application and this Court's stated understanding of their scope.

CONCLUSION

The Court should affirm the decision below.

Respectfully Submitted,

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Dated: October 21, 2010