No. 09-529

In the Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES W. STEWART, III, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

ANN RAVEL
Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GINGER D. ANDERS
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner, an independent state agency, brought this action against state officials for prospective injunctive relief to remedy ongoing violations of the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq*. The question presented is whether the Eleventh Amendment bars this suit, notwithstanding the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), because petitioner is a state agency.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Miscellaneous: Page

In the Supreme Court of the United States

No. 09-529

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY, PETITIONER

v.

JAMES W. STEWART, III, COMMISSIONER, VIRGINIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a protection and advocacy system established as an independent state agency pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq.*, may invoke *Ex parte Young*, 209 U.S. 123 (1908), in order to seek prospective injunctive relief in federal court to remedy ongoing violations of those statutes. The Secretary of Health and Human Services administers those Acts. The United States has a substantial interest in

ensuring that all protection and advocacy systems are able both to effectively enforce the rights established by the Acts and to fulfill their statutory function of protecting the rights of persons with developmental disabilities and mental illness. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae, recommending that the Court grant the petition for a writ of certiorari.

STATEMENT

1. a. In 1975, Congress established the first of several grant programs that provide States funding to create protection and advocacy (P&A) systems to protect individuals with developmental disabilities or mental illness from abuse and neglect. The law was enacted in response to reports of severe abuse and neglect at a New York state institution for the mentally disabled. See Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6001 *et seq.* (1976) (repealed 2000); S. Rep. No. 1297, 93d Cong., 2d Sess. 59 (1974) (*1974 Senate Report*). In 2000, Congress reauthorized the statute as the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act), Pub. L. No. 106-402, 114 Stat. 1677 (42 U.S.C. 15001 *et seq.*), finding that "individuals with developmental disabilities are at greater risk than the general population of abuse [or] neglect," 42 U.S.C. 15001(a)(5), and are in need of improved services and assistance, 42 U.S.C. 15001(a)(6) and (12).

Under the DD Act, a State may receive federal funding to improve "community services and opportunities," including medical care, job training, and social supports,

available to persons with developmental disabilities. 42 U.S.C. 15023(a), 15024. If the State wishes to receive this funding, it must create and maintain a P&A system to "protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. 15043(a). The P&A system then receives separate federal funding, which is paid directly to the system. 42 U.S.C. 15042(a) and (b).

Similar concerns about abuse and neglect of mentally ill individuals in state-run psychiatric facilities led to the enactment of the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), 42 U.S.C. 10801 *et seq.*, in 1986. See S. Rep. No. 109, 99th Cong., 1st Sess. 1-3 (1985) (*PAIMI Senate Report*). The PAIMI Act authorized additional funding for P&A systems established pursuant to the DD Act, and expanded their mission to encompass the protection of and advocacy for individuals with mental illness. 42 U.S.C. 10802(2), 10803, 10827. The PAIMI Act was reauthorized most recently in 2000. See Youth Drug and Mental Health Services Act, Pub. L. No. 106-310, Div. B, § 3206(f), 114 Stat. 1195. Congress has also enacted several other statutes that provide additional funding for P&A systems.[1]

b. Under the DD Act and the PAIMI Act, a P&A system "shall * * * have the authority to investigate incidents of abuse and neglect * * * if the incidents

---

[1] See 29 U.S.C. 794e (funding for P&A systems to serve persons with disabilities not eligible under previously established P&A programs); 29 U.S.C. 3004 (funding pertaining to obtaining assistive technologies); 42 U.S.C. 300d-53 (2006 & Supp. II 2008) (funding to serve individuals with traumatic brain injury); 42 U.S.C. 1320b-21 (funding to assist beneficiaries of Social Security with employment); 42 U.S.C. 15461 (funding to assist individuals with disabilities in the electoral process).

are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. 15043(a)(2)(B); see 42 U.S.C. 10805(a)(1)(A). To ensure that such investigations are effective, the statutes provide that P&A systems "shall * * * have" a broad right of access to "all records" that are relevant to an investigation in enumerated circumstances.[2] 42 U.S.C. 10805(a)(4), 15043(a)(2)(I) and (J). Because P&A systems often investigate ongoing abuse, the DD Act entitles them to prompt access: institutions ordinarily must produce requested records within three business days of a P&A system's request, and must provide "immediate access" to records in cases involving the death of, or immediate danger to, a disabled individual. 42 U.S.C. 10543(a)(2)(J). "[R]ecords" are defined to include any records created by an institution's staff or an investigating agency, including those that "describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents." 42 U.S.C. 10806(b)(3)(A); see 42 U.S.C. 15043(c). The PAIMI Act specifies that these federal rights of access exist even if state law would otherwise "prohibit [the system] from obtaining access to the records of individuals with men-

[2] P&A systems are also entitled to obtain access to disabled individuals receiving services, 42 U.S.C. 15043(a)(2)(H), and access to facilities that provide care to mentally ill individuals, 42 U.S.C. 10805(a)(3).

tal illness in accordance with" federal law.[3] 42 U.S.C. 10806(b)(2)(C).

The DD and PAIMI Acts provide that a P&A system "shall * * * have the authority * * * to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of" individuals with disabilities or mental illness. 42 U.S.C. 15043(a)(2)(A)(i); see 42 U.S.C. 10805(a)(1)(B). In addition to pursuing remedies on their own behalf, P&A systems also may "pursue administrative, legal, and other remedies on behalf of" individuals with disabilities or mental illness. 42 U.S.C. 10805(a)(1)(C); see 42 U.S.C. 15044(b).

---

[3] The Department of Health and Human Services (HHS), which administers the DD and PAIMI programs, see 42 U.S.C. 10802(6), 10803, 10826, 15002(26), 15004, has promulgated regulations defining records as including certain evaluative materials, but stating 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); 45 C.F.R. 1386.22(c)(1). A number of courts of appeals have ruled that notwithstanding HHS's regulation, the PAIMI Act preempts state peer-review privileges. See *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Social Servs. Admin.*, 603 F.3d 365, 382-383 (7th Cir. 2010) (en banc), petition for cert. pending, No. 10-131 (filed July 21, 2010); *Protection & Advocacy for Persons with Disabilities, Conn.* v. *Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs.* v. *Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023-1024 (8th Cir. 2006); *Center for Legal Advocacy* v. *Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc.* v. *Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.). The question whether a P&A system is entitled to obtain access to peer-review records when such records are privileged under state law is currently under regulatory review, see, *e.g.*, 73 Fed. Reg. 19,708-19,709, 19,716, 19,731-19,732 (2008), and is not before this Court.

A participating State has the option to designate either a state agency or a private nonprofit entity to serve as its P&A system. See 42 U.S.C. 10805(c)(1)(B), 15044(a). Under either alternative, the P&A system must be independent of any state agency that provides treatment or services, 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), to ensure that the system will be effective in investigating abuse and neglect at state-run (as well as private) facilities. See *PAIMI Senate Report* 2. Whether the P&A system is public or private, the DD Act provides that the Governor may not appoint more than one-third of the system's governing board, 42 U.S.C. 15044(a)(2), and the Act also restricts the State's ability to impose funding and hiring restrictions on the system, 42 U.S.C. 10543(a)(2)(K). In addition, once a State establishes its P&A system, it may change the public or private nature of the system only by redesignating the system for "good cause." 42 U.S.C. 15043(a)(4).

c. The Commonwealth of Virginia has elected to participate in these federal spending programs. Virginia chose to place its P&A system in an independent state agency—the petitioner in this case—known as the Virginia Office of Protection and Advocacy. See Va. Code Ann. § 51.5-39.2(A) (2009). Petitioner is independent of the Attorney General of Virginia and has authority "to investigate complaints relating to abuse and neglect or other violation of the rights of persons with disabilities in proceedings under state or federal law, and to initiate any proceedings to secure the rights of such persons." *Ibid*.

2. Petitioner filed this action in the United States District Court for the Eastern District of Virginia, seeking records in connection with its investigation into the

deaths of two individuals and injuries to a third that occurred while the individuals were residents of institutions operated by the Commonwealth. Pet. 9-11; J.A. 11, 13-17. The defendants—respondents in this Court—are three state officials. J.A. 12-13.

Petitioner alleged that in 2006, two patients at state-run institutions for individuals with mental illness or developmental disabilities had died and a third had been injured, leading petitioner to open investigations into whether those events were the result of abuse or neglect. J.A. 13-16. Petitioner requested that respondents provide records relating to any risk-management or mortality reviews conducted with respect to the deaths and injuries. J.A. 14-16. Respondents, according to petitioner, refused to produce the records on the basis of an asserted peer-review privilege. J.A. 16. Petitioner alleged that the DD and PAIMI Acts entitled it to receive the records, notwithstanding any state-law privilege that might otherwise apply. J.A. 18-20. Petitioner sought a declaration that respondents' "refusal to provide the records requested * * * is in violation of the DD and PAIMI Acts"; an injunction requiring respondents to provide access to "records mandated by the DD and PAIMI Acts"; and an injunction prohibiting respondents "from interfering, in any way, with [petitioner's] access to records." J.A. 21-22.

Respondents moved to dismiss, contending, as relevant here, that they were immune from suit under the Eleventh Amendment. Pet. App. 30a-31a, 35a. The district court denied respondents' motion, explaining that because petitioner sought declaratory and injunctive relief against state officials in their official capacities under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment did not bar the suit. In determining wheth-

er *Ex parte Young* applies, the district court stated, "a court 'need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Pet. App. 41a (quoting *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (*Verizon*)). The court also rejected respondents' contention that because petitioner is a state agency, "special sovereignty interests" counseled against allowing the suit to proceed under *Ex parte Young*. The court reasoned that "[i]t is the nature of the issue to be decided, not who brings suit, that potentially implicates special sovereignty interests," and petitioner's suit properly sought prospective relief to enforce federal law. *Id.* at 44a-45a.

3. Respondents appealed the district court's sovereign immunity ruling under the collateral order doctrine, Pet. App. 6a; see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the court of appeals reversed and remanded. The court acknowledged that under the "straightforward inquiry" set out in *Verizon*, 535 U.S. at 645, and followed by the district court, *Ex parte Young* would permit petitioner's suit. Pet. App. 13a-14a. Indeed, the court noted, respondents conceded that petitioner's suit could proceed under *Ex parte Young* if it were brought by a private P&A system or an individual. *Id.* at 16a-17a.

Nonetheless, the court concluded, relying on *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), a suit that "otherwise satisfie[s] the requirements of *Ex parte Young*" may be barred by sovereign immunity if the suit implicates "special sovereignty interests." Pet. App. 16a. In the court's view, petitioner's status as a state agency rendered the suit an "intramural contest" that

"encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff." *Id.* at 17a. The court stated that it found support for that proposition in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), which held that an action under *Ex parte Young* is not available to enforce state law, and in *Alden* v. *Maine*, 527 U.S. 706 (1999), which held that Congress lacks the power under the Commerce Clause to abrogate state sovereign immunity in state courts. The court also found support for that proposition in decisions holding that state political subdivisions do not have constitutional rights that may be enforced against the State, Pet. App. 22a (citing *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907)). The court therefore held that "the *Ex parte Young* exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court." *Id.* at 17a. A state P&A system, the court suggested, could still seek to enforce the DD and PAIMI Acts against state officials in state court, to the extent permitted by state law. *Id.* at 25a.

4. Petitioner filed a petition for rehearing and rehearing en banc. The United States filed a brief as *amicus curiae* in support of petitioner. Pet. App. 82a-97a. The court of appeals denied rehearing. *Id.* at 47a-48a.

SUMMARY OF ARGUMENT

Petitioner may invoke *Ex parte Young*, 209 U.S. 123 (1908), to enforce the federal-law obligations of state officials who operate facilities for developmentally disabled and mentally ill individuals under the DD and PAIMI Acts. This Court has held that in determining whether a plaintiff's suit against state officials is per-

missible under *Ex parte Young*, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (brackets in original). Petitioner's suit indisputably satisfies these requirements. Petitioner alleges that the defendant officials are violating federal law by refusing to provide petitioner access to certain patient records, and seeks declaratory and injunctive relief to remedy that violation. No more is required to allow a suit to proceed under *Ex parte Young*. Indeed, respondents and the court of appeals agreed that this suit would be permissible under *Ex parte Young* if it were brought by a private P&A system.

Nonetheless, the court of appeals held that petitioner could not invoke *Ex parte Young* and therefore barred this suit from proceeding. In the court of appeals' view, the ability of a plaintiff to invoke *Ex parte Young* depends on a case-by-case examination of possible "special sovereignty interests." The court found that petitioner's status as a state agency gave rise to such an interest. Pet. App. 16a (citing *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997)). Both propositions are mistaken. This Court reaffirmed in *Verizon* that a case-by-case balancing of state and federal interests has no place in the *Ex parte Young* analysis. And even if "special sovereignty interests" might in some circumstances justify disallowing a suit under *Ex parte Young*, petitioner's state-agency status does not engender any such interest.

Petitioner's suit is not, as the court of appeals suggested, an "intramural" dispute between two arms of the Commonwealth that threatens the Commonwealth's "sovereign dignity," Pet. App. 18a. Under the DD and

PAIMI Acts, a P&A system has the authority to "pursue legal, administrative, and other appropriate remedies" to ensure protection of persons with developmental disabilities or mental illness. 42 U.S.C. 15043(a)(2)(A)(i); see 42 U.S.C. 10805(a)(1)(B). The Acts expressly provide, moreover, that the P&A system must be independent of other arms of state government. 42 U.S.C. 10805(a)(2), 15043(a)(2)(G). Here, the Commonwealth established petitioner specifically to enforce the federal requirements of the DD and PAIMI Acts against both state and private facilities, and made petitioner independent of state control, as is required by the Acts to ensure P&A systems' ability to take adversarial positions against state entities. When petitioner sues a state official, then, it is implementing the federal policy to which the Commonwealth voluntarily assented by participating in the federal programs—not engaging in an intrastate political dispute. And, in any event, respondents cannot contend that petitioner's status as a state agency transforms an otherwise permissible *Ex parte Young* suit into an affront to its sovereignty when that status is the result of the Commonwealth's own decision, in opting to accept federal funds, to create a public P&A rather than a private one.

The court of appeals' decision threatens to unravel the calibrated enforcement scheme that Congress contemplated in the DD and PAIMI Acts. The result will inevitably be to compromise the ability of public P&A systems to protect vulnerable individuals from abusive and neglectful practices that can result in injury and death. To facilitate the P&A systems' protective functions, Congress gave them the authority to investigate individual suspected instances of abuse and neglect, and to obtain expeditious access to records, facilities

and patients. Without the ability to invoke *Ex parte Young* to enforce those rights in federal court, petitioner would effectively be left without an adequate remedy in any forum: the only potential state-court remedy, mandamus relief from the Virginia Supreme Court, is available only in extraordinary circumstances and does not permit interim relief. Public P&A systems would thus not be able to enforce their rights against state facilities, whereas private P&A systems would be, resulting in a two-tiered and unequal enforcement system. Congress did not intend such an odd result, and nothing in this Court's Eleventh Amendment jurisprudence requires it.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER MAY NOT BRING AN *EX PARTE YOUNG* SUIT AGAINST STATE OFFICIALS

A. Petitioner's Suit Satisfies The Requirements Of *Ex Parte Young*

1. In *Ex parte Young*, this Court held that a federal court may adjudicate a suit against a state officer to enjoin official actions that violate federal law, even if the State would be immune under the Eleventh Amendment if the same suit were brought against the State itself. 209 U.S. at 159-160; see, *e.g.*, *Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring in part and concurring in the judgment). This longstanding rule is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (*Pennhurst*) (internal quotation marks and citation omitted). By ensuring the

availability of "[r]emedies designed to end a continuing violation of federal law," *Ex parte Young* "gives life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

At the same time, the need to vindicate the supremacy of federal law "must be accommodated to the constitutional immunity of the States" under the Eleventh Amendment. *Pennhurst*, 465 U.S. at 105. The Court has therefore identified three characteristics that, in order to address Eleventh Amendment concerns, must be present before a plaintiff may invoke the rule of *Ex parte Young*.

First, the suit must be brought against a state official, rather than the State itself. The Eleventh Amendment does not permit the State to be sued without its consent. See *Pennhurst*, 465 U.S. at 98. *Ex parte Young* is grounded in the premise that a state officer who violates federal law is "stripped of his official or representative character and * * * subjected in his person to the consequences of his individual conduct." 209 U.S. at 160; *Pennhurst*, 465 U.S. at 104-105.

Second, the suit must allege a violation of federal law. *Pennhurst*, 465 U.S. at 105-106. A plaintiff may not invoke *Ex parte Young* to enforce state law against state officials, because such a suit would intrude on state sovereignty without furthering any "federal interest in assuring the supremacy of [federal] law." *Green*, 474 U.S. at 68. When a suit does not seek to vindicate the authority of federal law, the "entire basis for the doctrine of *Young* * * * disappears." *Pennhurst*, 465 U.S. at 106.

Third, the suit must seek only prospective relief for an ongoing violation. While prospective remedies to end continuing violations of federal law are "necessary" to

protect federal rights, "compensatory or deterrence interests" are insufficient to overcome the force of the Eleventh Amendment. *Green*, 474 U.S. at 68-69. Permitting retroactive relief, moreover, "would effectively eliminate the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105. Therefore, a plaintiff may not invoke *Ex parte Young* to sue state officials for money damages to be paid out of the state treasury, see *Edelman* v. *Jordan*, 415 U.S. 651, 665 (1974), for divestiture of state property interests, see *Coeur d'Alene Tribe*, 521 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment), or for any relief that, though facially characterized as prospective, would in substance "impose upon the State a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," *Verizon*, 535 U.S. at 646 (internal quotation marks, citation and emphasis omitted); see *Edelman*, 415 U.S. at 666-667 (equitable restitution "in practice resemble[d] a money judgment payable out of the state treasury").

Applying these principles, this Court reaffirmed in *Verizon* that a suit that complies with these three limitations may "avoid[] an Eleventh Amendment bar to suit" under *Ex parte Young*. 535 U.S. at 645. In determining whether a plaintiff may invoke *Ex parte Young*, then, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Ibid.* (brackets in original) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)).

2. Petitioner's complaint satisfies the "straightforward inquiry" set out in *Verizon*. Petitioner names as defendants three state officials in their official capaci-

ties. J.A. 12-13; see *Verizon*, 535 U.S. at 645. Petitioner alleges that respondents are committing an ongoing violation of federal law by refusing to provide petitioner with access to patient records to which petitioner maintains it is entitled under the DD and PAIMI Acts. J.A. 18-21. And petitioner seeks purely prospective relief: a declaration that respondents' refusal to provide the requested records violates federal law, and an injunction directing respondents to allow access to the records. J.A. 21; Pet. 11. *Ex parte Young* requires no more. See *Verizon*, 535 U.S. at 646.

Indeed, respondents and the court of appeals acknowledged that examining the four corners of the complaint for the determinative characteristics identified in *Verizon* would lead to the conclusion that petitioner may avail itself of *Ex parte Young*. Thus, respondents "concede that *Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." Pet. App. 16a-17a.

B. Petitioner's Status As A State Agency Does Not Alter Its Ability To Invoke *Ex Parte Young*

Even though petitioner's suit satisfies the three conditions set forth in *Verizon*, the court of appeals nonetheless held that petitioner could not avail itself of *Ex parte Young*. The court reasoned that because petitioner is a state agency, "this case differs from *Ex parte Young* in a critical respect," Pet. App. 14a, rendering *Verizon*'s "straightforward inquiry" inapplicable. That conclusion was erroneous.

1. The court of appeals relied primarily on *Coeur d'Alene Tribe*, which it read as requiring a case-by-case analysis of whether a suit that "otherwise satisfie[s] the requirements of *Ex parte Young*" implicates "special

sovereignty interests" that outweigh the importance of ensuring prospective compliance with federal law. Pet. App. 16a (quoting *Coeur d'Alene Tribe*, 521 U.S. at 281). But this Court has not, in the century since the doctrine was first announced, engrafted a "special sovereignty interests" inquiry onto the traditional *Ex parte Young* analysis.

In *Coeur d'Alene Tribe*, the Tribe and some of its members brought suit against Idaho state officials, claiming a beneficial interest in certain submerged lands within the State. 521 U.S. at 265. The plaintiffs sought declaratory and injunctive relief establishing the Tribe's exclusive right to use and enjoyment of the lands and the invalidity of all state statutes and regulations as applied to the lands. *Ibid.* This Court acknowledged that the plaintiff sought prospective relief for an alleged ongoing violation of federal law. *Id.* at 281. Nonetheless, it held that *Ex parte Young* did not permit the suit because the relief sought by the Tribe was unusually "far-reaching and invasive." *Id.* at 282, 287 (requested relief was "fully as intrusive as almost any conceivable retroactive levy upon" state funds). The Court concluded that not only did the suit seek "the functional equivalent of quiet title," but also it sought a determination that "a vast reach of lands and waters long deemed by the States to be an integral part of its territory" were "not even within the regulatory jurisdiction of the State." *Id.* at 282. The suit thus differed from the "typical *Young* action" in aiming to "eliminate altogether the State's regulatory power" over sovereign lands rather than "bring[ing] the State's regulatory scheme into compliance with federal law." *Id.* at 289, 291 (O'Connor, J., concurring in part and concurring in the judgment).

In this case, as the court of appeals acknowledged, the relief petitioner seeks does not implicate *Coeur d'Alene Tribe*'s holding: the requested injunction requiring state officials to provide access to records does not seek divestiture of state lands or property interests, or the elimination of regulatory authority. See Pet. App. 16a-17a; see also *Verizon*, 535 U.S. at 648 (Kennedy, J., concurring) (distinguishing Verizon's suit for injunctive relief from *Coeur d'Alene Tribe* on the ground that *Coeur d'Alene Tribe* involved a situation in which the plaintiffs sought "to divest a State of sovereignty over territory within its boundaries"). The court of appeals instead relied on the analysis undertaken in another portion of the *Coeur d'Alene Tribe* opinion, authored by Justice Kennedy and joined only by Chief Justice Rehnquist. Those Justices would have adopted a case-by-case approach to the application of *Ex parte Young*, guided by the presence or absence of "special sovereignty interests." See *Coeur d'Alene Tribe*, 521 U.S. at 270-280. In relying on that portion of the opinion, the court of appeals overlooked the fact that seven other Justices reaffirmed that the inquiry governing whether an *Ex parte Young* suit may proceed against state officials is "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 298-299 (Souter, J., dissenting); see also *Verizon*, 535 U.S. at 648-649 (Kennedy, J., concurring).

In *Verizon*, moreover, the Court confirmed that *Ex parte Young* does not call for a case-by-case approach based on "special sovereignty interests." There, the Fourth Circuit had adopted the case-by-case balancing test proposed by Justice Kennedy in *Coeur d'Alene*

Tribe, 521 U.S. at 270-280. Weighing the "federal interests" in the plaintiffs' claims against the "affront" to state sovereignty it believed to be threatened by the suit, the Fourth Circuit held that the plaintiffs could not bring an *Ex parte Young* suit against members of the Maryland Public Service Commission, challenging a ruling of the Commission. See *Bell Atl. Maryland Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 294-298 (4th Cir. 2001), vacated *sub nom. Verizon Maryland Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002). This Court rejected that analysis and adopted the "straightforward inquiry" set out in Justice O'Connor's *Coeur d'Alene Tribe* concurrence. See *Verizon*, 535 U.S. at 645. The Fourth Circuit therefore erred in this case in departing from the *Verizon* framework and holding that "special sovereignty interests" could justify barring petitioner's suit even though it otherwise satisfies the requirements of *Ex parte Young*.

2. Even if the court of appeals were correct that a case-specific consideration of "special sovereignty interests" has a place in the *Ex parte Young* analysis after *Verizon*, the court was wrong to conclude that such interests justified barring petitioner's suit here. Respondents and the court of appeals acknowledged that the relief that petitioner seeks and the nature of its claims do not themselves infringe any special sovereignty interest; an *Ex parte Young* suit would lie, respondents agree, if brought by a non-profit P&A system or an individual. The sovereignty interest on which respondents rely, therefore, pertains narrowly to the Commonwealth's asserted interest in not having its officials sued in federal court by another, independent component of the Commonwealth, regardless of the relief sought or the federal-law nature of the suit. Such a suit is no more

than an "intramural" dispute, the court of appeals asserted, and adjudication would result in a "substantial" "infringement on a state's sovereign dignity." *Id.* at 17a-18a (quoting *Virginia Office for Prot. & Advocacy* v. *Reinhard*, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring)). The court of appeals was mistaken.

a. Even if federal courts might in some circumstances appropriately refrain on sovereign immunity grounds from adjudicating a state-agency suit that otherwise satisfies *Ex parte Young*, no such circumstances are presented here. Far from being an "intramural contest," Pet. App. 17a (citation omitted), the suit here involves an independent entity that the Commonwealth voluntarily established to participate in federal programs that protect vulnerable individuals. The Commonwealth established petitioner specifically to enforce the *federal* duties that the Commonwealth agreed to assume under the DD and PAIMI Acts, see Pet. 6-7 & n.2, and petitioner receives funds to do so directly from the federal government, 42 U.S.C. 10823, 15042(b). When petitioner sues state officials to enforce its rights under the DD and PAIMI Acts, then, petitioner is implementing federal law and policy, not seeking relief that might be characterized as intramural in nature. In accepting federal funds, the Commonwealth agreed as a substantive matter that its facilities that provide services to the developmentally disabled and mentally ill would be subject to federal access rights conferred on the P&A system. A suit such as this one simply enforces those rights.

Nor can respondents contend that this suit is intramural on the notion that the parties lack adversity. A key feature of the DD and PAIMI Acts is their requirement that state-agency P&A systems, like non-profit

P&A systems, be independent of state governmental control. Congress so provided precisely because it recognized that in protecting the rights of the disabled, P&A systems must sometimes take an adversarial position vis-a-vis other state entities. See 42 U.S.C. 10805(a)(2), 15043(a)(2)(G), 15044(a); S. Rep. No. 376, 101st Cong., 2d Sess. 12, 24 (1990) (*1990 Senate Report*). In accordance with federal law, the Commonwealth established petitioner as an independent agency that operates outside the Commonwealth's three branches of government. Pet. Br. 17-18; see Va. Code Ann. § 51.5-39.2(A) (2009). Only three of petitioner's eleven board members are appointed by the Governor, and petitioner has statutory authority to retain outside counsel in any matter. Va. Code Ann. § 2.2-510 (2008); Va. Code Ann. §§ 51-539.2(B) and .5(B) (2009). Petitioner is thus "insulated from the type of state control over policy * * * and governance that could justify treating this as an 'intramural' dispute." *Indiana Prot. & Advocacy Servs.* v. *Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 373 (7th Cir. 2010) (en banc), petition for cert. pending, No. 10-131 (filed July 21, 2010) (*IPAS*); *id.* at 387 (Posner, J., concurring).

In any event, even if petitioner's suit might fairly be termed "intramural" in some sense, that is solely the result of the Commonwealth's own choices regarding the assignment of P&A functions. It is difficult to see how the Commonwealth's sovereignty or dignity is infringed as a result of its own choices. In voluntarily accepting federal funds under the DD and PAIMI Acts, the Commonwealth agreed that it would create a P&A system that would be empowered to enforce federal requirements, including access to records, against state-run facilities. In implementing that undertaking, the Com-

monwealth chose to create a state entity rather than assigning those functions to a private non-profit organization. Having made those choices, the Commonwealth cannot now argue that petitioner's efforts to enforce the requirements of the DD and PAIMI Acts are an "affront," Pet. App. 18a, while the same suit would be permissible if brought by a non-profit P&A. See *IPAS*, 603 F.3d at 373[4]; accord *id.* at 387 (Posner, J., concurring); cf. *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 438-439 (2004) (rejecting the argument that the Eleventh Amendment barred enforcement of a consent decree entered in an *Ex parte Young* suit, because the consent decree reflected the State's choice as to how to implement federal law, and "enforcing the decree vindicates an agreement that the state officials reached to comply with federal law").

b. In concluding that petitioner's state-agency status, without more, gave rise to "special sovereignty interests" that barred this suit, the court of appeals also relied on *Pennhurst*, *supra*; *Alden* v. *Maine*, 527 U.S. 706 (1999); and *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), all of which the court viewed as establishing a general principle that federal courts should not adjudicate disputes between a state agency and state officials.

---

[4] The en banc Seventh Circuit explained, in unanimously holding that Indiana's state P&A system could invoke *Ex parte Young*:

> Indiana made the choice to set up IPAS as an independent state agency. If we gave that choice any weight in the Eleventh Amendment inquiry, we would be permitting Indiana to use its own choice to set up an independent state agency as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens. That result would be strange indeed.

603 F.3d at 373.

Pet. App. 18a-19a. None of these decisions lays down such a sweeping rule.

In *Pennhurst*, the Court held that *Ex parte Young* does not apply in suits alleging violations of state law, because the relief sought in such a suit would require a federal court to "instruct[] state officials on how to conform their conduct to state law," thereby "intru[ding] on state sovereignty" without vindicating any federal interest. 465 U.S. at 106. That conclusion reflects the fact that *Ex parte Young*'s animating principle—the "need to reconcile [the] competing interests" of the Eleventh Amendment and the Supremacy Clause—is "wholly absent" when no federal right is at stake. *Ibid.*; see *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986) (describing *Pennhurst* as a case in which "federal supremacy [was] not implicated"). It does not follow, and the *Pennhurst* Court nowhere suggested, that an *Ex parte Young* suit by a state entity seeking to enforce federal law would similarly intrude on state sovereignty. Cf. *Frew*, 540 U.S. at 439 (rejecting argument that *Pennhurst* and state sovereignty interests barred enforcement of a consent decree where the decree's terms exceeded federal-law obligations, because the decree as a whole vindicated federal law). Because petitioner seeks only to require state officials to comply with specific federal-law duties, *Pennhurst* is irrelevant.

In *Alden*, the Court held that Congress lacked the power under the Commerce Clause to abrogate a nonconsenting State's immunity from damages actions in state court. Abrogating the State's Eleventh Amendment immunity in state court would, the Court reasoned, essentially enable Congress to assert "plenary federal control" over the States' allocation of internal political authority, thereby "commandeer[ing] the entire political

machinery of the State." 527 U.S. at 749. Congress clearly has not attempted to assert such control by giving States the opportunity to receive federal funding through the DD Act and PAIMI Act spending programs, and respondents cannot plausibly contend that the Commonwealth's voluntary participation in those programs and its agreement to the conditions of participation raise commandeering issues. Nor would permitting federal-court adjudication of this suit implicate *Alden*'s concerns about federal control over intrastate governance: granting the relief sought would not result in federal regulation of the structure of state government or purely internal political disputes. See *IPAS*, 603 F.3d at 387 (Posner, J., concurring).

In *Hunter* and its progeny, the Court held that state political subdivisions may not enforce certain constitutional provisions against their States. See 207 U.S. at 178-179; *Trenton* v. *New Jersey*, 262 U.S. 182, 188 (1923); see also *Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1101 (2009). Although the court of appeals acknowledged that "[s]overeign immunity was not at issue" in that line of cases, Pet. App. 23a, it nonetheless viewed those decisions as establishing a general rule that the Court is "unwilling[] to override the [S]tates' control of their own internal disputes." See *id.* at 22a-23a. The *Hunter* line of cases, however, merely stands for the more limited proposition that the constitutional provisions at issue in those cases did not regulate a State's relationship with its political subdivisions, see *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344 (1960), and therefore a political subdivision cannot prevail on the merits of those constitutional claims against the State. That conclusion does not create a blanket rule forbidding federal courts from adjudicating any suit between

different arms or creations of state government. Indeed, this Court has adjudicated such suits when—as here—the state entities are sufficiently independent of each other to create the requisite adversity. See, *e.g.*, *Lassen* v. *Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458, 459 n.1 (1967); *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1441-1442 (2009) (adjudicating the merits of a suit by state agency against the State).

Even if the principles stated in *Hunter* and its progeny might in some circumstances suggest that a federal court should not adjudicate a state subdivision's *Ex parte Young* suit, this would not be such a case. The premise of the *Hunter* rule is that political subdivisions are "created as a convenient agency for the exercise of such of the governmental powers of the State as may be intrusted to it," and therefore they do not have certain constitutional rights against the State that created them. *Trenton*, 262 U.S. at 186. That premise does not apply here, given that the Commonwealth created petitioner for the express purpose of advocating for the rights of disabled individuals, many of whom are treated by state facilities, pursuant to federal statutes that explicitly confer judicially enforceable rights on petitioner vis-a-vis both state and private facilities.[5]

---

[5] Before the court of appeals, respondents relied on two decisions that cited the *Hunter* line of cases in support of their holdings that the state-subdivision plaintiffs' *Ex parte Young* suits should not be adjudicated. See Resps. C.A. Br. 23-24 (citing *Kelley* v. *Metropolitan County Bd. of Educ.*, 836 F.2d 986 (6th Cir. 1987), cert. denied, 487 U.S. 1206 (1988), and *Harris* v. *Angelina County*, 31 F.3d 331 (5th Cir. 1994)). Both decisions involved attempts by state subdivisions found liable for federal-law violations to seek contribution from the State itself—relief that clearly is barred by *Edelman*, regardless of the nature of the plaintiff. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 250-252 (1985). Both *Kelley* and *Harris* cited *Trenton* by analogy, in

II. THE COURT OF APPEALS' DECISION LEAVES PETITIONER WITHOUT THE MEANS NECESSARY TO FULFILL THE CRUCIAL PROTECTIVE DUTIES THAT CONGRESS ENVISIONED

A. Petitioner's Access Rights Are Critical To Its Functions Under The DD And PAIMI Acts, But The Court Of Appeals' Decision Renders Those Rights Largely Unenforceable

1. Congress enacted the DD and PAIMI Acts in order to encourage the States to improve the treatment and care of vulnerable individuals. See, *e.g.*, *1974 Senate Report* 59. Within the statutory framework, the P&A systems are of "critical importance," because they are charged with ensuring that Congress's purpose is carried out on the ground—that disabled individuals are protected from abuse, and that they have access to legal remedies when abuse occurs. S. Rep. No. 493, 98th Cong., 2d Sess. 28 (1984) (*1984 Senate Report*) (P&A systems "assure disabled persons both protection of their rights under law and full access to federally funded programs"); see *1990 Senate Report* 12 ("It is the P&As that ensure that the rights of persons with developmental disabilities are protected and that public policy is translated into meaningful action.").

To ensure that P&A systems may fulfill their protective functions, Congress conferred on them broad au-

---

the course of observing that the state-subdivision plaintiffs sought to use the federal courts to regulate internal political relations between the arms of state government, in order to circumvent state budgetary decisions. *Harris*, 31 F.3d at 339; *Kelley*, 836 F. 2d at 998. These concerns are not implicated here, for the reasons stated in the text. And unlike the plaintiffs in *Kelley* and *Harris*, petitioner seeks relief that does not itself offend any state sovereignty interests.

thority to investigate public and private treatment and care facilities. 42 U.S.C. 15043(a)(2)(B); see 42 U.S.C. 10805(a)(1)(A). In bestowing that authority on P&A systems, Congress expressly provided the systems with rights of prompt access to records, patients, and facilities whenever a system has probable cause to believe that abuse or neglect has occurred. See 42 U.S.C. 10805(a)(3) and (4); 15043(a)(2)(H)-(J); *1984 Senate Report* 30. These rights reflect Congress's intent that P&A systems should be able to respond quickly to individual instances of suspected abuse, and its determination that this capability is the most effective way to learn of abusive and neglectful conditions before they become systemic, and to protect individuals who are currently being abused or are in imminent danger. See *PAIMI Senate Report* 2-3.

The effectiveness of these statutory access rights depends on P&A systems' ability to enforce them through litigation when necessary. Congress therefore anticipated that P&A systems would sometimes have to resort to litigation, including against state facilities. 42 U.S.C. 10805(a)(1)(B) (P&A systems "shall * * * have the authority to" "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State"), 15043(a)(2)(A)(i) (same); see *1990 Senate Report* 24 (noting that bringing suit "against a State or [its] agencies * * * has been a longstanding responsibility of P&A Systems"); *1984 Senate Report* 28 (approving infrequency with which P&A systems filed suit, but noting that "there will undoubtedly be future instances where litigation is the necessary alternative to protect disabled persons' rights"). As Congress contemplated, P&A systems have used litiga-

tion when necessary to obtain injunctive and declaratory relief enforcing their access rights in a variety of contexts involving both state and private facilities. See, *e.g.*, *Disability Law Ctr. of Alaska, Inc.* v. *Anchorage Sch. Dist.*, 581 F.3d 936, 939-940 (9th Cir. 2009) (upholding non-profit P&A system's right to obtain contact information for guardians of disabled students in a public school); *State Office of Prot. & Advocacy for Persons with Disabilities* v. *Hartford Bd. of Educ.*, 464 F.3d 229, 239-242 (2d Cir. 2006) (upholding public P&A system's access to a state-run school for disabled children, to interview the children, and to obtain personal records); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 498-499 (11th Cir. 1996) (upholding public P&A system's access to medical records of patients in a state facility).

2. Under the court of appeals' decision, however, petitioner effectively will be unable to enforce its access rights against state-run institutions in any forum. According to respondents and the court of appeals, petitioner's only potentially available avenue to obtain the records it seeks would be an action for mandamus in the Virginia Supreme Court. Pet. App. 25a-26a; Br. in Opp. 26. But under Virginia law, mandamus is an "extraordinary remedy" available only upon a showing of "clear and certain" entitlement and at the court's discretion. See *Gannon* v. *State Corp. Comm'n*, 416 S.E.2d 446, 447 (Va. 1992); see also *Umstattd* v. *Centex Homes, G.P.*, 650 S.E.2d 527, 530 (Va. 2007). The need to establish circumstances justifying the court's "extraordinary" exercise of discretion, *ibid.*, would render the possibility of mandamus relief highly contingent, and discretionary denials of relief may be insulated from this Court's re-

view. See *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U.S. 241, 243 (1978).

Moreover, the delay incumbent in a state mandamus proceeding would render it ineffective. Preliminary relief—which P&A systems often invoke in order to further their ability to respond expeditiously to ongoing and imminent abuse—is not available in a mandamus proceeding. See Pet. 27; *IPAS*, 603 F.3d at 374 n.7 (state-court mandamus remedy is inadequate because "Congress clearly intended [P&A systems] * * * to be able to respond quickly to threats of imminent harm"). In short, a mandamus proceeding brought under the original jurisdiction of the Virginia Supreme Court would not provide an adequate means of judicially enforcing petitioner's access rights under the DD and PAIMI Acts.

Respondents also suggest that petitioner could invoke *Ex parte Young* to obtain remedies in federal court by bringing suit in the name of a "private litigant." Resps. Supp. Br. 2 n.1. Although the DD and PAIMI Acts vest P&A systems with the authority to pursue legal remedies on behalf of individual plaintiffs, 42 U.S.C. 10805(a)(1)(C), 15044(b), such a suit would not provide an adequate means of enforcing petitioner's statutory access rights.[6] The Acts grant access rights to P&A systems, not to individuals, whose rights to obtain their treatment records are governed by other state and federal laws. Indeed, many of the access rights conferred

---

[6] Suits in which a P&A system acts as counsel to an individual plaintiff include those in which the individual seeks to enforce rights conferred by other federal statutes, such as the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* See, *e.g.*, *Feldman* v. *Oakland Univ. Bd. of Trs.*, No. 08-14922, 2010 WL 2572768, at *1-*2 (E.D. Mich. June 23, 2010).

by the DD and PAIMI Acts are clearly not intended to be—and could not be—enforced by individual patients named as plaintiffs. These include the rights to obtain access to facilities and patients; and the right to obtain access to the records of individuals who do not have the capacity to authorize access, 42 U.S.C. 15043(a)(2)(I)(ii), individuals who have not had an opportunity to consent in emergency situations, 42 U.S.C. 15043(a)(2)(J)(ii), and individuals whose guardians have failed or refused to take action on their own, 42 U.S.C. 15043(a)(2)(I)(iii).

Under respondents' view, then, public P&A systems would be unable effectively to enforce their access rights in any forum. It is no answer to suggest that the federal government could fill the resulting enforcement gap. Even if the government might bring enforcement actions on its own, see *IPAS*, 603 F.3d at 384 (Posner, J., concurring), it cannot duplicate in every jurisdiction the P&A systems' ability to conduct individual, quick-response investigations, and thus it cannot perform the P&A systems' function as Congress contemplated. See, *e.g.*, *1984 Senate Report* 28 (P&As are a "local and thus available resource"). And although HHS may suspend or terminate funding to non-compliant States, 42 C.F.R. 51.10, 45 C.F.R. 1386.111, that drastic remedy is too blunt an instrument to be used to respond to or remedy individual instances of abuse and neglect. Terminating funding would simply penalize the P&A system and the disabled individuals who are "the intended beneficiaries of the federal program." *IPAS*, 603 F.3d at 383 (Posner, J., concurring). Protecting disabled individuals in the manner contemplated by Congress therefore depends on the investigatory powers vested in the local P&A systems, which in turn are founded on access to records, facilities and individuals. See *ibid.*

B. The Court Of Appeals' Decision Creates Inequalities Between Public And Private P&A Systems That Congress Did Not Intend

By leaving petitioner and other public P&A systems without a remedy, respondents' position would create a two-tiered enforcement system that undermines the congressional purpose of ensuring that protection and advocacy services are as broadly available as possible. See *1984 Senate Report* 28. Respondents acknowledge that private P&A systems may invoke *Ex parte Young* in federal-court suits against officials of state institutions, because the "special sovereignty interest" purportedly created by petitioner's state-agency status is not present in such suits. In respondents' view, then, non-profit P&A systems may enforce their access rights against both state and public institutions, but public P&A systems are limited to enforcing remedies against private facilities. If that were the case, patients or clients of public facilities in States with public P&A systems would not receive the full extent of the protections provided in the DD and PAIMI Acts.

Nothing in the DD and PAIMI Acts differentiates between the capabilities of private and public P&A systems; the Acts assume that both will be equally able to fulfill their investigative and protective functions with respect to disabled and mentally ill individuals. See 42 U.S.C. 10802(2), 10805, 15043(a). Moreover, the Acts contain several provisions designed to take into account the different ways in which States may organize their P&A systems, and to ensure that all systems, however organized, will be independent and able to effectively advocate their clients' rights. See, *e.g.*, 42 U.S.C. 15043(a)(2)(G) (requiring independence), 15044(a)(1) (multi-member governing boards of both public and non-

profit P&As must include disabled individuals), (a)(2) (where state executive has appointment authority, he may appoint no more than one-third of board members), (a)(5) (public system without a board must have an advisory council that includes disabled individuals). These provisions reflect Congress's intent that States' internal governance choices with respect to P&A systems should not affect the systems' ability to perform their functions or disabled individuals' ability to receive the benefits for which Congress created the DD and PAIMI programs. Respondents' position would create disparities that Congress did not intend.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
ANN RAVEL
Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
Attorneys

AUGUST 2010