No. 09-529

IN THE

Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,

Petitioner,

—v.—

JAMES S. REINHARD, Commissioner, Department of Behavioral Health and Developmental Services, *et al.*,

Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of federal jurisdiction and experts in the law governing the federal courts. Although *amici* share differing views on the appropriate scope of the Eleventh Amendment, *amici* agree that the rule affording jurisdiction to federal courts to grant prospective injunctive relief against state officers compelling obedience to federal law regardless of the plaintiff's identity, as established by *Ex parte Young*, 209 U.S. 123 (1908), plays a vital role in our federal system, and is "indispensable to the establishment of constitutional government and the rule of law." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 14 (6th ed. 2002). *Amici* support certiorari in this case because the decision of the Court of Appeals is deeply inconsistent with both the principles animating the doctrine of *Ex parte Young* and this Court's subsequent applications thereof, and risks undermining the supremacy of federal law if allowed to stand.

SUMMARY OF ARGUMENT

The doctrine of *Ex parte Young* is based on the well-accepted proposition that the Constitution's Supremacy Clause deprives state officers of any law-

[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

ful authority to violate federal law. A state officer who so acts is no longer an "alter ego" of the state, and is thereby not entitled to invoke the Eleventh Amendment as a defense in federal court to any suit for prospective relief. As this Court has explained, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

This Court has never suggested that the applicability of *Ex parte Young* turns in any way on the identity of the plaintiff. Rather, in instances where this Court has identified constraints on the scope of *Ex parte Young* actions, those limits have invariably sounded in the nature of the relief sought—requiring that a suit be for prospective, rather than retrospective, relief; requiring that the claim arise under federal, rather than state, law; requiring that Congress not have displaced *Ex parte Young* through an alternative remedial scheme; and disallowing *Ex parte Young* actions that are functionally equivalent to actions to quiet title.

These strands of doctrine reinforce rather than undermine *Ex parte Young*'s core, which demands only a " 'straightforward' inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in

the judgment) (alteration in original)). Clearly, those criteria are satisfied here.

Notwithstanding the clear, well-established, and time-tested principles at the heart of the *Ex parte Young* doctrine, the Court of Appeals in this case announced a heretofore undiscovered destabilizing exception that threatens substantial harm to settled jurisprudence, holding that *Ex parte Young* depends on the identity of the *plaintiff*, and does not afford any remedies for ongoing violations of federal law in suits by state-created agencies specifically authorized by Congress to enforce federal law. *See Va. Office for Prot. & Advocacy v. Reinhard*, 568 F.3d 110 (4th Cir. 2009). While it may be true as a descriptive matter that few cases invoking *Ex parte Young* have been brought by agencies such as the Virginia Office for Protection and Advocacy, it is certain that *no* decision, prior to the lower court decision here, has ever suggested that *Ex parte Young*'s applicability depends on the identity of the plaintiff, whether the plaintiff be a citizen, an alien, a legal entity, or a state agency created in response to an exercise of congressional power under the Spending Clause. Allowing the availability of *Ex parte Young* relief to turn on factors other than those previously recognized by this Court—including the identity of parties that have been empowered by states to enforce federal mandates—risks undermining the doctrine's vital role in our constitutional system.

Especially in the context of Spending Clause legislation such as the federal statute here at issue, to give states that have been granted substantial federal funds in exchange for certain promises that kind of indirect but unavoidable control over their amenability to prospective relief turns the Eleventh

Amendment into a means of avoiding compliance with federal law—the very evil that the *Ex parte Young* doctrine exists to prevent.

Argument

I. The Central Premise of *Ex parte Young* is That the Constitution's Supremacy Clause Deprives State Officers of Any Lawful Authority To Violate Federal Law and Requires Prospective Coercive Relief

a. *Ex parte Young* Held That the Eleventh Amendment Does Not Bar a Suit for Federal Injunctive Relief Against a State Officer

As then-Justice Rehnquist wrote for this Court 35 years ago,

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect.

Edelman v. Jordan, 415 U.S. 651, 664 (1974). At the heart of *Ex parte Young* and its companion case, *General Oil Co. v. Crain*, 209 U.S. 211 (1908), is the premise that "certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme

law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999). As Justice McKenna explained in *Crain*, "Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers." 209 U.S. at 226; *see also Ex parte Young*, 209 U.S. at 159 ("The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.").

Ex parte Young and *Crain* thereby solidified as constitutional law a principle that had been repeatedly suggested in prior cases, i.e., "that a suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of [the Eleventh A]mendment." *Smyth v. Ames*, 169 U.S. 466, 518–19 (1898); *see also Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 389–90 (1894); *Pennoyer v. McConnaughy*, 140 U.S. 1, 9 (1891); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 868 (1824) (Marshall, C.J.) (rejecting the argument that "a void act can afford any protection to the officers who execute it"); *cf. United States v. Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the

exercise of the authority which it gives."). In that regard, *Ex parte Young* was nothing more than an application of the conclusion the Court had already reached in *McConnaughy*, *Reagan*, and *Smyth*, albeit one that was only the more significant in light of the Court's broad construction of the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890). *See generally* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000) (highlighting the relationship between *Hans* and *Young*).

The animating idea behind *Ex parte Young* is a "basic principle of federal law," *Coeur d'Alene*, 521 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment), that "has become bedrock," Barry Friedman, *The Story of Ex parte* Young*: Once Controversial, Now Canon, in* FEDERAL COURTS STORIES 247, 247 (Judith Resnik & Vicki C. Jackson eds., 2009); *see also* Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 908–12 (2000) (describing the significance of *Ex parte Young* in the context of modern doctrine). More than that, it has proved "indispensable to the establishment of constitutional government and the rule of law." WRIGHT & KANE, *supra*, at 14. Simply put, "The doctrine of *Ex parte Young* . . . ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

b. *Ex parte Young* Established That the Supremacy Clause Divests State Officers of Any Authority To Violate Federal Law and Must Be Prospectively Enforceable

In recognizing such a "necessary exception to Eleventh Amendment immunity," *id.*, the *Ex parte Young* Court relied, as *Smyth v. Ames* had before it, on the Supremacy Clause of Article VI. *See*, *e.g.*, *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."); *Smyth*, 169 U.S. at 527 ("No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case, for that would make the state legislature the final judge of the validity of its enactment . . . ."). As Justice Peckham explained in *Ex parte Young*,

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159–60 (citing *In re Ayers*, 123 U.S. 443, 507 (1887)). Thus, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives

life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985); *see also* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1154–55 (1989) (explaining the constitutional significance of the *Young* rationale).

That the availability of relief under *Ex parte Young* is required to vindicate the Supremacy Clause is perhaps nowhere better reflected than in those cases in which this Court has *declined* to apply the 1908 decision. In *Pennhurst*, for example, the question was whether *Ex parte Young* could be invoked to pursue injunctive relief against state officers for violations of *state* law. Writing for the Court, Justice Powell answered that question in the negative. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103–06 (1984). In his words, "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* at 106; *see also* Jackson, *supra*, at 990 ("[In *Pennhurst*], it was not history and remedial traditions, but rather the supremacy of federal law, that justified *Ex parte Young* actions for injunctive relief under federal law but not for injunctive relief under state law.").

To similar effect, *Edelman v. Jordan*, which reaffirmed *Ex parte Young* within its longstanding, necessary bounds but declined to extend it to claims seeking retrospective relief, was expressly grounded in the Supremacy Clause. *See*, *e.g.*, *Green*, 474 U.S. at 68; *Edelman*, 415 U.S. at 664–68. As *Ex parte*

Young itself suggested, the supremacy of federal law might not be as squarely threatened in cases where an ongoing violation of federal law was not at issue. *See*, *e.g.*, *Ex parte Young*, 209 U.S. at 192 ("There is a wide difference between a suit against individuals, holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state.").

Finally, this Court's more recent holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress can displace *Ex parte Young* by enacting a "carefully crafted and intricate remedial scheme," *see id.* at 73–74, is also consistent with the Supremacy Clause principles at the heart of *Ex parte Young* and its progeny. Whatever may be said about the adequacy of such alternative remedies, the very *creation* by Congress of a federal remedial scheme alleviates the central concern behind *Ex parte Young*—i.e., that the Eleventh Amendment would otherwise insulate states from being compelled by effective federal judicial relief to abandon ongoing violations of federal law and prospectively comply with that supreme law.

c. This Court Has Consistently and Repeatedly Reiterated Both the Scope and the Significance of This Rule

Time and time again, this Court has repeatedly defended both the substance and the significance of the *Ex parte Young* doctrine's core holding: that

suits for *prospective* relief against state officers for violations of *federal* law do not run afoul of the Eleventh Amendment. *See*, *e.g.*, *Verizon*, 535 U.S. at 645. *See generally* Friedman, *supra*, at 273 ("[T]he core of *Ex parte Young* remains and even has been expanded."). Few doctrines of constitutional law have remained as stable, settled, and unquestioned for over 100 years as has *Ex Parte Young*'s rule that state officers must be subject to suits for prospective relief to eliminate ongoing violations of supreme federal law, unless Congress has afforded some alternative remedy to secure ongoing compliance with the demands of the Supremacy Clause. *Edelman* itself is instructive, for even while acknowledging that the difference between retroactive and prospective relief that it articulated "will not in many instances be that between day and night," 415 U.S. at 667, the Court nevertheless stressed that such a distinction would not immunize the states from their obligation to comply with *any* federal court orders with pecuniary consequences (e.g., those awarding attorney's fees, *see Hutto v. Finney*, 437 U.S. 678, 690 (1978)).

Indeed, so long as the lawsuit seeks prospective relief against a state officer for a violation of federal law, this Court's jurisprudence is unequivocal: the Supremacy Clause compels the availability of a federal court remedy, and federal judges are authorized, notwithstanding anything in the Eleventh Amendment, to secure prospective compliance with federal law. *See*, *e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 289–90 (1977). That is what *Ex parte Young* has required—and provided—for more than a century.

II. Relief Under *Ex parte Young* Cannot Turn—and Has Never Turned—on the Identity of the Plaintiff

a. This Court Has Never Suggested that the Identity of the Plaintiff Has Any Bearing on the Availability of Relief Under *Ex parte Young*

Because *Ex parte Young* stands for the Supremacy Clause-based principle that states have no authority to empower their officers to continue to act in violation of federal law, this Court has never suggested that its applicability turns on the identity of the plaintiff. Rather, as Justice Scalia has explained, "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " *Verizon*, 535 U.S. at 645 (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment) (alteration in original)).

To that end, this Court has routinely applied the rule of *Ex parte Young* without any special comment where the plaintiff is a private corporation. *See*, *e.g.*, *Verizon*, 535 U.S. 635; *S. Covington & Cincinnati St. Ry. Co. v. City of Covington*, 235 U.S. 537 (1915). Such decisions reflect and enforce the principle underlying the *Ex parte Young* doctrine, i.e., that it is the need to enjoin ongoing violations of federal law—and not any concern with whom the plaintiff might be—that warrants treating persons responsible for such ongoing violations as private individuals, not alter egos of the state.

"Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." *Coeur d'Alene*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 293 ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar.").

This Court's rejection of any notion that only natural-born persons may invoke *Ex parte Young* makes eminent good sense, because the threat to federal supremacy has nothing to do whatsoever with the identity of the plaintiff. *Any* ongoing violation of federal law by a state officer threatens the supremacy of that law—and of federal authority writ large. *See, e.g.*, Henry Paul Monaghan, *The Supreme Court, 1995 Term—Comment: The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 126–32 (1996) (noting the continuing significance—and vitality—of *Ex parte Young* after *Seminole Tribe*).

b. *Coeur d'Alene* Did Not Erode *Ex Parte Young*

The conclusion that it is these fundamental principles—and only these—that govern the scope of *Ex parte Young* is not called into question by this Court's decision in *Coeur d'Alene*. Although Justice Kennedy's opinion in that case suggested that "[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," 521 U.S. at 270 (opinion of Kennedy, J.),[2] the three other Justices

[2] Justice Kennedy returned to this theme in *Verizon*. *See* 535 U.S. at 649 (Kennedy, J., concurring) ("In my view, our *Ex*

whose votes formed the majority declined to endorse such an approach.

Instead, the concurring Justices suggested that "the principal opinion is flawed in several respects," *id*. at 291 (O'Connor, J., concurring in part and concurring in the judgment), not the least of which was its proposal "that a case-by-case balancing approach is appropriate where a plaintiff invokes the *Young* exception to the Eleventh Amendment's jurisdictional bar, even when a complaint clearly alleges a violation of federal law and clearly seeks prospective relief." *Id*. at 293–94; *see also id*. at 295 ("Our case law simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed."). Thus, seven members of this Court in *Coeur d'Alene* agreed that *Ex parte Young* was left fully intact and unaffected by the decision there, while a different majority (of five Justices) held simply that actions in the nature of quiet title to submerged lands owned by the state involved effectively more than just prospective coercive relief, and were therefore beyond the boundary marked out by *Ex parte Young* and its progeny.

Any doubt that *Young*'s central principles survived *Coeur d'Alene* intact has been eliminated by subsequent case law in this Court, as further reflected in the uniform decisions of the Courts of Appeals. In *Verizon*, for example, Justice Scalia specifically rejected Maryland's suggestion that *Coeur d'Alene* had fundamentally altered the nature of *Ex parte Young* actions, reiterating that "the inquiry into

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parte Young jurisprudence 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.").

whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim," 535 U.S. at 646, and instead turns only on the traditional factors. *See also Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (holding that an action to enforce a consent decree could be brought under *Ex parte Young*, and not even citing *Coeur d'Alene*). *See generally* Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 42–51 (1998) (arguing for, and justifying, a limited reading of *Coeur d'Alene*).

In addition to this Court (and with the exception of the Fourth Circuit in this case), every Court of Appeals to reach the issue has held that (1) *Coeur d'Alene* did not upset the settled rule under *Ex parte Young* that federal courts generally have jurisdiction over all suits against state officers for prospective relief to enforce compliance with federal law; and (2) *Coeur d'Alene*'s holding narrowly applies only to claims that are (as was the plaintiffs' claim there) the functional equivalent of a quiet title action. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *In re Deposit Ins. Agency*, 482 F.3d 612 (2d Cir. 2007); *MCI Telecomms. Corp. v. Bell Atl. Pa.*, 271 F.3d 491 (3d Cir. 2001); *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407 (5th Cir. 2004); *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610 (6th Cir. 2003); *Ameritech Corp. v. McCann*, 297 F.3d 582 (7th Cir. 2002); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512 (8th Cir. 2004); *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269 (11th Cir. 2002); *Vann v. Kempthorne*, 534

F.3d 741 (D.C. Cir. 2008); *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334 (Fed. Cir. 2006).

The upshot of these cases is simple: the fundamental Supremacy Clause principles behind the *Ex parte Young* doctrine remain intact and highly stable today, over a century after their enunciation. Any plaintiff who seeks prospective relief from a state officer based on an alleged violation of federal law will not be precluded by the Eleventh Amendment from pursuing such a claim in federal court.

III. The Decision Below Risks Fundamentally Undermining Both the Logical Premise and the Animating Purpose of *Ex parte Young*

a. The Court of Appeals Erroneously Treated This Suit as Expanding *Ex parte Young*

Notwithstanding these clear, well-established, and time-tested principles, the Court of Appeals in this case announced a heretofore undiscovered destabilizing exception that threatens substantial harm to well-settled doctrine, holding that *Ex parte Young* depends on the identity of the *plaintiff*, and does not afford any remedies for ongoing violations of federal law in suits by state-created agencies specifically authorized by Congress to enforce federal law. *See Reinhard*, 568 F.3d 110.

Treating *Ex parte Young* as a grave departure from the constitutional plan that needs to be narrowed and cabined, the Court of Appeals reasoned that "while no subsequent decision has expressly limited the application of *Ex parte Young* to suit by

a private plaintiff, many decisions have recognized this basic element of the doctrine," *id.* at 118, i.e., that the plaintiff must be a private (albeit not natural-born) person. It reached this result notwithstanding that not a single case it cited had ever addressed the issue of whether the doctrine was limited to suits by "a *private* plaintiff," much less so decided, and without explaining how such a limitation could be reconciled with the theory underlying the doctrine, which sounds in the need to enforce supreme federal law simpliciter. The panel simply seized on a handful of cases that had, in passing, used the word "individual" as an entirely descriptive synonym for "plaintiff." *See id.* at 118.[3]

Relying heavily on *Coeur d'Alene*, *see*, *e.g.*, *id.* at 119, the court below maintained that "the infringement on a state's sovereign dignity would be substantial if a state agency, acting unilaterally, could force other state officials to appear before a federal tribunal. . . . Splintering a state's internal authority in this manner would be antithetical to our system of dual sovereignty," *id.* at 120. The court gave no account of the central principles underlying *Ex*

[3] In addition to an earlier Fourth Circuit decision, the Court of Appeals cited this Court's decisions in *Seminole Tribe*, 517 U.S. at 71 n.14 ("[A]n individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law . . . ."), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001), which referred to *Ex parte Young* actions as suits by "private individuals." Neither of these opinions *decided* that the plaintiff must be private, any more than the same language can be read as deciding that a corporation is not an "individual." There was simply no question presented in either case as to whether *Ex parte Young* could be ignored depending on the identity of the plaintiff; in each case the word "individual" was merely used synonymously with "person" or "plaintiff."

Parte Young, or how they were even remotely consistent with the novel distinction the court was articulating.

Instead, the Court of Appeals asserted that it was simply declining to "expand" *Ex parte Young* into a "new" context. *See id.* at 125 ("[E]xpanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." (quoting *Coeur d'Alene*, 521 U.S. at 270) (alteration in original)); *id.* at 119 ("[W]e are convinced 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."); *see also id.* at 118 ("This lack of historical support . . . is important in light of the Supreme Court's presumption that the states are immune from proceedings that were 'anomalous and unheard of when the constitution was adopted.' " (quoting *Alden*, 527 U.S. at 727)).[4]

b. To the Contrary, this Lawsuit Falls Within the Heart of *Ex parte Young*

As should be clear from the above discussion, the Court of Appeals erred in its insistence that claims by state-created agencies would represent an "expansion" of *Ex parte Young*. Quite to the contrary, the petitioner's complaint clearly "alleges an ongoing violation of federal law and seeks relief

[4] In a similar case, the Seventh Circuit also suggested that a state-created agency could not bring a lawsuit under *Ex parte Young*. *See Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 573 F.3d 548 (7th Cir. 2009). There, though, the plaintiffs were not pursuing injunctive relief against any individual state officers, *see id.* at 553, and so the court's observations were necessarily dicta.

properly characterized as prospective." *Verizon*, 535 U.S. at 645. Under this Court's long-settled doctrine, that is all that *Ex parte Young* requires, because that is precisely the conduct that necessitates a coercive, prospective remedy to ensure compliance with federal law. While it may be true as a descriptive matter that there is little precedent for allowing *Ex parte Young* suits by public agencies,[5] that factual anomaly is legally beside the point.

c. The Distinction Drawn by the Court of Appeals is Unsupported by the Supremacy Clause, and Would Jeopardize the Supremacy of Federal Law

The Court of Appeals itself conceded that "*Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system." *Reinhard*, 568 F.3d at 119. If that is true—and it clearly is—then it is difficult to see how the Supremacy Clause could possibly countenance the distinction that would result from the Court of Appeals' decision in this case. Under the Court of Appeals' reasoning, the availability of relief against a state officer for violations of the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801–51, turns on whether the state has chosen to create a private protection and advocacy system rather than a public one. To give states that have accepted substantial

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[5] The Second Circuit, at least, has expressed no hesitation in allowing state-created agencies under the statute at issue here—the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801–51—to sue appropriate state officials under § 1983. *See, e.g.*, *Prot. & Advocacy for Persons With Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.).

federal funds in exchange for certain promises such indirect but unavoidable control over their amenability to prospective relief turns the Eleventh Amendment into a means of avoiding compliance with federal law—the very evil that *Ex parte Young* exists to prevent.

The only justification suggested by the Court of Appeals for such an indefensible distinction was its assertion that "federal court adjudication of an 'intramural contest' between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex parte Young* action brought by a private plaintiff." *Reinhard*, 568 F.3d at 119–20. Even if this sentiment were accurate in different circumstances (and *amici* believe that it is not), such an argument is wholly unpersuasive in the general context of Spending Clause legislation and the particular context of the PAIMI Act. In such cases, Congress has given states the choice of complying with federal policy or not, and under the PAIMI Act specifically, those states that choose to accept funding are given the further choice of creating a private or public protection and advocacy system, so long as the agency created is ready and able to enforce the federal requirements attached to the grants. In such circumstances, actions under *Ex parte Young* are perhaps the exclusive legal means by which the state can be kept to its word—and to the mandate of the federal program with which it chose to comply.

Conclusion

For the foregoing reasons, *amici* respectfully submit that the petition for a writ of certiorari to the U.S. Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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