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

[April 19, 2011]

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

Today the Court holds that a state agency may sue officials acting on behalf of the State in federal court. This has never happened before. In order to reach this unsettling result, the Court extends the fiction of *Ex parte Young*—what we have called an "empty formalism"—well beyond the circumstances of that case. Because I cannot subscribe to such a substantial and novel expansion of what we have also called "a narrow exception" to a State's sovereign immunity, I respectfully dissent.

I

A

"The federal system established by our Constitution preserves the sovereign status of the States." *Alden* v. *Maine*, 527 U. S. 706, 714 (1999). As confirmed by the Eleventh Amendment, "[a]n integral component of that residuary and inviolable sovereignty" is the States' "immunity from private suits." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751–753 (2002) (internal quotation marks omitted); *Hans* v. *Louisi-*

ana, 134 U. S. 1, 13 (1890) ("'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*'" (quoting The Federalist No. 81 (A. Hamilton))). "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n*, *supra*, at 760. Accordingly, any time a State is haled into federal court against its will, "the dignity and respect afforded [that] State, which [sovereign] immunity is designed to protect, are placed in jeopardy." *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 268 (1997). The immunity does not turn on whether relief will be awarded; "[t]he Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 147, n. 5 (1993). See *Federal Maritime Comm'n*, *supra*, at 769 ("the primary function of sovereign immunity is not to protect state treasuries, but to afford the States the dignity and respect due sovereign entities" (citation omitted)).

Because of the key role state sovereign immunity plays in our federal system, the Court has recognized only a few exceptions to that immunity. The sole one relevant here is the "narrow exception," *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 76 (1996), established by our decision in *Ex parte Young*, 209 U. S. 123 (1908). In *Ex parte Young*, the Court held that private litigants could seek an injunction in federal court against a state official, prohibiting him from enforcing a state law claimed to violate the Federal Constitution. See *id.*, at 159–168. As we have often observed, *Ex parte Young* rests on the "obvious fiction," *Couer d'Alene Tribe*, *supra*, at 270, that such a suit is not really against the State, but rather against an individual who has been "stripped of his official or representative character" because of his unlawful conduct, *Ex parte*

Young, *supra*, at 159–160.[1]

While we have consistently acknowledged the important role *Ex parte Young* plays in "promot[ing] the vindication of federal rights," we have been cautious not to give that decision "an expansive interpretation." *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 105, 102 (1984). Indeed, the history of our *Ex parte Young* jurisprudence has largely been focused on ensuring that this narrow exception is "narrowly construed," 465 U. S., at 114, n. 25. We have, for example, held that the fiction of *Ex parte Young* does not extend to suits where the plaintiff seeks retroactive relief, *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974); where the claimed violations are based on state law, *Pennhurst*, *supra*, at 106; where the federal law violation is no longer "ongoing," *Green* v. *Mansour*, 474 U. S. 64, 71 (1985); "where Congress has prescribed a detailed remedial scheme for the enforcement against a State" of the claimed federal right, *Seminole Tribe*, *supra*, at 74; and where "special sovereignty interests" are implicated, *Couer d'Alene Tribe*, *supra*, at 281.

We recently stated that when "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 Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 645 (2002) (internal quotation marks omitted). But not every plaintiff who complies with these prerequisites will be able to bring suit under *Ex parte Young*. Indeed, in *Verizon* itself the Court went beyond its so-called straightforward inquiry in con-

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[1] *Ex parte Young* also rests on the "well-recognized irony that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment." *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 105 (1984) (internal quotation marks omitted).

sidering whether *Ex parte Young* applied. After deciding the plaintiffs "clearly satisfie[d]" the "straightforward inquiry," the Court went on to examine whether Congress had created a detailed remedial scheme like the one in *Seminole Tribe*. 535 U. S., at 645, 647–648 (internal quotation marks omitted). Only after determining that Congress had not done so did the Court conclude that the suit could go forward under *Ex parte Young*.

If *Verizon*'s formulation set forth the only requirements for bringing an action under *Ex parte Young*, two of our recent precedents were wrongly decided. In *Seminole Tribe*, the Court acknowledged that it had often "found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law." 517 U. S., at 73 (internal quotation marks omitted). The Court held, however, that the "situation presented" there was "sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." *Ibid*.[2]

In *Couer d'Alene Tribe*, the Court recognized that an "allegation of an ongoing violation of federal law where the requested relief is prospective is *ordinarily* sufficient to invoke the *Young* fiction." 521 U. S., at 281 (emphasis added). The Court held, however, that the action could not proceed under *Ex parte Young* because it implicated "special sovereignty interests"—in that case, the State's

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[2] While I agree that in *Seminole Tribe* "we refused to permit suit to proceed" under *Ex parte Young* because Congress "had foreclosed recourse to the doctrine," *ante*, at 7, n. 3, that simply confirms my point that the availability of *Young* depends on more than just whether *Verizon*'s prescribed inquiry is satisfied. In short, *Seminole Tribe* makes clear that a plaintiff who files a "complaint alleg[ing] an ongoing violation of federal law and seeks relief properly characterized as prospective," *Verizon*, 535 U. S., at 645 (internal quotation marks omitted), may nonetheless be barred from pursuing an action under *Young*.

property rights in certain submerged lands. 521 U. S., at 281–283.

As we explained in *Papasan* v. *Allain*, 478 U. S. 265 (1986), there are "certain types of cases that formally meet the *Young* requirements of a state official acting inconsistently with federal law but that stretch that case too far and would upset the balance of federal and state interests that it embodies." *Id.*, at 277. This is one of those cases.

In refusing to extend *Ex parte Young* to claims that involve "special sovereignty interests," the Court in *Coeur d'Alene Tribe* warned against a rote application of the *Ex parte Young* fiction:

> "To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." 521 U. S., at 270.

B

It is undisputed that petitioner's complaint alleges an ongoing violation of federal law by a state official and seeks only prospective relief. If this were a "traditional *Ex parte Young* action," *Seminole Tribe*, *supra*, at 73, petitioner might very well be able to pursue its claims under that case. This, however, is anything but a traditional case—and petitioner is anything but a typical *Ex parte Young* plaintiff.

Unlike the plaintiffs in *Ex parte Young*—and, for that matter, unlike any other plaintiff that has ever sought to invoke *Ex parte Young* before this Court—petitioner is a state agency seeking to sue officials of the same State in federal court. The Court is troubled by this novelty, *ante* at 12–13, but not enough. See *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. ___, ___ (2010) (slip op., at 25) ("Perhaps the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" (internal quotation marks omitted)); cf. *Alden*, 527 U. S., at 743–745; *Printz* v. *United States*, 521 U. S. 898, 905–910, 918, 925 (1997). This is especially true in light of the "presumption" we articulated more than 120 years ago in *Hans* v. *Louisiana*, that States are immune from suits that would have been "anomalous and unheard of when the Constitution was adopted." *Hans*, 134 U. S., at 18; see also *Alden*, *supra*, at 727 (invoking presumption).

Accordingly, when determining whether to lift the bar of sovereign immunity, we have "attribute[d] great significance" to the absence of analogous suits "at the time of the founding or for many years thereafter." *Federal Maritime Comm'n*, 535 U. S., at 755. This sort of suit was not only anomalous and unheard of at the time of the founding; it was anomalous and unheard of yesterday. The *Hans* presumption applies here with full force.

The Court speculates that these suits have not previously arisen because the necessary conditions—state agencies pursuing a federal right free of internal state veto—are themselves novel. See *ante*, at 12; see also *ante*, at 3–4 (KENNEDY, J., concurring). Even if true, that simply highlights the fact that this case is not suitable for mere rote application of *Ex parte Young*.

In addition to its novel character, petitioner's complaint "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U. S.,

at 106. In *Alden*, we held that state sovereign immunity prohibited Congress from authorizing "private suits against nonconsenting States in their own courts." 527 U. S., at 749. We explained that such power would permit one branch of state government, the "State's own courts," "to coerce the other branches of the State" and "to turn the State against itself." *Ibid*.

Here the Court goes further: this suit features a state agency on one side, and state executive officials on the other. The objection in *Alden* was that the Federal Government could force the State to defend itself before itself. Here extending *Young* forces the State to defend itself *against* itself in federal court.

Both sides in this case exercise the sovereign power of the Commonwealth of Virginia. Petitioner claims the title of "The Commonwealth of Virginia" in its complaint, App. 10; respondents are state officials acting in an official capacity. Whatever the decision in the litigation, one thing is clear: The Commonwealth will win. And the Commonwealth will lose. Because of today's holding, a federal judge will resolve which part of the Commonwealth will prevail.

Virginia has not consented to such a suit in federal court; rather, petitioner has unilaterally determined that this intramural dispute should be resolved in that forum. This is precisely what sovereign immunity is supposed to guard against. See *ante*, at 10 ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent"). That indignity is compounded when the State is haled into federal court so that a federal judge can decide an internal state dispute.

The Court is wrong to suggest that Virginia has no sovereign interest in determining *where* such disputes will be resolved. See *ante*, at 10–11, and n. 6. It is one thing for a State to decide that its components may sue one

another in its own courts (as Virginia did here); it is quite another thing for such a dispute to be resolved in federal court against the State's wishes. For this reason, the Court's examples of other suits pitting state entities against one another are inapposite. In each of those hypotheticals, the State consented to having a particular forum resolve its internal conflict. That is not true here.[3]

In sum, the "special sovereignty interests" implicated here make this case "sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine." *Seminole Tribe*, 517 U. S., at 73. I would cling to reality and not extend the fiction of *Ex parte Young* to cover petitioner's suit.

II

The Court offers several justifications for its expansion of *Ex parte Young*. None is persuasive.

The Court first contends that whether the *Ex parte Young* fiction should be applied turns only on the "relief sought" in a case. *Ante*, at 8–9 (internal quotation marks omitted). The Court is correct that several of our prior cases have focused on the nature of the relief requested. See, *e.g.*, *Edelman*, 415 U. S., at 664–671. That may well be because "the difference between the type of relief barred by the Eleventh Amendment and that permitted

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[3] Sovereign immunity principles would of course not prohibit this Court from reviewing the federal questions presented by this suit if it had been filed in state court. See *ante*, at 11. We have held that "it is inherent in the constitutional plan that when a state court takes cognizance of a case, the State assents to appellate review by this Court of the federal issues raised in the case whoever may be the parties to the original suit, whether private persons, or the state itself." *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 30 (1990) (internal quotation marks and citation omitted). By contrast, there is nothing "inherent in the constitutional plan" that warrants lower federal courts handling intrastate disputes absent a State's consent.

under *Ex parte Young* will not in many instances be that between day and night." *Id.*, at 667. But the Court is wrong to draw a negative implication from those cases and categorically conclude that there can be no other basis for determining whether to extend *Ex parte Young*'s fiction.

The thrust of the Court's argument appears to be that, because the relief sought here is no different from that which could be sought in a suit by a private protection and advocacy system, the doctrine of *Ex parte Young* should also apply to a suit brought by a state system. *Ante*, at 7–9. But private entities are different from public ones: They are private. When private litigants are involved, the State is not turned against itself.

Contrary to the Court's suggestion, see *ante*, at 9, there is indeed a real difference between a suit against the State brought by a private party and one brought by a state agency. It is the difference between eating and cannibalism; between murder and patricide. While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting there that attracts notice. I would think it more an affront to someone's dignity to be sued by a brother than to be sued by a stranger. While neither may be welcomed, that does not mean they would be equally received.

The Court also contends that petitioner's ability to sue state officials in federal court "is a consequence of Virginia's own decision to establish a public [protection and advocacy] system." *Ibid.* This cannot mean that Virginia has consented to an infringement on its sovereignty. That argument was rejected below, and petitioner did not seek certiorari on that issue. See *Virginia* v. *Reinhard*, 565 F. 3d 110, 116–118 (CA4 2009); Pet. for Cert. i.

Instead the Court claims that "Virginia has only itself to blame"—if it wanted to avoid its current predicament, it could have chosen to establish a private entity instead. *Ante*, at 9–10, and n. 5; see also *ante*, at 3 (KENNEDY, J.,

concurring). But I am aware of no doctrine to the effect that an unconstitutional establishment is insulated from challenge simply because a constitutional alternative is available. And here the public and private systems are not interchangeable alternatives in any event.

The Court's analysis is also circular; it wrongly assumes Virginia knew in advance the answer to the question presented in this case. Only *after* concluding that *Ex parte Young* applies to this arrangement—that for the first time in history a state agency may sue an unwilling State in federal court—can the Court suggest that Virginia knowingly exposed its officers to suit in federal court.

In a similar vein, the Court asserts that because Virginia law authorizes petitioner to exercise independent litigating authority, petitioner should be treated the same "as any other litigant." *Ante*, at 13. But petitioner is not like any other litigant. While it is true petitioner enjoys some independence from the State's executive branch, that does not mean petitioner is independent *from the State*. As noted, petitioner certainly views itself as "The Commonwealth of Virginia," App. 10, and would presumably invoke sovereign immunity itself if sued. As a matter of sovereign immunity law, it should make no difference how a State chooses to allocate its governmental powers among different state agencies or officials.

The Court is wrong to suggest that simply because petitioner possesses independent litigating authority, it may sue state officials in federal court. See *ante*, at 13 ("the Eleventh Amendment presents no obstacle" since it "was Virginia law that created [petitioner] and gave it the power to sue state officials"). There is more to this case than merely whether petitioner needs the approval of the Attorney General to sue, and the Virginia Code provisions cited by the Court say nothing about actions against the State in federal court.

If independent litigating authority is all that it takes,

then scores of state entities now "suddenly possess the authority to pursue *Ex parte Young* actions against other state officials" in federal court. *Reinhard*, *supra*, at 124. There would be no Eleventh Amendment impediment to such suits. Given the number of state agencies across the country that enjoy independent litigating authority, see, *e.g.*, Brief for State of Indiana et al. as *Amici Curiae* 11–13, the Court's decision today could potentially lead to all sorts of litigation in federal courts addressing internal state government disputes.

And there is also no reason to think that the Court's holding is limited to state *agency* plaintiffs. According to the Court's basic rationale, state officials who enjoy some level of independence could as a matter of federal law bring suit against other state officials in federal court. Disputes that were formerly resolved in state cabinet rooms may now appear on the dockets of federal courts.

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No one questions the continued vitality or importance of the doctrine announced in *Ex parte Young*. But *Ex parte Young* was about affording relief to a private party against unconstitutional state action. It was not about resolving a dispute between two different state actors. That is a matter for the State to sort out, not a federal judge.

Our decision in *Chisholm* v. *Georgia*, 2 Dall. 419 (1793)—permitting States to be sued by private parties in federal court—"created such a shock of surprise" throughout the country "that the Eleventh Amendment was at once proposed and adopted." *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 325 (1934). It is fair to say that today's decision will probably not trigger a similar response. But however much their practical functions and prominence may have changed in the past 218 years, the States remain a vital element of our political structure. Sovereign immunity ensures that States retain a stature

commensurate with their role under the Constitution. Allowing one part of the State to sue another in federal court, so that a federal judge decides an important dispute between state officials, undermines state sovereignty in an unprecedented and direct way. The fiction of *Ex parte Young* should not be extended to permit so real an intrusion.

Because I believe the Court's novel expansion of *Ex parte Young* is inconsistent with the federal system established by our Constitution, I respectfully dissent.