

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   VIRGINIA OFFICE FOR PROTECTION       :

4   AND ADVOCACY,                         :

5                                 Petitioner                         :     No. 09-529

6                         v.   :

7   JAMES W. STEWART, III,                         :

8   COMMISSIONER, VIRGINIA DEPARTMENT       :

9   OF BEHAVIORAL HEALTH AND                         :

10   DEVELOPMENTAL SERVICES, ET AL.         :

11   - - - - - x

12   Washington, D.C.

13   Wednesday, December 1, 2010

14                         The above-entitled matter came on for oral  
15   argument before the Supreme Court of the United States  
16   at 11:01 a.m.

17   APPEARANCES:

18   SETH M. GALANTER, ESQ., Washington, D.C.; on behalf of  
19         Petitioner.

20   GINGER D. ANDERS, ESQ., Assistant to the Solicitor

21         General, Department of Justice, Washington, D.C.; on  
22         behalf of the United States, as amicus curiae,  
23         supporting Petitioner.

24   EARLE DUNCAN GETCHELL, JR., ESQ., Solicitor General,  
25         Richmond, Virginia; on behalf of Respondents.

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1 P R O C E E D I N G S

2 (11:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 09-529, the Virginia Office for Protection  
5 and Advocacy v. Stewart.

6 Mr. Galanter.

7 ORAL ARGUMENT OF SETH M. GALANTER

8 ON BEHALF OF THE PETITIONER

9 MR. GALANTER: Mr. Chief Justice, and may it  
10 please the Court:

11 The Virginia Office for Protection and  
12 Advocacy, known as "VOPA," seeks to enforce its Federal  
13 statutory right to inspect and copy records that are in  
14 the possession of State officials who run State-operated  
15 hospitals.

16 Respondents acknowledged below that if  
17 Petitioner were a private entity, Ex parte Young would  
18 permit this suit. VOPA's status as a State entity does  
19 not change the Ex parte Young analysis because it  
20 imposed neither a greater burden on the treasury nor the  
21 dignity of the State. The only issue to be resolved by  
22 the Federal court is who has the correct reading of  
23 Federal law about the records access issue. It --

24 CHIEF JUSTICE ROBERTS: Counsel, if this  
25 were a private suit, let's say Ford Motor Company has

1 two subsidiaries, Ford East and Ford West. They get  
2 into a dispute. Ford West sues Ford East. No Federal  
3 court would entertain that action, would it?

4 MR. GALANTER: Well, Your Honor, if I could  
5 clarify. First of all, there would have to be a  
6 question of Federal law.

7 CHIEF JUSTICE ROBERTS: Yes. They think --  
8 Ford West thinks Ford East is discriminating on the  
9 basis of race.

10 MR. GALANTER: It would have to --

11 CHIEF JUSTICE ROBERTS: That adversely  
12 affects their reputation, too, so they sue them.

13 MR. GALANTER: I -- I think that inquiry  
14 goes to the question of adversity and standing, the  
15 Article III question. And this case doesn't involve  
16 that because VOPA is independent of the entity that it's  
17 trying to --

18 CHIEF JUSTICE ROBERTS: No, no. It's  
19 independent -- right -- it's independent from what?

20 MR. GALANTER: It's independent from the  
21 executive branch. It's independent from the Respondents  
22 it's trying to sue.

23 CHIEF JUSTICE ROBERTS: Yes --

24 MR. GALANTER: And it is --

25 CHIEF JUSTICE ROBERTS: -- but is it

1 independent from the State? Is that what the statute  
2 says?

3 MR. GALANTER: The -- the statute requires  
4 independence. The Federal statute requires that VOPA be  
5 independent. But it's independent here because its  
6 commission -- only a third of it is appointed by the  
7 governor, and none of the members of the commission that  
8 run VOPA can be removed except for cause.

9 CHIEF JUSTICE ROBERTS: You say on page 27  
10 of your brief, the blue brief, that there's no big deal  
11 here with respect to State sovereignty because  
12 ultimately the sovereign retains the authority to  
13 dissolve the State agency plaintiff if the State  
14 believes the litigation is too onerous.

15 MR. GALANTER: That -- that's correct. That  
16 is, the sovereign, the Commonwealth, could repeal the  
17 law that enacted VOPA, just as in this Court's cases,  
18 ICC v. United States, Congress could have removed --  
19 eliminated the ICC.

20 CHIEF JUSTICE ROBERTS: That's a good -- a  
21 good cite for your proposition, but arguably in those  
22 cases, the ICC is really not the real party in interest.  
23 The real party in interest is the beneficiary of the ICC  
24 ruling.

25 MR. GALANTER: Well, I believe this Court

1 has continually held that independent agencies and other  
2 Federal agencies can litigate, the cases involving the  
3 Federal Labor Relations Board. And this Court has  
4 allowed, for example, suits about licenses for Federal  
5 dams where one agency wants to build a Federal dam and  
6 another is --

7 CHIEF JUSTICE ROBERTS: To get -- to get  
8 back to my question, you -- no court would entertain  
9 Ford West against Ford East?

10 MR. GALANTER: If -- if that's right, and I  
11 think it is if they're part of the same -- if they're  
12 subsidiaries of one corporation and aren't separate.

13 JUSTICE SOTOMAYOR: Well, why is that true?  
14 If they're separate corporate entities, what legal rule  
15 would stop a separate corporate entity from suing  
16 another? Is there a -- if they're part of the same  
17 company, I think that's a different issue. If they are  
18 the same company, that's a different issue, and just a  
19 different branch or a different office.

20 MR. GALANTER: I -- I had understood that to  
21 be the Chief Justice's hypothetical. They were -- they  
22 were divisions of a single legal entity.

23 CHIEF JUSTICE ROBERTS: Not divisions;  
24 separate corporate entities that happened to be wholly  
25 owned by the same parent.

1                   MR. GALANTER: I do believe then that there  
2     could be litigation between them, but ultimately there  
3     wouldn't be.

4                   CHIEF JUSTICE ROBERTS: Well, I would have  
5     thought that would become an advisory opinion. Ford has  
6     an internal dispute, basically, and your -- in that  
7     hypothetical, one of the entities would be asking the  
8     Federal court to resolve it. Ford can decide at the end  
9     of the day how it wants to resolve it. If Ford West  
10    wins and Ford East loses, Ford can say, all right, this  
11    is how we're going to do it regardless of what the  
12    Federal court says.

13                  MR. GALANTER: Well, that's true that after  
14    the litigation is over, one of the parties may, you  
15    know, be able to work around the law. That's true, in  
16    fact, in every Federal Spending Clause statute where  
17    you're dealing with prospective relief. The State is  
18    always free to say, okay, if this is what we have to do,  
19    we -- we opt out of the program.

20                  CHIEF JUSTICE ROBERTS: Well, the State here  
21    is free to dissolve one of the -- one of the parties to  
22    the case. That's -- that's a little different.

23                  MR. GALANTER: Well, it's the Commonwealth  
24    that's free to dissolve one of the parties to the case.

25                  CHIEF JUSTICE ROBERTS: All right, State,

1 Commonwealth.

2 MR. GALANTER: But I know. I meant, as  
3 opposed to the -- I wasn't making --

4 CHIEF JUSTICE ROBERTS: Oh.

5 MR. GALANTER: But the Respondents here are  
6 State officials, and even the Respondents' agency has no  
7 power over IPAS. And on the day-to-day basis, even the  
8 governor and the attorney general have no control over  
9 what IPAS -- excuse me -- VOPA does. IPAS is a similar  
10 case out of Indiana.

11 But what's critical here is that, as we  
12 stand here today, the Commonwealth has vested a Federal  
13 right in VOPA, and neither the attorney general nor the  
14 governor of Virginia can stop VOPA from exercising that  
15 right.

16 JUSTICE SOTOMAYOR: Counsel, I'm -- I'm not  
17 quite sure what the premise of your argument is. You  
18 seem to be arguing that the independence of the State  
19 agency is what makes this particular entity capable of  
20 suing. Yet, in your brief, you rely on Verizon's simple  
21 test, which says if you're asserting a Federal claim,  
22 you can sue and you're not -- and you're looking for  
23 prospective injunctive relief, you can sue the State.  
24 That general rule wouldn't look at who's suing. That  
25 was part of your argument. Yet, now you're arguing the



1 independence of the agency. Which is your position?

2 MR. GALANTER: I --

3 JUSTICE SOTOMAYOR: And if it is the one  
4 about the State's independence, how do you articulate  
5 why that becomes important or not? What's the legal  
6 significance of that vis-à-vis this case and any ones  
7 moving forward?

8 MR. GALANTER: If I may, I -- there are --  
9 there are three issues that are intertwined here.  
10 First, the issue that I was talking about with the Chief  
11 Justice regarding the Article III adversity that you  
12 need for standing. That's where the independence is  
13 relevant.

14 The second question is the one that we  
15 petitioned on, which is the Eleventh Amendment issue,  
16 and there we would suggest that the simple  
17 straightforward inquiry of Verizon is relevant.

18 And then there's a third portion which the  
19 court of appeals seemed to rely on, which is that --  
20 that the notion that the State has a Federal right at  
21 all was -- against another part of the State and its  
22 officials was incongruous. That, if anything, would be  
23 a Tenth Amendment concern and is resolved here because  
24 it was the Commonwealth itself that made the voluntary  
25 decision to vest these Federal rights in independent

1 State agencies.

2 JUSTICE SCALIA: Well, let's assume -- and  
3 -- and I'm not sure what the situation is in -- in the  
4 Commonwealth. We have held that the States don't have  
5 to have the same notion of separation of powers that the  
6 Federal Government does. In the Federal Government, we  
7 allow independent regulatory agencies separate from the  
8 President. Let's assume that Virginia has a system in  
9 which the governor is indeed in charge of the entire --  
10 the entire executive branch. Do you know whether that's  
11 the case? I don't know.

12 MR. GALANTER: It -- it is not the case in  
13 Virginia or in 49 of the 50 States. .

14 JUSTICE SCALIA: Okay. Well, if it were and  
15 if Congress offered money to the State and the only way  
16 the State could get it would be to abandon its system of  
17 separation of powers and to allow an agency of the State  
18 which would normally be under the direction of the  
19 governor to go riding off on its own and -- and sue the  
20 governor, do you think there wouldn't be any -- any  
21 problem about -- about the Federal Government doing  
22 that?

23 MR. GALANTER: I --

24 JUSTICE SCALIA: Requiring the State to in  
25 effect alter its -- its governmental structure in order

1 to obtain the Federal money?

2 MR. GALANTER: I do think there might be a  
3 problem, first requiring it. And I think there might  
4 even be a problem if it were a Spending Clause statute  
5 alone. But if -- I realize that's the -- but that's not  
6 an Eleventh Amendment problem. That's a question about  
7 whether --

8 JUSTICE SCALIA: Sure.

9 MR. GALANTER: And here the only question,  
10 because -- the only question addressed below and the  
11 only question -- this is all on an interlocutory appeal  
12 just on the Eleventh Amendment --

13 JUSTICE SCALIA: Got you.

14 MR. GALANTER: -- is whether we can sue  
15 other officials in the State to bring them into  
16 prospective compliance with the Federal law. And as --  
17 as I said, though -- and this statute authorizes the  
18 State, if it takes the money, to designate either a  
19 public or a private entity as its protection and  
20 advocacy system; that is, they could have vested these  
21 Federal rights in a nonprofit corporation --

22 CHIEF JUSTICE ROBERTS: Well, right, but  
23 that makes all the difference in the world because they  
24 made the choice of saying this is going to be one of us,  
25 the State. And as far as what issue is before the

1 Court, I would suppose the Article III question is a  
2 jurisdictional one that we have to address before  
3 reaching the Eleventh Amendment question.

4 MR. GALANTER: I -- I think that they're  
5 both sufficiently jurisdictional that you could reach  
6 them in -- in -- you wouldn't have to reach Article III  
7 before the Eleventh Amendment. But I do think that the  
8 Article III question -- I mean, this Court in its FOIA  
9 decisions such as, you know, Public Citizen v.  
10 Department of Justice, has said that Congress can create  
11 a right to access to information --

12 JUSTICE GINSBURG: Mr. Galanter, if we can  
13 go back to get what this -- this entity was. The  
14 Federal legislation gives the States a choice. They can  
15 do it either in a State agency or a private entity. The  
16 specification that the State agency has to be  
17 independent is in the Federal statute, isn't it?

18 MR. GALANTER: Yes, Your Honor.

19 JUSTICE GINSBURG: It's not -- it's not up  
20 to the State to want to put it into an independent  
21 regulatory agency. And is it -- and this VOPA -- is  
22 that an entity that was created just to carry out this  
23 Federal program or was it a pre-existing agency?

24 MR. GALANTER: It -- it and its predecessors  
25 were created just to implement this program.

1 JUSTICE GINSBURG: And does it do anything  
2 else other than administer the Federal program?

3 MR. GALANTER: It has a few responsibilities  
4 that the State has given it under State law in addition,  
5 but its primary function -- and at this point all its  
6 budget comes from the Federal Government, and it serves  
7 primarily this Federal function to go into public and  
8 private institutions to observe and make sure that abuse  
9 and neglect is not occurring there.

10 And that is, obviously, why these records  
11 were requested, because the statute gives the protection  
12 and advocacy service a right to access records of people  
13 in the institutions to make sure that they are not being  
14 mistreated and that the investigations and the  
15 oversights by the State are taking place and are being  
16 done correctly.

17 JUSTICE SOTOMAYOR: Counsel, following up on  
18 Justice Scalia's question to you, his question in fact  
19 is in part what happened here. Virginia at some point  
20 did require every State agency to seek the permission of  
21 its attorney general, is it, to sue? And the government  
22 said that's not independent enough, and if you want the  
23 money, you've got to make VOPA eligible to sue without  
24 that permission; is that correct?

25 MR. GALANTER: That -- that is correct. And

1 then the legislature of the Commonwealth went in and  
2 gave VOPA independent litigating authority, independent  
3 of the attorney general.

4 On the Eleventh Amendment point, which is,  
5 again --

6 CHIEF JUSTICE ROBERTS: Well, just -- I know  
7 you're anxious to get to that, but --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- do you know -- do  
10 you know of any other situation where one party to a  
11 Federal court action can dissolve the other one in the  
12 middle of the case? I mean, if VOPA files a discovery  
13 request with the State and they think it is, as you put  
14 it in your brief, too onerous, the State can say: Guess  
15 what, the case is over, you're dissolved.

16 MR. GALANTER: Well, I -- again, I would go  
17 back to the Federal analogy, that in all this litigation  
18 with the ICC or -- well, with the Federal labor  
19 relations authorities, with the licensing authority of  
20 the Department of Interior for dams that -- that, you  
21 know, the TVA might want to build, that Congress can  
22 always eliminate these agencies, but while they are  
23 still in existence --

24 JUSTICE SCALIA: I guess, in Nixon v. United  
25 States, the President could have dismissed the attorney

1 general, but we allowed the suit to go forward. I never  
2 did understand that.

3 (Laughter.)

4 MR. GALANTER: Well, I think -- I think it's  
5 because you look at standing in terms of the current  
6 reality, and in Nixon, for example, the attorney general  
7 had promulgated a regulation saying he couldn't dismiss  
8 the special prosecutor except for cause.

9 JUSTICE KENNEDY: But there are a number of  
10 instances in the States where constitutional officers  
11 have their separate autonomy, their separate  
12 responsibilities. And it seems to me to follow  
13 inevitably from your position that the attorney general  
14 of State A could sue the governor of State A saying the  
15 governor is being sued in an Ex parte Young capacity  
16 because the governor is not following Federal law. I  
17 think that's just inevitable from your -- from your  
18 position, and that seems to me a vast extension of Ex  
19 parte Young. It's true, I think, that we've never said  
20 that the identity of -- or the permissibility of an Ex  
21 parte Young suit depends on the identity of the  
22 plaintiff, but don't we have to say that here if we're  
23 going to allow the States to structure their -- their  
24 own governments as they choose?

25 MR. GALANTER: Well, I would say that --

1 well, I would say two things. First, the idea that --  
2 you have to accept, as I think Respondents do in this  
3 case, that the Virginia Office of Protection and  
4 Advocacy legitimately holds a Federal right. I can't --  
5 I am hard pressed, and -- and Respondents and their  
6 amici were hard pressed, to come up with any example  
7 where an attorney general would hold a Federal right  
8 against another part of the State. And particularly  
9 here --

10 JUSTICE KENNEDY: Well, he would tell the  
11 governor that the governor is not giving adequate  
12 protection to prison inmates or State employees, that  
13 the -- that the governor's own personnel regulations are  
14 incorrect, and he would sue under Ex parte Young.

15 MR. GALANTER: If the Commonwealth --

16 JUSTICE KENNEDY: There are all kinds of  
17 Federal rights.

18 MR. GALANTER: Well, but they're generally  
19 not the --

20 JUSTICE KENNEDY: And the question is: Can  
21 one State entity enforce it against another State entity  
22 in a Federal court?

23 MR. GALANTER: The -- there aren't a lot of  
24 Federal rights that State officials have against other  
25 officials. Here, this is a right --



1 JUSTICE KENNEDY: Well, but that's -- but  
2 under -- under your theory there would be, because under  
3 Ex parte Young, the whole point of it is that a -- a  
4 person can allege that this fictional private individual  
5 who's really a governmental individual is violating a  
6 Federal right. That's the whole point of it.

7 MR. GALANTER: Violating the plaintiff's  
8 Federal right. That was the only point I was making.  
9 But, yes, if there are Federal disputes at issue, a  
10 Federal forum is appropriate, but --

11 JUSTICE KENNEDY: All State attorney  
12 generals have the -- have the obligation to enforce  
13 Federal rights for all of the citizens of their States.

14 MR. GALANTER: And if they have that right  
15 under -- power under State law, then -- and they  
16 exercise that power and elect to be in Federal court to  
17 litigate Federal issues, that is not barred by the  
18 Eleventh Amendment, we would submit.

19 JUSTICE KENNEDY: Well, that -- that  
20 issue -- I know your white line is on.

21 You -- you indicated that there are certain  
22 cases in which dams can be authorized by the Federal  
23 Government, I think, contrary to State laws, with  
24 municipalities. Do you know what those are? There's an  
25 Iowa case; there's also a Washington case you were

1 talking about.

2 MR. GALANTER: I believe the case here I'm  
3 thinking of comes out of Seattle. But -- but I think --

4 JUSTICE KENNEDY: Do you have the citation?

5 MR. GALANTER: I don't have it with me. I  
6 --

7 JUSTICE KENNEDY: I've been looking for it.  
8 Okay.

9 MR. GALANTER: But -- but the point I was  
10 making is that sometimes one Federal agency needs  
11 permission from another Federal agency to build  
12 something, and there would be a litigable controversy  
13 under Article III, and that's the only point I was  
14 trying to make.

15 If I may, if there are no more questions,  
16 I'd like to reserve the balance of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 Ms. Anders.

19 ORAL ARGUMENT OF GINGER D. ANDERS

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
21 SUPPORTING THE PETITIONER

22 MS. ANDERS: Mr. Chief Justice, and may it  
23 please the Court:

24 VOPA has properly invoked Ex parte Young to  
25 enforce Respondents' obligations under the DD and PAIMI

1 Acts here, because VOPA's complaint satisfies the  
2 straightforward inquiries set forth in Verizon.

3 We don't think that it's necessary to go  
4 into State sovereignty interests to determine whether Ex  
5 parte Young should be allowed here, but even if the  
6 Court were to do that, I think it's unquestionable that  
7 there are no State sovereignty interests here.

8 JUSTICE ALITO: Do you think -- do you think  
9 the Spending Clause allows the Federal Government to  
10 condition the receipt of Federal funds on a State's  
11 agreement to change the structure of State government?

12 MS. ANDERS: I think it does, so long as --  
13 as that requirement is reasonably related to the  
14 government's interest in the funds and in -- in the  
15 objective of its regulation. Now, there's --

16 JUSTICE ALITO: Suppose the government said  
17 if you want Medicaid funds, the State agency that  
18 administers the Medicaid program must be headed by a  
19 person who has a 20-year term of office and is removable  
20 only for gross dereliction of duty. Would -- can they  
21 do that? Can the Federal Government do that? Can  
22 Congress do it?

23 MS. ANDERS: I think it could do that, so  
24 long as that's not independently unconstitutional. I  
25 think the State always has the opportunity to decide not

1 to opt into the scheme, and I think that's very  
2 important here because the sole aspect of this suit that  
3 Virginia challenges, which is the fact that VOPA is a  
4 State agency, is the result of two sovereign choices  
5 that the State made here.

6 The first choice was to opt into the DD and  
7 PAIMI Act programs, to take the Federal funds, to create  
8 a P and A system that has Federal rights of access to  
9 which both State and private facilities are subject.  
10 And the second choice that Virginia made was to  
11 establish a State agency P and A system here. It could  
12 have established a private agency if it were concerned  
13 about --

14 JUSTICE GINSBURG: Ms. Anders, I understand  
15 that most States that -- that are taking advantage of  
16 this program do it through a private entity, not a  
17 State; is that -- is that right?

18 MS. ANDERS: That's correct. There are  
19 eight public P and A systems.

20 CHIEF JUSTICE ROBERTS: Can EPA sue the Army  
21 Corps of Engineers for violating the Clean Water Act?

22 MS. ANDERS: Well, I think you would have an  
23 Article III problem if there isn't sufficient adversity.  
24 If the --

25 CHIEF JUSTICE ROBERTS: Oh, very adverse.

1 EPA wants clean water, and the Army Corps of Engineers  
2 wants to, you know, dredge the water in a way that  
3 contributes to pollution.

4 MS. ANDERS: Well, they're both -- the heads  
5 of both agencies are, in that situation, I think,  
6 subject to removal by the same people, and so in that  
7 situation, you would have an Article III problem. But  
8 we don't have that problem here, because VOPA is  
9 independent under State law, and --

10 CHIEF JUSTICE ROBERTS: Do you agree with  
11 the Petitioners that Virginia can dissolve VOPA if it  
12 finds the litigation too onerous?

13 MS. ANDERS: I think that that would not  
14 happen in practice, because if Virginia were to dissolve  
15 VOPA, it would be out of compliance with the Federal  
16 scheme, and so it would lose its -- it would lose its  
17 Federal funding at that point. And so I don't think  
18 that's a situation that's going to arise, but --

19 CHIEF JUSTICE ROBERTS: If -- if it happened  
20 to arise, do you think that they can -- do you agree  
21 with the Petitioners that they can do it?

22 MS. ANDERS: I think they -- I think they  
23 could do it, but I think this -- this Court has  
24 previously adjudicated cases where, in theory, the  
25 government could have changed the case midstream.

1 U.S. v. Nixon is an example of that; the ICC case as  
2 well. And I think also in the Lassen case, this Court  
3 said that it could adjudicate a suit between two State  
4 agencies because the agencies were sufficiently  
5 independent from each other. They weren't subject to  
6 removal by the same head of government.

7 So I think, while you might have an Article  
8 III problem in some situations, you don't have that  
9 problem here because of VOPA's independence.

10 JUSTICE SOTOMAYOR: Could you be a little  
11 bit more specific for me on what you mean about an  
12 Article III problem? Justice Kennedy was concerned  
13 about State attorney generals willy-nilly suing -- or  
14 not willy-nilly -- suing governors to comply with  
15 Federal law.

16 Why do you think it won't happen, and what  
17 are the legal impediments to that occurring?

18 MS. ANDERS: I think there are several. I  
19 think, first, you would have to have a Federal right  
20 that the AG would be able to enforce. He would have to  
21 have a way to get into Federal court. He would have to  
22 have a theory of standing, and I think this is not a  
23 situation that has arisen at this point. There are no  
24 examples of this. And so I think --

25 JUSTICE BREYER: I thought -- this I'm

1 confused about. I would think you would have to have a  
2 State which has a law that permits the attorney general  
3 to sue the governor. Wouldn't you?

4 MS. ANDERS: If the --

5 JUSTICE BREYER: I mean, if the State law is  
6 the attorney general can't sue the governor, that's the  
7 end of it, isn't it? Or is it --

8 MS. ANDERS: If that were sufficient to get  
9 into Federal court for Article III purposes. I think  
10 there might be some situations in which the attorney  
11 general --

12 JUSTICE BREYER: No. Suppose the State law  
13 is the governor of the State cannot bring a lawsuit  
14 against the attorney general, and vice versa. Okay?  
15 That's the State law. Now, under those circumstances,  
16 can either bring a lawsuit on a Federal right in Federal  
17 court?

18 MS. ANDERS: There may be some circumstances  
19 like that one, in which the State AG's use of Ex parte  
20 Young would raise special sovereignty interests that  
21 would counsel against --

22 JUSTICE BREYER: No, but I want just a yes  
23 or no answer. In your opinion, can an attorney general,  
24 where the State law says, black letter law, attorney  
25 general can never sue the governor; he's fired instantly

1 if he tries. That's the law in this State, okay? Now,  
2 can that individual come into Federal court and sue on  
3 an Ex parte Young theory suing the governor?

4 MS. ANDERS: I think he could --

5 JUSTICE BREYER: He could?

6 MS. ANDERS: -- under this Court's decision  
7 in Verizon. I think that if -- there might be certain  
8 extreme circumstances where --

9 JUSTICE BREYER: Well, I don't -- I think  
10 that is a problem, and is that --

11 JUSTICE SCALIA: Yes, I --

12 JUSTICE BREYER: -- what we're saying here?

13 JUSTICE SCALIA: That can't be. How can  
14 that be? He has no power as attorney general to do  
15 that. It has nothing to do with -- with Ex parte Young.  
16 It has to do with his power as attorney general.

17 MS. ANDERS: Right, and as this Court said  
18 in Lassen, though, I think often the Federal court  
19 doesn't look behind State officers' version of --

20 JUSTICE BREYER: But my -- excuse me -- I  
21 thought --

22 JUSTICE SCALIA: But your -- your answer --

23 JUSTICE BREYER: Suppose I'm right about  
24 this and you can't do it. You can't. You can't -- the  
25 Federal Government cannot tell a State how to organize



1     itself.  If it wants to have an attorney general that  
2     can never bring a lawsuit, that's up to the State,  
3     unless it's a due process problem.

4                   Now, suppose I believe that.  Now, do you  
5     lose this case?

6                   MS. ANDERS:  No, I don't think so, because  
7     the same special sovereignty interests are not present  
8     here, because under the Spending Clause, Virginia had  
9     the choice to opt into this scheme.

10                  JUSTICE GINSBURG:  Doesn't -- doesn't the  
11     Federal statute say, Virginia, if you want to do this  
12     through a State agency, that State agency has to be an  
13     independent agency and have the authority to sue?

14                  MS. ANDERS:  That's correct, and --

15                  CHIEF JUSTICE ROBERTS:  Are you sure that  
16     the governor cannot remove the members of VOPA?  I know  
17     it says VOPA has to be independent of any State agency,  
18     and the governor appoints one-third.  Can the governor  
19     remove the members of this Virginia agency?

20                  MS. ANDERS:  As a matter of State law, I  
21     don't think he can.  And if he were to try to do that,  
22     that would be a compliance problem from HHS's  
23     perspective.  And so Virginia might at that point --

24                  CHIEF JUSTICE ROBERTS:  What would it not --  
25     what would it not comply with?  I just don't know.  I'm

1 just looking at the provision where you say it's  
2 independent, and it says independent of any State  
3 agency. You said the governor may not appoint more than  
4 one-third. I just wonder if there's a prohibition on  
5 him removing.

6 MS. ANDERS: Well, there's definitely a  
7 prohibition on him removing board members of VOPA or  
8 officials of VOPA as a result of VOPA's actions in  
9 litigation. I think --

10 CHIEF JUSTICE ROBERTS: Where is that?

11 MS. ANDERS: Well, the provision -- well,  
12 the requirement that VOPA have full authority to pursue  
13 legal remedies to ensure the protection of individuals.  
14 This is on page 52a of the petition appendix. That's  
15 the PAIMI law. And I think that actually did happen in  
16 Virginia, that HHS came in --

17 CHIEF JUSTICE ROBERTS: What if the VOPA  
18 officials are engaged in corruption or illegal conduct  
19 or, you know, extracurricular activity that brings  
20 discredit upon the -- the governor has no power to say  
21 that, you're a Virginia official and you're -- you know,  
22 whatever -- breaking Virginia law, for example? And --

23 MS. ANDERS: Well, under Virginia law, I  
24 think that VOPA's officials are subject to for-cause  
25 removal provisions. So they can actually be removed

1     judicially through for-cause proceedings. And from our  
2     perspective, that's consistent with VOPA's independence  
3     and its full authority to pursue remedies because that  
4     type of for-cause removal wouldn't be on the basis of  
5     VOPA's actions in litigation.

6                   JUSTICE KENNEDY: Going back to your  
7     exchange with Justice Breyer, I assume that you could  
8     stand by your answer and say the attorney general could  
9     sue the governor, because he's not suing the governor in  
10    his official capacity. He has a Federal right under Ex  
11    parte Young to sue the governor as an individual. It's  
12    a fiction; we all know that. But that's the way it  
13    works, and this is a Federal right. .

14                  MS. ANDERS: Well --

15                  JUSTICE KENNEDY: I think that's your  
16    position.

17                  MS. ANDERS: I think that's right, that  
18    under Verizon no more is required. VOPA has a Federal  
19    right here.

20                  JUSTICE KENNEDY: Of course -- of course,  
21    Verizon was a private party.

22                  MS. ANDERS: Verizon was a private party,  
23    but --

24                  JUSTICE BREYER: Suing in his capacity as  
25    attorney general and under his -- that's the plaintiff,

1 not the defendant. And he has no right to bring that  
2 suit, because -- it's not that he doesn't have a right;  
3 it's that he doesn't have authority. He's not a person  
4 that can do this kind of thing --

5 JUSTICE SCALIA: I really lost you. I  
6 thought Ex parte Young applied to defendants.

7 JUSTICE BREYER: Yes, right. Exactly.

8 JUSTICE SCALIA: I didn't think Ex parte  
9 Young allows -- allows an attorney general to sue -- to  
10 sue as a plaintiff in his personal capacity. Am I wrong  
11 about that?

12 MS. ANDERS: Well, I think that you might  
13 have State sovereignty interests at that point --

14 JUSTICE BREYER: That's your position.

15 MS. ANDERS: -- that would prevent a Federal  
16 court from -- from adjudicating the suit, but there's no  
17 question that those interests aren't present here  
18 because Virginia has chosen to create a State agency in  
19 order to enforce these Federal rights. When it opted  
20 into the scheme --

21 JUSTICE BREYER: I'm with Justice Scalia on  
22 this. Well, I'll pass to the other side.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Ms. Anders.

25 Mr. Getchell.

1 ORAL ARGUMENT OF EARLE DUNCAN GETCHELL, JR.,

2 ON BEHALF OF THE RESPONDENTS

3 MR. GETCHELL: Mr. Chief Justice, and may it  
4 please the Court:

5 The dignity interest of a sovereign is  
6 impaired if it is pitted against itself in the courts of  
7 another sovereign without its consent. And I would  
8 take --

9 JUSTICE SCALIA: A dignified sovereign  
10 should not agree to the deal.

11 (Laughter.)

12 MR. GETCHELL: Well, let's --

13 JUSTICE SCALIA: I mean, you know, the  
14 Commonwealth had the choice. It had two choices, as --  
15 as counsel for the Government said. It could either  
16 turn down the money or, if it's not dignified enough to  
17 do that, it could take the money and establish a private  
18 organization to do this work instead of a State agency.  
19 So, what -- you know, what complaint do you have here?

20 MR. GETCHELL: Well, let me -- let me first  
21 say that the choice issue raises some interesting  
22 questions because of the procedural posture of this case  
23 being an interlocutory appeal. Because remember, on the  
24 issue of waiver and abrogation, that was litigated  
25 below, and no waiver was found, and that wasn't appealed

1     against. So if we're going to say it makes a difference  
2     under a spending statute that the State has taken the  
3     money in analyzing the sovereign interest, then we are  
4     creating a waiver on the cheap and disheveling the  
5     established doctrine.

6                   JUSTICE GINSBURG: It's not a waiver; it's  
7     -- the Federal statute is clear. It says: State, you  
8     can do this in one of two ways. If you go with a  
9     government agency, then that agency has to have  
10    independence and it has to be able to sue.

11                   So if the State is given a choice, it has --  
12    it can do it through private entity; it can do it  
13    through, as in this case, an agency that was set up for  
14    this very purpose and no other, right?

15                   MR. GETCHELL: I would have thought two  
16    things about that. One is when Congress gave the State  
17    the choice of making it a State agency, it understood  
18    that any issues that arise from that would come with the  
19    territory. The second thing is what the State consented  
20    to is it waived its sovereign immunity to be sued, but  
21    it did not specify suit in Federal court, and under  
22    ordinary doctrine, that's a consent to be sued in its  
23    own courts, not in Federal court.

24                   JUSTICE BREYER: Suppose you have a State  
25    which loves litigation.

1 (Laughter.)

2 JUSTICE BREYER: Forty-eight percent of the  
3 population are retired lawyers.

4 (Laughter.)

5 JUSTICE BREYER: Nothing pleases them more  
6 than to have everybody suing everybody else. So they  
7 pass a statute which says, for purposes of lawsuits in  
8 this State, every department can sue every other  
9 department.

10 Now, if you have such a State, what in the  
11 Constitution stops the Federal Government from abiding  
12 by that rule and applying ordinary Ex parte Young rules,  
13 looking at the defendant, looking at horizon, and then,  
14 if the plaintiff happens to be a Federal agency suing  
15 another, say, well, if it complies with those first set,  
16 the fact that A sues B and they're both State agencies,  
17 that's the State's decision. What in the Constitution  
18 can prevent the State from deciding to organize what  
19 we'll call the legal heaven way?

20 (Laughter.)

21 MR. GETCHELL: I would say two things about  
22 that. The first is that that's not what Congress did.  
23 Congress -- Congress said they had to have a right to  
24 sue, and they didn't specify it was Federal court.

25 JUSTICE BREYER: Okay. That's A. We can go

1     into A later because I agree that would be an answer, if  
2     it's correct -- I mean, if that is what happened.  
3     That's a different question, whether Congress could  
4     restructure the State. That's a serious question. But  
5     my question was on the first. Can Congress stop the  
6     State from restructuring itself?

7                 MR. GETCHELL: Well, I -- I don't think the  
8     State by restructuring itself would then ordinarily  
9     expect its agencies to sue each other in Federal court.  
10    In --

11                JUSTICE BREYER: If they wrote it down  
12    specifically in the law and said we'd love to have our  
13    agencies sue each other. They don't say Federal court.  
14    They just say we love to have our agencies sue each  
15    other. They don't mention the court.

16                MR. GETCHELL: I would think that, under  
17    ordinary rules of waiver of sovereign immunity, that  
18    would limit the suits to the suits of the sovereign, the  
19    State.

20                JUSTICE BREYER: Why? What's undignified  
21    about allowing the State --

22                MR. GETCHELL: I just --

23                JUSTICE BREYER: -- to live with the choice  
24    it made?

25                MR. GETCHELL: I think the existing doctrine



1 is an unspecified waiver of sovereign immunity does not  
2 consent to the Federal court.

3 JUSTICE SOTOMAYOR: I'm sorry. I -- I think  
4 there are concepts being confused. There's no question  
5 that it hasn't waived sovereign immunity. VOPA doesn't  
6 claim that. And this is not a direct suit against the  
7 State; it's a suit against a State official. And the  
8 entire premise of Ex parte Young is that this doesn't  
9 offend sovereign immunity for a party to seek  
10 enforcement, prospectively, of a Federal right.

11 So I don't know why it really matters who  
12 the plaintiff is so long as the sovereign interests that  
13 we've recognized, that the issue of sovereignty is one  
14 that respects a State's coffers and State's laws and  
15 we're not going to interfere with any of them, but we  
16 are going to ensure that, because of the pre-emptive  
17 effect of the Constitution and our laws, that Federal  
18 laws are respected. So what's in this case the  
19 intrusion on State sovereignty when the State knew and  
20 consented consciously to letting VOPA sue for records  
21 when it needed to?

22 MR. GETCHELL: In referring to sovereign  
23 immunity, I was trying to answer the hypothetical with  
24 respect to why Ex parte Young doesn't apply. The second  
25 part of the question was Congress could expect Ex parte

1 Young to apply. There's -- there's no indication in the  
2 legislative record that I could find of that.

3 JUSTICE SOTOMAYOR: The State should have  
4 expected that.

5 MR. GETCHELL: Excuse me. That Congress  
6 should have expected. In the hypothetical, Congress was  
7 posited as having thought that Ex parte Young --

8 JUSTICE BREYER: No. The hypothetical was  
9 just -- Justice Sotomayor is totally right. I'm talking  
10 about Ex parte Young.

11 MR. GETCHELL: Okay.

12 JUSTICE BREYER: I'm imagining -- I'm  
13 imagining a system where the State wants to let the AG,  
14 this organization, the sheriff of Middlesex County, the  
15 City of San Francisco -- they want to permit such  
16 entities to become plaintiffs against other parts of the  
17 State government in such a State if ordinary Ex parte  
18 Young requirements are met. What in the Constitution of  
19 the United States prohibits that suit from going ahead?

20 MR. GETCHELL: Because Ex parte Young is an  
21 exception to the default position. The default position  
22 is that the States at the founding retained all of their  
23 natural law-of-nations sovereign immunity. We know that  
24 it was -- that it was limited. A State can sue another  
25 State; the Federal Government can sue another State; and

1 -- can sue a State; and there is the Ex parte Young  
2 exception, but it is the exception.

3           It is being extended here. We know it's  
4 being extended here because it's never been done before.  
5 And if you're going to extend it, then we ought to ask  
6 the question of whether or not -- asking the Hans  
7 question.

8           JUSTICE SCALIA: Why -- why is it an  
9 extension? I mean, I have sort of a bit of a problem  
10 with that. Why is it somehow a -- a greater  
11 infringement upon State sovereignty to allow a State to  
12 be sued in Federal court by a private individual, who  
13 doesn't even have to be a Virginian, for Pete's sake --  
14 he could be from anywhere, he could be from Iowa. And  
15 yet, it somehow offends State sovereignty more when --  
16 when you allow a State agency to sue a State?

17           I don't -- I don't see why that's so  
18 horribly worse, unless you're arguing that -- that it  
19 somehow destroys the State system of separation of  
20 powers. But that's a different question, and -- and the  
21 answer to that is simply you did it yourself.

22           MR. GETCHELL: Well, what I -- what I would  
23 say is that Ex parte Young is intended to deal with the  
24 situation where a citizen of a dual sovereign is able to  
25 vindicate his superior Federal rights against the State.

1 That interest is not served one bit by having a State  
2 agency sue another State agency in Federal court, even  
3 though that State agency could have sued in State court.

4 And I would ask the Hans question. The Hans  
5 question is, would the -- you know, the Constitution is  
6 presumed not to raise up causes of action against the  
7 States that would have been considered as anomalous and  
8 unheard-of at the time of the founding. And I think if  
9 you posited whether or not at the founding, if you had  
10 asked, can a part of a State -- well, can the Federal  
11 Congress authorize part of a State to sue the other part  
12 of the State in Federal court, I think it would have  
13 been regarded as anomalous generally.

14 JUSTICE ALITO: When Virginia agreed to  
15 participate in this program, did Virginia understand  
16 that it could be sued by VOPA not only in -- in the  
17 State courts but also in Federal court?

18 MR. GETCHELL: I would assert not. I mean,  
19 that was the point of the waiver argument below, and the  
20 court said there had not been a specific enough  
21 declaration of the consequences of taking the money to  
22 raise a traditional waiver.

23 JUSTICE GINSBURG: So the choice is, if it's  
24 not in -- you certainly agree that this State agency has  
25 taken on the obligations of the Federal program, and if

1 it doesn't turn over records as the Federal statute  
2 requires it to do, it has to be amenable to suit  
3 somewhere. We know if it were a private entity  
4 administering this program, it would be suable in -- in  
5 Federal court. So this State agency is doing the exact  
6 same thing, because Virginia chose to do it that way.  
7 Where is it -- where -- a very simple thing, the Federal  
8 statute says turn over records to the agency, and the  
9 State hospital says no, we're not going to turn over the  
10 records. Where does the agency, whether private or  
11 public, that's administering the Federal program go to  
12 enforce the Federal right?

13 MR. GETCHELL: The program would go to State  
14 court. Virginia has waived its sovereign immunity, and  
15 there is a remedy through mandamus.

16 JUSTICE GINSBURG: If you -- is that -- I  
17 mean, I want to make sure I understood what your  
18 position is on that. It's not that you go into the  
19 court that you ordinarily go to when you want to get  
20 documentary discovery; you go to the State's supreme  
21 court, and you -- you apply for the extraordinary writ  
22 of mandamus? That's it?

23 MR. GETCHELL: If you have a -- if you have  
24 a clear right to these documents as a surrogate -- and,  
25 you know, that's a merits question that has never been

1 reached, whether this is a rights-conferring statute.

2 JUSTICE GINSBURG: I'm asking you what is  
3 the forum? We have a simple problem. An agency,  
4 whether private or public, wants records. A Federal  
5 statute says you're entitled to the records. And I  
6 would like to know now, Virginia having chosen to give  
7 this newly created independent State agency the  
8 authority, rather than picking a 501(c)(3) organization  
9 to do it -- simple, we want records of these three  
10 people, the hospital has them, the hospital doesn't give  
11 them to us. The only way under Virginia law is to  
12 petition the highest court of the State for a writ of  
13 mandamus?

14 MR. GETCHELL: I would -- I personally  
15 believe you could also do it in circuit court. I know  
16 this office has previously taken the position that it  
17 had to go to the supreme court, and I don't want to  
18 withdraw any concession that had been made there, but I  
19 personally read the statute differently.

20 JUSTICE GINSBURG: But which office has said  
21 it has to go to -- to the State supreme court on  
22 mandamus? You said that the office has taken that  
23 position previously.

24 MR. GETCHELL: The statute, the mandamus  
25 statute, has a fairly broad catch-all provision at the

1 end which I think would allow suit in -- in circuit  
2 court, but I don't think where it can sue really informs  
3 the doctrine here, because I think the doctrine here is  
4 if you're going to let, under the analysis argued  
5 here -- which is not modest; it's very, very broad. If  
6 VOPA can sue in Federal court under Ex parte Young, so  
7 can any agency of -- of the -- of any State that  
8 receives Federal funds upon which it makes the claim at  
9 the Ex parte Young stage, which is before you reach the  
10 merits -- any agency receiving Federal money that can  
11 dream up a Federal claim under Ex parte Young could sue  
12 the State.

13 JUSTICE SCALIA: And -- and that has  
14 independent litigating authority.

15 MR. GETCHELL: Yes, and -- and --

16 JUSTICE SCALIA: Okay. I mean, that's the  
17 difference here.

18 MR. GETCHELL: And I believe --

19 JUSTICE SCALIA: This agency was given  
20 independent litigating authority.

21 MR. GETCHELL: I think -- I think Virginia  
22 happens to be unusual, as long as we're talking about  
23 the policy results that will come from this. I think  
24 Virginia is unusual in having as much control in the  
25 attorney general over who can sue than -- than a lot of

1 States do, because I think a lot of States have their  
2 own independent agencies that proliferate and have suit  
3 authority.

4 But I will tell you, even in Virginia, there  
5 is a mechanism by which, if you had the governor in one  
6 party's hands and the attorney general in the other, the  
7 governor can declare a conflict of interest and order  
8 private counsel hired.

9 And so, if -- if the University of Virginia  
10 wanted to sue the governor, or rather sue the attorney  
11 general, and the governor said, well, if you want to,  
12 and the attorney general won't authorize it, then that's  
13 a conflict of interest. I --

14 JUSTICE SOTOMAYOR: It hasn't happened. Why  
15 do you think? Don't you think it hasn't happened  
16 because there are so many practical political restraints  
17 on that kind of activity?

18 What would happen, I think, in that State  
19 where there was a rogue attorney general is somebody  
20 would win; the governor would win by getting a  
21 legislative act that says it can't be done, or the  
22 attorney general will win because the political  
23 sentiments are so strong in his or her favor that the  
24 suit is actually welcomed by the population.

25 So where's the intrusion on sovereignty?



1 States do what they want. The only issue is how do we  
2 protect Federal rights.

3 MR. GETCHELL: I would -- I would say that  
4 it's never happened before because nobody's ever claimed  
5 before that Ex parte Young permits a part of the State  
6 to sue the other part of the State. And I would say if  
7 the word were declared from this Court that you can do  
8 that, that there would be a lot of political motivation  
9 to file suits.

10 JUSTICE BREYER: It isn't that Ex parte  
11 Young, if I understand this right, which is why I  
12 mention it -- it isn't that Ex parte Young permits one  
13 part of a State to sue another part; it is a State  
14 permits one part of a State to sue another part, that  
15 that's common in the State, that the law requires it.  
16 And the question is, in that circumstance, should the Ex  
17 parte Young situation be treated differently?

18 MR. GETCHELL: And --

19 JUSTICE BREYER: Am I right about the  
20 statement of the question in the case?

21 MR. GETCHELL: I -- I think -- I think  
22 whether or not the State has given independent authority  
23 to sue without specifying that it can be in Federal  
24 court, without waiving its immunity in Federal court, is  
25 not the issue in the case. I think the issue in the

1 case -- I think that the issue in the case is whether or  
2 not Ex parte Young should be extended to do something  
3 that's never been done before. I think that's the issue  
4 in the case. And I don't think Ex parte Young, which is  
5 a necessary fiction -- but it is a fiction; it's a  
6 necessary fiction to allow the citizens of a dual  
7 sovereign to vindicate his or her Federal rights in  
8 Federal court -- is implicated in the least when it's a  
9 State agency that could sue another State agency by the  
10 State's consent in State court.

11 JUSTICE GINSBURG: Do you know -- do you  
12 know of any other statute in which there is an  
13 independent State agency that exists for the sole  
14 purpose of administering a Federal program?

15 MR. GETCHELL: I -- I'm not an expert in  
16 that area of the law. I would have thought it's quite  
17 common. But I don't -- I don't know. That's just my  
18 supposition. I think that -- that --

19 JUSTICE GINSBURG: You couldn't give any  
20 example of a Federal program that says: State, you can  
21 do it through a private agency; you can do it through a  
22 public agency -- public agency created to implement this  
23 Federal program, that is its sole business. I don't  
24 really know of any such.

25 MR. GETCHELL: I -- I personally don't know

1 of one as I stand here, but my supposition is that  
2 because the Federal spending power has been so  
3 dramatically exercised over the years, that there  
4 probably is one, and I had not thought to look for it.

5 JUSTICE BREYER: In your experience -- this  
6 would be helpful -- would you characterize as common or  
7 uncommon situations where State agencies are given  
8 authority to sue other parts of the State? As I think  
9 it to myself, I think, well, City of Glendale v. State  
10 Water Authority, or Middlesex County Sheriff v. The  
11 Bureau of Prisons. That doesn't sound weird to me. It  
12 sounds as if there probably are a lot of such  
13 circumstances, but I don't know. What -- what do you  
14 think?

15 MR. GETCHELL: There -- I think two -- there  
16 are two things to look at: lower subdivisions of the  
17 States, which in many States are --

18 JUSTICE BREYER: Cities -- cities against --  
19 they must do that a lot.

20 MR. GETCHELL: Yes, but they're just  
21 corporations in -- in Virginia and in most States.  
22 There are a few States where they are treated as  
23 something different, but they are not generally regarded  
24 as even units of -- subordinate units of government for  
25 purposes of sovereign immunity.

1                   However, the State itself and its agencies  
2   are, and that's the issue that's implicated by Ex parte  
3   Young. I would -- I would say that --

4                   JUSTICE BREYER: University of  
5   Massachusetts v. State Environmental Organization. Does  
6   that -- does that kind of suit sound familiar to you or  
7   -- or not?

8                   MR. GETCHELL: I think that -- that the  
9   States vary as to how tolerant they are of -- of being  
10   sued by -- having their parts sue each other in State  
11   court. I think I have seen titles like that, but I  
12   don't think that, as a principle of Federal jurisdiction  
13   -- because, ultimately, whether sovereign immunity  
14   exists, if it's not waived, does deprive this Court --  
15   or deprives a Federal court of the right to proceed.

16                   I think that deciding we're going to extend  
17   the fiction of Ex parte Young beyond the rights of  
18   citizens to allow the State to sue itself in Federal  
19   court is just something that's totally anomalous. I --  
20   I just don't see how this Court would want to do that,  
21   even -- even if it thought otherwise that it was, you  
22   know, something that could be done under the logic of Ex  
23   parte Young. I don't know why you'd want to extend that  
24   and create -- and create the Federal courts as a venue  
25   for political grandstanding, which is what I think --

1 JUSTICE SOTOMAYOR: I'm not sure that --  
 2 what you're forgetting is that Virginia took a lot of  
 3 money to set up and get the benefits of Federal funds by  
 4 creating an independent agency. It had expressed its  
 5 desire to control the agency more, and it was told very  
 6 directly: You can't. You have to let that agency sue.

7 What I don't understand is why you think  
 8 that it's a greater affront to sovereignty that the suit  
 9 is here as opposed to State court. The State has  
 10 already said: We're going to take your money, and this  
 11 is what we're going to permit --

12 MR. GETCHELL: I think it has --

13 JUSTICE SOTOMAYOR: -- a suit.

14 MR. GETCHELL: I think it has long been  
 15 recognized that the dignity of the State is not offended  
 16 at all by a suit against -- against it in its own courts  
 17 that it has authorized. I think that it is well  
 18 understood that if you bring a State against its will  
 19 into a Federal court, even if you're using the fiction  
 20 of Ex parte --

21 JUSTICE SOTOMAYOR: But we use -- we don't  
 22 bring the State in; we bring a State official who is  
 23 violating a Federal law.

24 MR. GETCHELL: But this Court has always  
 25 recognized that there is a large sense in which that's a

1 fiction and it's just something that we have to tolerate  
2 in order to have a dual system of -- of sovereignty.

3 JUSTICE SCALIA: So your argument is really  
4 -- really is a sovereign immunity argument. You're  
5 saying that the waiver of sovereign immunity, unless it  
6 explicitly includes a waiver to be sued in Federal  
7 courts, applies only in State courts -- okay -- and that  
8 that limitation should not be evaded by applying Ex  
9 parte Young to a suit in Federal court where the suit is  
10 by another State agency.

11 MR. GETCHELL: That is precisely my view.

12 JUSTICE SCALIA: So sovereign immunity is  
13 part of your argument, but --

14 MR. GETCHELL: It -- well, it's -- I think  
15 it's all that's really appropriately before this Court,  
16 because, again, we're up here on an interlocutory appeal  
17 where the decision below in the Fourth Circuit by Judge  
18 Wilkinson is premised entirely on sovereign immunity.

19 JUSTICE BREYER: Right. Now, explain --  
20 this is good because that's very helpful to me -- the  
21 exact statement that Justice Scalia made, and you said  
22 yes, that's exactly right.

23 And then it is the case that a citizen of  
24 the State could come into Federal court and sue the  
25 State official under Ex parte Young, but you say -- but

1 the agency of the State can't do it, even though they  
2 have State litigating authority. And the reason that  
3 the latter is more injurious of the dignity interests of  
4 the State than the former is --

5 MR. GETCHELL: One, the State is being  
6 pitted against itself. If you look at the very caption  
7 in this case, VOPA sued the State officials in the name  
8 of the Commonwealth.

9 Secondly, there's a -- to the extent there's  
10 any authority, we have Ex parte Young here that gives  
11 rights to citizens, and we have a lot of cases that  
12 resulted most recently in Ysursa, in which it was  
13 recognized that the general rule is that subordinate  
14 parts of States, subordinate State authorities, have no  
15 constitutional privileges and immunities that they can  
16 assert against their creator.

17 And if you wanted to know whether or not Ex  
18 parte Young should be extended into this area, it seems  
19 to me that the previous expectation would have been that  
20 the Ysursa tradition would have said, no, we don't want  
21 to extend this into this area.

22 JUSTICE KENNEDY: Are there other areas --  
23 and I can't come up with the name of the case. It was  
24 suggested by counsel, your friend, in the -- in his  
25 opening argument.

1           I thought there were cases in which a  
2   subdivision is not -- a political subdivision of a State  
3   is not allowed to build a dam by State law, and yet it  
4   can go to the Federal Government, get a license, and  
5   build the dam anyway and just bypass the restrictions  
6   put upon its parent. The agent has more powers than the  
7   principal gives it because it relies on Federal law.

8           MR. GETCHELL: I don't know the case. And I  
9   don't believe anybody has cited as a principal case a  
10   decision of this Court that would say that.

11           Now, a State can do anything it -- it wanted  
12   to in terms of waiving its sovereign immunity.

13           JUSTICE KENNEDY: In -- in this case, could  
14   Virginia sue VOPA in Federal court?

15           MR. GETCHELL: I don't think -- I don't  
16   think it appropriately could.

17           JUSTICE KENNEDY: You think it could or  
18   could not?

19           MR. GETCHELL: I do not think it  
20   appropriately could. I don't think parts of the State  
21   can sue other parts of the State in Federal court.

22           JUSTICE KENNEDY: Well, it would be the  
23   parent suing the -- the subsidiary, and -- and VOPA is  
24   not the State.

25           MR. GETCHELL: VOPA is -- is part of the



1 State for purposes of sovereign immunity analysis, I  
2 would have thought.

3 But if somebody tried to get a personal  
4 recovery -- I mean, VOPA employees are ordinary State  
5 employees. I presume they're subject to the Tort Claims  
6 Act, so it is -- it is a State agency. But I don't know  
7 why the involuntary suing of the State in Federal court,  
8 which I think raises these traditional sovereignty  
9 dignity interests, would be reciprocal.

10 I mean, if for some strange reason the State  
11 wanted to sue VOPA, I don't know what the answer would  
12 be, because it may be they waived all their interests if  
13 they tried to do that.

14 But I think that the -- that the practical  
15 problem for this Court is that there's no limit.  
16 There's no practical principle limit to what's being  
17 argued here. And so we set up this intramural political  
18 contest in Federal court as a matter of course. And I  
19 think, doctrinally, that it is clear that this is an  
20 extension of *Ex parte Young*, beyond dispute, and I don't  
21 think it ought to be extended without doing a federalism  
22 inquiry. And I think if you do a federalism inquiry,  
23 you ask the Hans question: Is -- would this have been  
24 regarded as anomalous and unheard-of at the founding?  
25 And I don't think there's --

1 JUSTICE GINSBURG: The bottom line, then, is  
2 to -- to restrict Congress's choice. Congress wants to  
3 have an entity superintend this program for disabled  
4 people. So the instruction we would like to give  
5 Congress is: Congress, if you want Federal courts to be  
6 able to enforce the Federal right, then you have to set  
7 it up as an agency, as a private agency. You can't  
8 give -- Congress, you can't give the States a choice  
9 whether they'd rather do it through private or  
10 public organizations.

11 MR. GETCHELL: I don't think so, for two  
12 reasons. One is --

13 CHIEF JUSTICE ROBERTS: I'm sorry. I don't  
14 think so -- what? You don't think Congress --

15 MR. GETCHELL: I don't think that -- I think  
16 Congress could have, under traditional waiver authority,  
17 under the spending power, have said: If you want to  
18 take the money, we're making a clear statement, you have  
19 to waive your sovereign immunity and be sued in State --  
20 I mean, Federal court. That didn't happen.

21 Also, let's not overlook the fact that the  
22 Secretary has an administrative remedy in withholding  
23 the funds, and when this Court was faced with the  
24 question of whether or not to extend *Ex parte Young* in  
25 the Seminole Tribe, the answer was: No, we're not going

1 to do it, because there is an alternative remedy.

2 JUSTICE SCALIA: So you -- you would  
3 acknowledge that if a State knew when it took the money  
4 that it was -- and when it created a State agency to  
5 administer the program, that it was letting itself open  
6 to suit in Federal court under an Ex parte Young theory,  
7 then everything would be okay?

8 MR. GETCHELL: Well, no, because I don't  
9 think it ever -- it would ever.

10 JUSTICE SCALIA: Well, that would be a  
11 waiver of --

12 MR. GETCHELL: No, but I would --

13 JUSTICE SCALIA: -- whatever sovereignty  
14 immunity interest it had, wouldn't it?

15 MR. GETCHELL: If Congress -- Congress  
16 conditioned receiving the money on waiver, then I  
17 suppose it --

18 JUSTICE SCALIA: Well, Congress could, but  
19 if they knew it in this instance when they accepted the  
20 money, you wouldn't have a case, would you?

21 MR. GETCHELL: The law -- if -- if under  
22 traditional waiver doctrine, it had been done right, no,  
23 we wouldn't have a case. But remember, the law of the  
24 case in this interlocutory appeal is that there was no  
25 waiver. That waiver was -- was determined below and not

1     appealed.

2                     JUSTICE SCALIA:   That's a good point.

3                     MR. GETCHELL:   And -- and so under -- under  
4     the circumstances here, we have a fairly peculiar  
5     specialized situation, but -- but deciding in favor of  
6     the Petitioners I think is fraught with peril and is  
7     doctrinally unprecedented and improper, and we would ask  
8     that the decision of the Fourth Circuit be affirmed.

9                     CHIEF JUSTICE ROBERTS:   Thank you, counsel.

10                    Mr. Galanter, have you 3 minutes remaining.

11                    REBUTTAL ARGUMENT OF SETH M. GALANTER

12                    ON BEHALF OF THE PETITIONER

13                    MR. GALANTER:   I have three points for those  
14     3 minutes.   First, we don't think that a State AG or a  
15     State agency could sue a governor if State law  
16     prohibited it.   The question of capacity to sue, the  
17     power to sue, is one of State law.   What we're saying  
18     here is that if a suit could go forward between two  
19     State agencies -- excuse me -- between a State agency  
20     and State officials in State court, that if that case  
21     involved a Federal issue, it can be heard in Federal  
22     court if the other requirements of Article III and Ex  
23     parte Young are being met.

24                    Second, there was some suggestion that Ex  
25     parte Young is only about citizens.   But this Court's

1 applied Ex parte Young to Indian tribes, allowing them  
2 to sue State officials. It's allowed foreign countries  
3 to use Ex parte Young to sue State officials. The only  
4 -- and the Respondents concede that political  
5 subdivisions, which can also be eliminated at will by  
6 the State, could use Ex parte Young.

7 JUSTICE BREYER: Have you found any case --  
8 are there a lot, a few, none -- where one State agency  
9 at a State level sues another in Federal court, period?  
10 Say they have "arising under" jurisdiction.

11 MR. GALANTER: No. There aren't a lot of  
12 them because --

13 JUSTICE BREYER: Well, are there any?

14 MR. GALANTER: Other than in this protection  
15 advocacy system --

16 JUSTICE BREYER: None?

17 MR. GALANTER: None.

18 JUSTICE BREYER: See, nagging at me is some  
19 kind of Article III problem.

20 MR. GALANTER: Well, but --

21 JUSTICE BREYER: And maybe there is none. I  
22 don't know. It's -- there are none, though? None?

23 MR. GALANTER: Well, but that's because  
24 Congress doesn't usually vest rights in --

25 JUSTICE BREYER: No, no. It wouldn't have

1 to. All -- they could get into all kinds of arguments  
2 about EPA and all kinds of Federal rights with each  
3 other. I would think.

4 MR. GALANTER: I -- I don't think that's  
5 correct.

6 JUSTICE BREYER: Yes.

7 MR. GALANTER: I think that most of the  
8 time, when a State is involved in a dispute with another  
9 State, it's about State law. This is rather unique in  
10 that respect.

11 And that brings me to the third point, which  
12 is this notion of waiver. Now, we're not arguing here  
13 that they've waived their sovereign immunity. What  
14 we're claiming is that they don't have sovereign  
15 immunity to these injunctive suits against the State  
16 officials. We're not seeking damages, and we haven't  
17 named the State in its own name. But what we are  
18 suggesting is that -- that they -- it was the natural  
19 consequence, as this Court decided in *Frew*, that when  
20 you, you know, accept the Federal money and you are  
21 bound by Federal duties and that the -- the entity that  
22 you give the Federal right to has a Federal -- has a  
23 right to sue, that the Federal issues will be litigated  
24 in Federal court.

25 And I would say particularly that here

1 just -- of course, Virginia renews every year to take  
2 the Federal money, but when it last amended the Federal  
3 statute -- or the State statute to create VOPA in its  
4 current structure, there were existing Ex parte Young  
5 suits against State officials.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
7 I have one question of curiosity. You said in your  
8 opening argument that 49 of 50 States limit in some way  
9 the executive's power in this area.

10 MR. GALANTER: I --

11 CHIEF JUSTICE ROBERTS: What's the one  
12 State?

13 MR. GALANTER: I'm drawing that from the --  
14 Indiana's amicus brief, and I believe they identified  
15 New Jersey as the State that has a unitary executive.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 The case is submitted.

18 (Whereupon, at 12:01 p.m., the case in the  
19 above-entitled matter was submitted.)

20

21

22

23

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25

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