No. 00-1597

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VICKI L. McGARRY,

Plaintiff

CHARLOTTE KLINGER, CHARLES WEHNER, SHEILA BRASHEAR,

Plaintiffs-Appellants

v.

DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This appeal involves the ability of individuals to seek judicial enforcement of Title II of the Americans with Disabilities Act (ADA) against state officials for injunctive relief. The Attorney General has authority to enforce Title II. See 42 U.S.C. 12133. However, because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that the ADA may be enforced in federal court by private parties acting as "private attorneys general" to the fullest extent permitted by the Act and the Constitution.

STATEMENT OF THE ISSUES

The United States will address the following question:

Whether an individual may sue a state official in his official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act.

STATEMENT OF THE CASE

Three individuals with disabilities who use removable parking placards (for which they are charged $2 a year) brought suit against the Director of the Department of Revenue, alleging that the fee violated regulations implementing Title II of the Americans with Disabilities Act (ADA) (J.A. 1-3). They sought reimbursement of fees previously paid, injunctive relief prohibiting future charges for the placards, and attorneys fees (J.A. 10-13).

On cross-motions for summary judgment, the district court entered judgment for the plaintiffs (J.A. 371-383 (reported at 7 F. Supp. 2d 1022)). It held that the ADA validly abrogated the defendant's Eleventh Amendment immunity and that the fee violated Title II's prohibition on "plac[ing] a surcharge on a particular individual with a disability * * * to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual * * * with the nondiscriminatory treatment required by the Act or [these regulations]." 28 C.F.R. 35.130(f).

After this Court held that the ADA did not validly abrogate States' Eleventh Amendment immunity, see Alsbrook v. City of

Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 120 S. Ct. 1003 (2000), cert. dismissed, 120 S. Ct. 1265 (2000), defendant moved to dismiss the action on Eleventh Amendment grounds (J.A. 621-622). Plaintiffs responded by acknowledging that Alsbrook barred their claims for restitution, but arguing that their claims for injunctive relief fell within the Ex parte Young exception to Eleventh Amendment immunity (R. 128 at 2-3; see also J.A. 672-673). In response, defendant argued that Title II only authorizes a suit against a "public entity" and thus a state official was not an appropriate defendant under the statute (R. 130 at 2-3). Plaintiffs replied that by defining the term "public entity" to include "instrumentality of a State," Congress intended to cover state officials, and noted that many courts had permitted Title II actions to be brought against state officials in their official capacities (R. 131 at 2-4).

On December 9, 1999, the district court dismissed the action for lack of subject matter jurisdiction (J.A. 680-682). It held it was "compelled" by Alsbrook to dismiss the action because of the Eleventh Amendment (J.A. 681). It declined to allow the action to proceed under the Ex parte Young exception because, it held, Title II provides "exclusive remedies within the statute" that do not allow for the use of Ex parte Young (J.A. 681). It also stated that Alsbrook "held that Congress lacked power to apply the ADA to the states" (J.A. 681). Plaintiffs filed a motion for reconsideration, which the court denied on January 31, 2000 (J.A. 692-694). This timely appeal followed (J.A. 695).

SUMMARY OF ARGUMENT

This case should be held in abeyance until the Supreme Court issues its opinion in University of Alabama Board of Trustees v. Garrett, No. 99-1240, which will definitively resolve the validity of the abrogation in the Americans with Disabilities Act (ADA). If this Court elects to proceed before Garrett is decided, the Eleventh Amendment is no bar to this action proceeding on the claim for injunctive relief against defendant, a state official sued in his official capacity. Under the doctrine of Ex parte Young, a state official sued for prospective relief to enjoin a continuing violation of federal law is not entitled to invoke the State's sovereign immunity.

In enacting Title II of the ADA, Congress intended to preserve suits against state officials in their official capacity. The language of the statute specifically incorporates the remedial scheme of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which in turn incorporated the remedial scheme of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Both Title VI and Section 504 have consistently been found (by this Court and others) to permit suits against government officials in their official capacities for injunctive relief and Congress was aware of that judicial interpretation. Moreover, the legislative history of the ADA confirms Congress' intent to make available the full panoply of remedies. To hold otherwise would cast aside clear precedent of this and every other circuit to address the issue and would deprive individuals

of an established tool to vindicate federal rights without intruding on States' sovereign immunity.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE CLAIM UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT FOR INJUNCTIVE RELIEF AGAINST THE DEFENDANT, A STATE OFFICIAL SUED IN HIS OFFICIAL CAPACITY

The district court dismissed this complaint on the ground that defendant was entitled to Eleventh Amendment immunity. That decision misunderstood the nature of Eleventh Amendment immunity and this Court's holding in Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 120 S. Ct. 1003 (2000), cert. dismissed, 120 S. Ct. 1265 (2000). As such, it failed to acknowledge that the "principle of sovereign immunity as reflected in [the Supreme Court's] jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States. Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause." Alden v. Maine, 119 S. Ct. 2240, 2268 (1999).

The Supreme Court has granted a writ of certiorari to address whether the Americans with Disabilities Act (ADA) validly abrogates Eleventh Amendment immunity in University of Alabama Board of Trustees v. Garrett, No. 99-1240, 2000 WL 122158 (Apr. 17, 2000). Although the Eleventh Amendment is no bar to plaintiffs' suit for injunctive relief against a state official in his official capacity regardless of whether the abrogation is valid, this Court should hold this appeal until Garrett is

resolved. For if Garrett holds that the ADA contains a valid abrogation, this Court will not need to resolve the issue addressed by the district court regarding the proper interpretation of Title II's remedial provisions. Moreover, plaintiffs' suit will be able to proceed for all the relief they initially sought, including the retrospective relief that is not currently available under Eighth Circuit precedent. Nonetheless, should this Court elect to proceed in advance of the Supreme Court's decision in Garrett, we explain why the district court's holding was erroneous.

A. The Eleventh Amendment Is No Bar To Private Suits Against State Officials To Enjoin Future Violations Of Federal Law

The Eleventh Amendment bars private suits against a State sued in its own name, absent a valid abrogation by Congress or waiver by the State. See Alden, 119 S. Ct. at 2267. In Alsbrook, this Court held that Congress' abrogation of States' Eleventh Amendment immunity could not validly be based on its power under Section 5 of the Fourteenth Amendment, and thus a private plaintiff's "ADA claim [against a State] is barred by the Eleventh Amendment." 184 F.3d at 1012.[1] And no one in this case has suggested defendant waived its Eleventh Amendment immunity to

[1] The United States intervened in Alsbrook to defend the constitutionality of the abrogation and successfully obtained a writ of certiorari from the Supreme Court before the case settled. We continue to believe that Alsbrook's holding was incorrect, but recognize that this panel is bound to follow it absent intervening Supreme Court precedent to the contrary.

this suit.[2] Thus, if this private suit had been brought against the State in its own name, under current Eighth Circuit precedent it would be barred by the State's Eleventh Amendment immunity.

However, it does not follow that States no longer need to comply with the ADA or that private parties cannot seek relief in federal court. The Supreme Court reaffirmed in Alden that the Eleventh Amendment immunity does not authorize States to violate federal law. "The constitutional privilege of a State to assert its sovereign immunity * * * does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." 119 S. Ct. at 2266. It was to reconcile these very principles — that States have Eleventh Amendment immunity from private suits, but that they are still bound by federal law — that the Supreme Court adopted the rule of Ex parte Young. Id. at 2267.[3]

Ex parte Young, 209 U.S. 123 (1908), held that when a state

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[2] Compare In re Rose, 187 F.3d 926, 930 (8th Cir. 1999) (State waived immunity by submitting proofs of claims in bankruptcy case); Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 752-753 (8th Cir.) (State waived immunity by accepting federal funds under Individuals with Disabilities Education Act), vacated in other part for reh'g en banc sub. nom. Jim C. v. Arkansas Dep't of Educ., 197 F.3d 958 (8th Cir. 1999); Entergy, Arkansas, Inc. v. Nebraska, No. 99-2376, 2000 WL 371136, at *7-*8 (8th Cir. Apr. 12, 2000) (State waived immunity by entering into interstate compact).

[3] The Eleventh Amendment is also no bar to the United States suing the State. See Alden, 119 S. Ct. at 2267 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); id. at 2269 (noting that United States could sue a State to recover damages under the Fair Labor Standards Act). The United States is not a party to this action, however, and takes no position on the merits.

official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is acting ultra vires and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 664, 667-668 (1974). By limiting relief to prospective injunctions of officials, the Court avoided a judgment directly against the State but, at the same time, prevented the State (through its officials) from continuing illegal action.

The Ex parte Young doctrine has been described as a legal fiction, but it was adopted by the Supreme Court almost a century ago to serve a critical function in permitting federal courts to bring state policies and practices into compliance with federal law. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but 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 Alden, 119 S. Ct. at 2268 ("Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.").

This Court recognized the applicability of Ex parte Young in Bradley v. Arkansas Department of Education, 189 F.3d 745 (8th Cir.), vacated in other part for reh'g en banc sub. nom. Jim C.

v. Arkansas Dep't of Educ., 197 F.3d 958 (8th Cir. 1999). In that case, even after holding that the Individuals with Disabilities Education Act did not validly abrogate the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment (another holding with which we respectfully disagree), this Court held that "Ex parte Young permits a private party to receive prospective injunctive relief in federal court against a state official, even if the Eleventh Amendment otherwise protects the state and its officials from being sued in federal court." 189 F.3d at 753; see also Entergy, Arkansas, Inc. v. Nebraska, No. 99-2376, 2000 WL 371136, at *8 (8th Cir. Apr. 12, 2000). Thus, the Eleventh Amendment is no bar to a suit proceeding against a state official for prospective injunctive relief.

B. State Officials In Their Official Capacities Are Appropriate Defendants In An Action To Enforce Title II

Defendant argued below (R. 130 at 2-3), and the district court held (J.A. 681), that a suit against a state official for injunctive relief to cure a continuing violation of federal law is not available under Title II because Congress only intended States, and not their officials, to be named as defendants. This is a question of statutory construction, which this Court reviews de novo.

The district court relied on the secondary holding of Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), in which the Court held that "Congress did not intend" to "authorize federal jurisdiction under Ex parte Young" to enforce the Indian

Gaming Regulatory Act (IGRA). Id. at 75 n.17. IGRA provided that certain forms of gaming were permissible on Indian lands only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. 2710(d)(1). IGRA provided that upon receiving a request from an Indian tribe to enter into negotiations for such a compact, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

The Tribe could sue the State to enforce the State's obligation to "negotiate in good faith" only after 180-days had elapsed from the Tribe's request. 25 U.S.C. 2710(d)(7)(A)(i) & (B)(i). In such a suit, the district court's authority was strictly limited. If the district court concluded that the State had failed to negotiate in good faith, it could "order the State and the Indian Tribe to conclude such a compact within a 60-day period," 25 U.S.C. 2710(d)(7)(B)(iii), but failure to comply was not subject to contempt sanctions, see 517 U.S. at 74-74. Instead, IGRA required the court to appoint a mediator to which the parties submitted their "last best offer for a compact." 25 U.S.C. 2710(d)(7)(B)(iv). If the mediator was unsuccessful in achieving agreement between the parties, the mediator informed the Secretary of Interior, who was empowered to authorize gaming even in the absence of a compact. 25 U.S.C. 2710(d)(7)(B)(vii).

The Court in Seminole Tribe stressed that the Eleventh Amendment did not bar an action against a state official to enforce IGRA. See 517 U.S. at 75. It held, instead, that as a

matter of statutory construction, "Congress did not intend" to permit suits against state officials under IGRA. Id. at 75 n.17. The Court relied on three factors in determining that Congress did not intend to permit a suit against a state official in his official capacity: (1) the duty imposed by IGRA "repeatedly refer[s] exclusively to 'the State'" (ibid.); (2) the duty imposed by IGRA — to negotiate to enter into a "a compact with another sovereign — stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers" (ibid.); and (3) the "carefully crafted and intricate remedial scheme" Congress enacted in IGRA limited the remedies to a particular "modest set of sanctions" that would have been made "superfluous" if recourse to Ex parte Young were available (id. at 73-75).

In Title II, unlike IGRA, Congress did not manifest an intent to bar a suit against state officials in their official capacities for injunctive relief. In holding to the contrary, the district court misunderstood Title II's duties and remedies.

1. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. While it is true that the text prohibits "public entit[ies]" from discriminating, that duty extends to the officials who are acting for the entity, for a public entity can only act through its

officials. For example, if a State is obliged under Title II to permit a person who is blind to enter a public building with her guide dog, then it would be unlawful for a state official to promulgate a rule to the contrary, or for a state employee to enforce that rule. For both "[t]he States and their officers are bound by obligations imposed * * * by federal statutes that comport with the constitutional design." Alden, 119 S. Ct. at 2266 (emphasis added).

If a lawsuit were brought to enjoin that state policy or practice, it would be immaterial for purposes of injunctive relief whether the individual sued the State itself or the official or employee in their official capacities. Under rules of equity, if the State was sued and enjoined, all its officers and agents would be automatically covered by the injunction. See Fed. R. Civ. P. 65(d) (every injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys"). If an official sued in his official capacity was the defendant, an injunction entered against him likewise binds other government officials as if the suit had been brought against the State. See ACLU v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999); Hendrickson v. Griggs, 672 F. Supp. 1126, 1142 n.26 (N.D. Iowa 1987).

The longstanding rule that a suit against an official in his or her official capacity is the same as a suit against the State (except for purposes of sovereign immunity) is based on this very understanding. "Official-capacity suits * * * 'generally

represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 165 (1985); see also Hafer v. Melo, 502 U.S. 21, 25 (1991). Thus, by definition, officials in their official capacities are no more free to violate Title II than the entity itself.[4]

2. The Court in Seminole Tribe relied on the unique nature of the duty required by IGRA — to negotiate and enter into a treaty — in concluding that Congress intended the State — and

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[4] Title II's definition of "public entity" supports this view. Title II defines a "public entity" to include a State or local government and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(B). The terms "agency" and "instrumentality" are not defined. A suit against a state official in his official capacity can fairly be described as one in which the official is "being sued not as a person, but as an instrumentality of state government." United States v. Ferrara, 54 F.3d 825, 832 (D.C. Cir. 1995) (Silberman, J., concurring). Indeed, under the Foreign Sovereign Immunity Act, courts have held that the term "agency or instrumentality of a foreign state" includes a government official sued in his official capacity. See Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101-1102 (9th Cir. 1990); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999). The Ninth Circuit reasoned that "[t]he terms 'agency,' 'instrumentality,' * * * 'entity,' * * * while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals. * * * The most that can be concluded from the preceding discussion is that the Act is ambiguous as to its extension to individual foreign officials." 912 F.2d at 1101.

only the State — to be bound by IGRA. Title II does not deal with affirmative steps involving formal relations between sovereigns. This case, in any event, involves only a standard prohibitory injunction to stop a state official from doing something (charging money for placards) that plaintiffs claim violated federal law. See Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 256 (8th Cir. 1995) (distinguishing an order to "compel negotiations" from an order that "simply prohibited [state officials] from doing an act which [they] ha[ve] no legal right to do" in order to "prevent future violations" of federal law); James Leonard, A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores, 41 Ariz. L. Rev. 651, 715-716 n.541 (1999) ("[T]he ADA is fundamentally different from IGRA. Enforcement of ADA provisions can normally be accomplished by ordering a single public official, or no more than a few, to perform a statutory duty, such as not applying a discriminatory policy. Such simple actions are quite different from the relatively complicated tasks of negotiating agreements with Indian tribes that were at issue in Seminole Tribe. Hence there is no reason to assume that Congress would not have intended for injunctive relief to run against individual officers.").

3. In contrast to IGRA, the remedial scheme of Title II does not identify a "State" as the only defendant in a lawsuit. To the contrary, Title II does not identify who the defendants

should be. Instead, it provides that the "remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II]." 42 U.S.C. 12133. Section 794a, in turn, provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., shall be available to any person aggrieved by any act or failure to act." 29 U.S.C. 794a(a)(2).

Title VI does not contain an express private cause of action that identifies potential defendants; instead, the courts have implied one. See Rodgers v. Magnet Cove Pub. Schs., 34 F.3d 642, 644 (8th Cir. 1994); Cannon v. University of Chicago, 441 U.S. 677, 696-697, 699-701 (1979). In cases decided prior to the enactment of the ADA, courts permitted suits under Title VI to be brought against government officials in their official capacities. For example, in United States v. Alabama, 791 F.2d 1450, 1457 (11th Cir. 1986), the court held "that injunctive relief against the Board itself [under Title VI] is so barred [by the Eleventh Amendment], but that such relief against Board members in their official capacities is permitted."[5]

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[5] See also, e.g., Bazemore v. Friday, 478 U.S. 385 (1986); Lau v. Nichols, 414 U.S. 563 (1974); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987) ("It would appear initially that the Superintendent might be held accountable for the appropriate declaratory and injunctive relief under Ex Parte Young, 209 U.S. 123 (1908), and its progeny.").

The same was true under Section 504. In addition to a number of Supreme Court cases in which Section 504 actions were brought against government officials in their official capacities,[6] courts of appeals held, prior to the enactment of the ADA, that the implied private right of action under Section 504 could be enforced against state officials in their official capacities, noting that they were relying on the doctrine of Ex parte Young to avoid States' Eleventh Amendment immunity.[7]

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[6] See Alexander v. Choate, 469 U.S. 287 (1985); Honig v. Students of Cal. Sch. for the Blind, 471 U.S. 148 (1985); Smith v. Robinson, 468 U.S. 992 (1984); Campell v. Kruse, 434 U.S. 808 (1977).

[7] See, e.g., Lussier v. Dugger, 904 F.2d 661, 670 n.10 (11th Cir. 1990) ("of course, the Eleventh Amendment does not bar Lussier's claims for equitable relief under § 794 against defendants named in this case in their official capacities" (citing Ex parte Young)); Brennan v. Stewart, 834 F.2d 1248, 1255, 1260 (5th Cir. 1988) (discussing Ex parte Young at length); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981) (citing Ex parte Young), cert. denied, 455 U.S. 946 (1982). Other cases, while not making an express holding, routinely adjudicated Section 504 suits brought against government officials in their official capacities. See, e.g, Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988); Disabled In Action v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied, 485 U.S. 989 (1988); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987); Parks v. Pavkovic, 753 F.2d 1397 (7th Cir.), cert. denied, 473 U.S. 906 (1985); Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984); Hurry v. Jones, 734 F.2d 879 (1st Cir. 1984); Plummer v. Branstad, 731 F.2d 574 (8th Cir. 1984); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984); Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983); Joyner v. Dumpson, 712 F.2d 770 (2d Cir. 1983); Kentucky Ass'n for Retarded Citizens, Inc. v. Conn, 674 F.2d 582 (6th Cir.), cert. denied, 459 U.S. 1041 (1982); S-1 v. Turlington, 635 F.2d 342 (5th Cir.), cert. denied, 454 U.S. 1030 (1981); Baker v. Bell, 630 F.2d 1046 (5th Cir. 1980); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).

This Court reached the same result in Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982). Plaintiff in Miener sued "[n]umerous individuals and political bodies and agencies" for violations of Section 504. Id. at 972. She sought "compensatory educational services to overcome the effects of any past denial of special educational services," as well as compensatory damages. Ibid. This Court held that "individual plaintiffs have a private cause of action under Section 504 of the Rehabilitation Act" and that "damages are awardable under § 504." Id. at 973, 978. This Court held that there was no bar to the award of relief against "the Special School District of St. Louis County, the Board of Education of the Special School District or officials of the Special School District who are sued in their official capacity." Id. at 980 (emphasis added). It thus "reverse[d] the dismissal of appellant's cause of action for damages under the Rehabilitation Act against these defendants," including against "its officials." Id. at 983. It held that officials of state departments were entitled to the State's Eleventh Amendment immunity only because the relief requested (damages and "compensatory services") were not "prospective, equitable relief [that] has long been recognized as an exception to eleventh amendment immunity." Id. at 982 (citing Ex parte Young). Thus, this Court held in Miener that an action could proceed against government officials sued in their official capacities. See also United Handicapped Fed'n v. Andre, 622 F.2d 342, 348 (8th Cir. 1980) (awarding attorneys fees against

government officials "in their official capacities only" for suit brought under Section 504).[8]

Congress, of course, is assumed to know the law and is generally deemed to have incorporated existing judicial interpretations when it adopts a preexisting remedial scheme. See Bragdon v. Abbott, 524 U.S. 624, 645 (1998); Cannon, 441 U.S. at 697-698. By incorporating the "remedies, procedures, and rights" of Title VI and Section 504, Congress incorporated the right to sue government officials in their official capacities.

4. This Court has previously explained that one of the critical factors in the Supreme Court's decision in Seminole Tribe not to permit the action to proceed under Ex parte Young was that "Congress had prescribed a detailed remedial scheme for enforcing [IGRA], with significantly fewer remedies than those available under Ex parte Young, thus signaling Congress's intent to limit relief to that available under the statute." Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 432 (8th Cir. 1997); see

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[8] After the enactment of the ADA, this Court has continued to treat government officials sued in their official capacities as appropriate defendants in Title VI and Section 504 actions. See Fuller v. Rayburn, 161 F.3d 516, 518 (8th Cir. 1998) ("Mr. Fuller's [Title VI] claims against the Board of Curators, and individual board members and the University President in their official capacities, were essentially claims against the University"); Gorman v. Bartch, 152 F.3d 907, 914, 916 (8th Cir. 1998) (Section 504 "[c]laims against individuals in their official capacities are equivalent to claims against the entity for which they work; * * * the claims against the defendants in their official capacities must be remanded for further development."); see also Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 609 n.1 (8th Cir. 1999) (permitting suit to proceed against government officials in their official capacities under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., which also incorporates the remedies of Title VI).

also Marie O. v. Edgar, 131 F.3d 610, 615-616 (7th Cir. 1997) (describing the existence of limited remedial measures as "one of the main reasons that the Court refused to allow an Ex parte Young action"); Sandoval v. Hagan, 197 F.3d 484, 501 (11th Cir. 1999) (permitting Ex parte Young suit to proceed because "Title VI also contains no express limitations on the remedial powers of federal courts, unlike the IGRA").

In enacting Title II, Congress did not provide "significantly fewer remedies than those available under Ex parte Young." To the contrary, Congress expressly incorporated the remedies of Section 504 and, by extension, Title VI. See 42 U.S.C. 12133; Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998). In Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992), the Court held that the remedies available under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which also incorporates the remedies of Title VI, were governed by the "general rule" under which "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Id. at 70-71. This Court has held that the holding of Franklin applies to Section 504 as well. See Rodgers, 34 F.3d at 644.

While there was extensive dispute in the courts prior to Franklin about the availability of compensatory damages under these statutes, it was never disputed that a prospective injunction was an appropriate remedy for the implied right of

action. Cf. Califano v. Yamasaki, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.").

This is consistent with Title II's legislative history, which states that Congress intended the "full panoply of remedies" to be available. H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 98 (1990); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 52 (1990). Indeed, the House Judiciary Committee Report cited as an example of the remedies available under Title II this Court's decision in Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), which held that an implied private right of action was available under Section 504 where officials of a school district were sued in their official capacities. See H.R. Rep. No. 485, Pt. 3, supra, at 52 n.62; see also 136 Cong. Rec. 11,471 (1990) (Rep. Hoyer) (same).[9]

[9] The district court's reliance on Alsbrook on this point was erroneous. Alsbrook identified a "congressional intent to foreclose resort" to the remedies of 42 U.S.C. 1983 in enforcing the rights of Title II. 184 F.3d at 1011. Alsbrook has no application to the distinct question raised in this appeal as to what remedies Congress intended to provide under Title II itself.

5. We are aware of no court of appeals after the Seminole Tribe decision that has extended the bar to suing a state official in his official capacity to any statute other than IGRA. To the contrary, even after Seminole Tribe courts of appeals have expressly held that individuals could rely on Ex parte Young to enforce Title II, as well as Section 504 and Title VI, against state officials. See J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999) (Title II and Section 504); Nelson v. Miller, 170 F.3d 641, 646-647 (6th Cir. 1999) (same); Armstrong v. Wilson, 124 F.3d 1019, 1025-1026 (9th Cir. 1997) (same), cert. denied, 524 U.S. 937 (1998); Sandoval v. Hagan, 197 F.3d 484, 500-501 (11th Cir. 1999) (Title VI).[10]

Finally, while this Court has not addressed the precise argument raised by defendant in the district court, previous opinions have accepted that government officials in their official capacities are appropriate defendants under Title II. Indeed, in Layton v. Elder, 143 F.3d 469 (8th Cir. 1998), this Court reversed a district court's decision not to award injunctive relief for a continuing violation of Title II. In doing so, it held that "[w]e find no error in the [district] court's ruling" that a suit brought against "Ted Elder, as County

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[10] Indeed, courts of appeals have generally confined the holding of Seminole Tribe to the unique confluence of factors that occurred in that case. See, in addition to the cases in the text above, Ellis v. University of Kansas Med. Ctr., 163 F.3d 1186, 1197-1198 (10th Cir. 1998); Marie O. v. Edgar, 131 F.3d 610, 615-616 (7th Cir. 1997); Sofamor Danek Group, Inc. v. Brown, 124 F.3d 1179, 1185-1186 (9th Cir. 1997); Natural Resources Defense Council v. California Dep't of Transp., 96 F.3d 420, 424 (9th Cir. 1996).

Judge of Montgomery County, Arkansas" could be "construed * * * as an action against the county pursuant to Kentucky v. Graham, 473 U.S. 159 (1985)." Id. at 470 n.3.

Similarly, in Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998), while affirming the dismissal of a Title II claim against the officials in their individual capacities, this Court reversed the dismissal of the Title II claim against officials in their official capacities. After noting that "defendants are representatives of the Kansas City police establishment, a department of local government and a public entity," id. at 913, and distinguishing between individual capacity suits and suits brought against "individuals in their official capacities [which] are equivalent to claims against the entity from which they work," id. at 914, this Court remanded "the official capacity claims against Bartch, Cleaver, Headley, Boley, Daniels, Ralls, and Becker for further proceedings," id. at 916 (footnote omitted). Cf. also Olmstead v. L.C., 119 S. Ct. 2176, 2182 (1999) (adjudicating on the merits Title II suit against state official in official capacity for injunctive relief).

The Supreme Court has "frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 293 (1997) (O'Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in judgment). As there is no evidence that Congress intended to preclude a Title II suit proceeding against a state official in his official capacity, the

district court erred in dismissing the injunctive claims in this suit on the grounds of Eleventh Amendment immunity.

CONCLUSION

This Court should hold this case pending the decision of the Supreme Court in University of Alabama Board of Trustees v. Garrett, No. 99-1240. In the alternative, the judgment of the district court dismissing plaintiffs' claims for injunctive relief should be reversed and the case remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Circuit Rule 28A(c), the attached amicus brief was prepared using WordPerfect 7 and contains 6154 words and 661 lines of monospace type. In compliance with Circuit Rule 28A(d), a 31/2 inch computer diskette containing the full text of the brief is included. This diskette was scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

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