No. 01-35950

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRANDA B; HANNAH C.; JAMIE G.; JONG K; JOANNE K.; JAMES R.; JAMES R.; GEORGE P.; ANTHONY G.; JUAN S.; LEONARD P., individually and on behalf of all others similarly situated,

Plaintiffs - Appellees

v.

JOHN KITZHABER, Governor of the State of Oregon; OREGON DEPARTMENT OF HUMAN SERVICES; BOB MINK, Director of the Oregon Department of Human Services,

Defendants - Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether conditioning the receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for suits under Section 504 of

the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

3. 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 and Section 504 of the Rehabilitation Act.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

2. Finding that Section 504 was not sufficient to bar discrimination against individuals with disabilities, Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such

forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5).

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" as authority for its passage of the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

3. This appeal involves a suit filed under Title II of the ADA and Section 504. 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. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2). Title II does not normally require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new

facilities must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151. Department of Justice regulations provide that, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

4. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the

nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002). Congress expressly conditioned receipt of federal funds on waiver of the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

SUMMARY OF ARGUMENT

Since the time defendants filed their notice of appeal, this Court has reaffirmed that Congress validly abrogated States' Eleventh Amendment immunity to suits under Title II of the Americans with Disabilities Act of 1990 and that Congress validly conditioned the receipt of federal financial assistance on a state agency waiving its Eleventh Amendment immunity to suits under Section 504 of the Rehabilitation Act of 1973. These holdings bind this panel.

In addition, the Eleventh Amendment is no bar to this action proceeding under Title II and Section 504 on the claims for injunctive relief against the named state officials sued in their official capacities. 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 and Section 504, Congress intended to permit suits against state officials in their official capacities. The language of the statute clearly permits such a reading. Moreover, Title II of the ADA specifically incorporates the remedial scheme of Section 504, which, in turn, incorporated the remedial scheme of Title VI of the Civil Rights Act of 1964. Both Title VI and Section 504 have

consistently been interpreted 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's intent to make available the full panoply of remedies.

ARGUMENT

I

DEFENDANTS' ARGUMENTS ABOUT THE VALIDITY OF THE FEDERAL STATUTORY PROVISIONS REGARDING THEIR ELEVENTH AMENDMENT IMMUNITY FROM SUIT UNDER TITLE II AND SECTION 504 ARE FORECLOSED BY BINDING CIRCUIT PRECEDENT

As defendants acknowledge (Def. Br. 18), after the Supreme Court's most recent decision regarding Congress's ability to abrogate States' Eleventh Amendment immunity, *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), this Court rejected States' claims of Eleventh Amendment immunity to suits under Title II of the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973. This panel is bound by these holdings. See *Hart* v. *Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court"). None of the grounds pressed by defendants permits this panel to revisit these issues.

In *Hason* v. *Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002), petition for reh'g en banc denied, 2002 WL 1371054 (June 26, 2002), this Court held that a private suit could proceed under Title II against a state agency for monetary and injunctive relief. The Court held that its prior decisions holding that Title II was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, thus authorizing Congress to abrogate Eleventh Amendment immunity, were not overruled by the Supreme Court's intervening decision in *Garrett* and remained the law of the circuit. The Court thus concluded that "the Eleventh Amendment does not bar Dr. Hason's Title II claims." *Id*. at 1171. Defendants suggest (Def. Br. 20) that *Hason*'s holding is not binding because they are not asserting that *Garrett* "overruled" those prior cases, but instead that the rationale of *Garrett* requires a "reexamination" of those same cases "and that such a reexamination necessarily must lead to a different result." Regardless of nomenclature, defendants are arguing that the Supreme Court's decision in *Garrett* justifies overruling prior panel opinions. *Hason* expressly rejected that argument and thus bars this panel from considering it.

Likewise, in *Douglas* v. *California Department of Youth Authority*, 271 F.3d 812, opinion amended, 271 F.3d 910 (9th Cir. 2001), reh'g en banc denied, 285 F.3d 1226 (2002), cert. denied, 122 S. Ct. 2591 (2002), this Court held that a private suit for monetary and injunctive relief could proceed under Section 504 against a state agency that accepted federal financial assistance because Congress had clearly conditioned the receipt of federal financial assistance on a waiver of

the agency's Eleventh Amendment immunity to suit. *Douglas* held that "Congress may exercise its spending power to condition the grant of federal funds upon the states' agreement to waive Eleventh Amendment immunity." *Id*. at 820 n.5. Examining the plain language of 42 U.S.C. 2000d-7, this Court concluded that Congress had used "clear waiver language" that "conditions the receipt of federal funds under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense." *Id.* at 820-821. "Accordingly," this Court said, "we hold that by accepting federal Rehabilitation Act funds, [the state agency] has waived its sovereign immunity under the Rehabilitation Act." *Id*. at 820. This Court reached the same result in *Armstrong* v. *Davis*, 275 F.3d 849, 878 (9th Cir. 2001), petition for cert. filed (Apr. 9, 2002) (No. 01-1501), and *Vinson* v. *Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002), petition for cert. filed (June 20, 2002) (No. 01-1878).

Defendants assert (Def. Br. 19) that *Douglas* was dictum. But the panel in *Douglas* rejected a constitutional challenge to the validity of Section 2000d-7 by "hold[ing]" that the defendant "waived its sovereign immunity under the Rehabilitation Act," *id*. at 820, and then proceeded to reach the merits. We cannot perceive how the panel's upholding the validity of Section 2000d-7 can be viewed as dictum. In any event, *Vinson* treated *Douglas* as a holding and applied it in rejecting a state agency's claim of immunity from suit. This Court, of course, is bound by *Vinson* even if, as defendants assert, *Vinson* relied on dictum in reaching its conclusion.

Even judges in this Circuit who disagree with the Eleventh Amendment holdings of *Hason*, *Douglas*, and *Vinson* recognize that these were holdings that would bind future Ninth Circuit panels. See *Vinson*, 288 F.3d at 1157 (O'Scannlain, J., dissenting) ("reluctantly acquiesc[ing]" in the panel's holding regarding the Eleventh Amendment in light of *Douglas*). Defendants' attempts to evade this Court's clear rule that panels may not overturn the decisions of other panels must be rejected.

II

SUITS UNDER TITLE II AND SECTION 504 MAY BE BROUGHT AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR PROSPECTIVE RELIEF

Defendants further assert that even if they are not entitled to Eleventh Amendment immunity to suits under Title II and Section 504, this action cannot proceed against the named state officials sued in their official capacities. To the contrary, the district court correctly held that this suit could proceed under the well-established *Ex parte Young* doctrine.

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* v. *Maine*, 527 U.S. 706, 755-756 (1999). But even the absence of a valid abrogation or waiver does not mean that States may ignore federal law or, if they do, that private parties have no remedy in federal court. The Supreme Court, in *University*

of Alabama v. *Garrett*, 531 U.S. 356 (2001), reaffirmed that Eleventh Amendment immunity does not authorize States to violate federal law. For a holding that "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages * * * does not mean that persons with disabilities have no federal recourse against discrimination." *Id.* at 374 n.9; see also *Alden*, 527 U.S. at 754-755 ("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.").

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*. See *Alden*, 527 U.S. at 756.[1] *Ex parte Young*, 209 U.S. 123 (1908), held that when a state 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 deemed to be acting *ultra vires* and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective relief. See *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 122 S. Ct. 1753, 1760 (2002); *Edelman* v. *Jordan*, 415 U.S. 651, 664, 667-668 (1974). By limiting relief to prospective injunctions

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[1] The Eleventh Amendment is also no bar to the United States suing the State. See *Garrett*, 531 U.S. at 374 n.9 (noting that the United States could sue a State to recover damages under the ADA); *EEOC* v. *Board of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 299-300 (7th Cir. 2002).

against officials, the rule of *Ex parte Young* avoids courts entering judgments directly against the State but, at the same time, prevents 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*, 527 U.S. at 757 ("Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause."). Thus, as defendants appear to concede (Def. Br. 53), the Eleventh Amendment is no bar to a suit proceeding against a state official for prospective injunctive relief.

B. *Congress Did Not Display Any Intent To Foreclose Jurisdiction Under Ex parte Young For Suits Under Title II And Section 504*

Agreeing that a suit against a state official in his or her official capacity for prospective relief is normally permitted by the Eleventh Amendment, defendants nonetheless contend (Def. Br. 47-52) that a suit against a state official for injunctive relief to cure a continuing violation of federal law is not available under

Title II and Section 504 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*.

1. Defendants rely (Def. Br. 52) on the Supreme Court's secondary holding in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). The Court in *Seminole Tribe* reaffirmed that the Eleventh Amendment did not bar actions against state officials in their official capacities seeking prospective injunctive relief. It held, however, as a matter of statutory construction, that "Congress did not intend" to "authorize federal jurisdiction under *Ex parte Young*" to enforce the Indian Gaming Regulatory Act (IGRA). 517 U.S. at 75 & n.17. In *Verizon Maryland*, the Supreme Court clarified the holding in *Seminole Tribe* in this regard by affirming the general availability of *Ex parte Young* actions to enforce federal statutes.

The statute at issue in *Verizon Maryland*, the Telecommunications Act of 1996, provided that "the State commission" was responsible for approving or rejecting certain agreements between telephone companies and that "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." 47 U.S.C. 252(e)(1), (e)(6). The Court held that plaintiffs could proceed against the state commissioners in their official capacities under *Ex parte Young*.

The Court explained that the doctrine of *Ex parte Young* is presumed to apply unless Congress "display[s]" an "intent to foreclose jurisdiction under *Ex parte Young*." 122 S. Ct. at 1761. The Court recounted that in *Seminole Tribe* "Congress had specified the means to enforce that duty in § 2710(d)(7), a provision 'intended . . . not only to define, but also to limit significantly, the duty imposed by § 2710(d)(3).'" *Ibid*. The statute in *Seminole Tribe* limited the remedies available to the Court. "The 'intricate procedures set forth in that provision' prescribed that a court could issue an order directing the State to negotiate, that it could require the State to submit to mediation, and that it could order that the Secretary of the Interior be notified. We concluded that 'this quite modest set of sanctions' displayed an intent not to provide the 'more complete and more immediate relief' that would otherwise be available under *Ex parte Young*." *Ibid*. (citations omitted). Applying this understanding of *Seminole Tribe* to the Telecommunications Act of 1996, the Court determined that the defendant had not shown that Congress intended to limit available relief in a way that would preclude actions under *Ex parte Young*.

> The Commission's argument that § 252(e)(6) constitutes a detailed and exclusive remedial scheme like the one in *Seminole Tribe*, implicitly excluding *Ex parte Young* actions, is without merit. That section provides only that when state commissions make certain "determinations," an aggrieved party may bring suit in federal court to establish compliance with the requirements of §§ 251 and 252. Even with regard to the "determinations" that it covers, it places no restriction on the relief a court can award. And it does not even say whom the suit is to be brought against -- the state commission, the individual commissioners, or the carriers benefiting from the state commission's order. The mere fact that Congress has authorized federal courts to review whether the Commission's action

> complies with §§ 251 and 252 does not without more "impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*."

Ibid.

As evidenced by the Supreme Court's discussion in *Verizon Maryland*, the most critical factor in the Court's decision in *Seminole Tribe* not to permit the action to proceed under *Ex parte Young* was that Congress had made clear that it did not want district courts to exercise their normal equitable authority to remedy violations of statutory rights. "Permitting suit under *Ex parte Young* [under IGRA] was thus inconsistent with the 'detailed remedial scheme,' -- and the limited one -- that Congress had prescribed to enforce the State's statutory duty to negotiate." 122 S. Ct. at 1761 (quoting *Seminole Tribe*, 517 U.S. at 74).[2] As defendants concede (Def. Br. 51-52), in enacting Title II and Section 504, Congress did not limit the availability of equitable remedies. To the contrary, Congress expressly incorporated the remedies of Title VI of the Civil Rights Act of 1964. See 42 U.S.C. 12133; 29 U.S.C. 794a. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that the remedies available

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[2] The courts of appeals had reached the same conclusion prior to *Verizon Maryland*. See *Joseph A.* v. *Ingram*, 275 F.3d 1253, 1263-1264 (10th Cir. 2002); *Gibson* v. *Arkansas Dep't of Corr.*, 265 F.3d 718, 721 (8th Cir. 2001); *In re Ellett*, 254 F.3d 1135, 1146 (9th Cir. 2001), cert. denied, 122 S. Ct. 1064 (2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 501 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Ellis* v. *University of Kan. Med. Ctr.*, 163 F.3d 1186, 1196-1197 (10th Cir. 1998); *Marie O.* v. *Edgar*, 131 F.3d 610, 615-616 (7th Cir. 1997); *Santee Sioux Tribe* v. *Nebraska*, 121 F.3d 427, 432 (8th Cir. 1997).

under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, a statute modeled on 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. The holding of *Franklin* applies to Title II and Section 504 as well. See *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002).

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). Unlike the statute in *Seminole Tribe*, then, there is no evidence in the text or legislative history that Congress intended to preclude the

availability of prospective injunctive relief.[3] Instead, as in *Verizon Maryland*, Congress manifested no intent to limit equitable remedies and thus no "intent to foreclose jurisdiction under *Ex parte Young*." 122 S. Ct. at 1761.[4]

2. *Verizon Maryland* also undermines defendants' contention (Def. Br. 49-50) that the texts of the statutes demonstrate that official-capacity suits were not available under Title II and Section 504. Although the Telecommunications Act of 1996 imposed duties on "the State commission," the Court held that a suit could be brought against the state commissioners in their official capacities because "[t]he mere fact that Congress has authorized federal courts to review whether the Commission's action" complies with federal law does not indicate "whom the suit is to be brought against -- the state commission, the individual commissioners, or the carriers benefiting from the state commission's order." 122 S. Ct. at 1761.

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[3] Indeed, the House Judiciary Committee Report cited as an example of the remedies available under Title II, the Eighth Circuit's decision in *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), cert. denied, 459 U.S. 909 (1982), which held that an implied private right of action for damages and injunctive relief was available under Section 504 where officials were sued in their official capacities. See H.R. Rep. No. 485, *supra*, Pt. 3, at 52 n.62; see also 136 Cong. Rec. 11,471 (1990) (Rep. Hoyer) (same).

[4] The Court in *Seminole Tribe* also 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 only the State — to be sued under IGRA. See 517 U.S. at 75. As Title II does not address an entity's formal relations with other sovereigns, this circumstance has no application. See *Gibson*, 265 F.3d at 722.

Like the Telecommunications Act of 1996 in *Verizon Maryland*, Title II and Section 504 do not identify who the defendants should be. Instead, Title II 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 *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001); *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*

(continued...)

The same was true under Section 504 prior to the enactment of the ADA. 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 had held 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] Congress, of course, is assumed to know the law and is generally

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[5](...continued)
Young, 209 U.S. 123 (1908), and its progeny.").

[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); *Campbell* 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); *Miener* v. *Missouri*, 673 F.2d 969, 982 (8th Cir. 1982) (finding *Ex parte Young* inapplicable because relief sought was not prospective); *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 L.A. 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

(continued...)

deemed to have incorporated existing judicial interpretations when it adopts a preexisting remedial scheme. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). By incorporating the "remedies, procedures, and rights" of Section 504 and Title VI, Congress incorporated the right to sue government officials in their official capacities into Title II.[8]

The holding of *Verizon Maryland*, and its implicit rejection of the argument pressed by defendants, is consistent with the fundamental legal doctrine that suits against state officials in their official capacities are, except for purposes of Eleventh Amendment immunity, suits against the entity itself. "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

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[7](...continued)
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).

[8] For the contrary position, defendants rely (Def. Br. 51) on this Court's decision in *Vinson*, 288 F.3d at 1155-1156, which held that Congress's creation of a private right for violations of Title II and Section 504 constituted a "comprehensive" remedial scheme that precluded enforcement of the statutory right through 42 U.S.C. 1983. But *Vinson* did not address the issue presented in this case regarding who Congress intended to be appropriate defendants in the remedial scheme it created for these statutes.

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 federal law than the entity itself.

As the Sixth Circuit explained in rejecting the argument that the text of Title II allows suits only against an entity, and not its officials in their official capacities:

> The problem with this argument is that it misrepresents *Ex parte Young*, insofar as it fails to recognize the nuances [of the doctrine]. The Court in [*Ex parte Young*] was not saying that the official was stripped of his official capacity for all purposes, but only for purposes of the Eleventh Amendment. This is evident in *Ex parte Young* itself: though the official was not "the state" for purposes of the Eleventh Amendment, he nevertheless was held responsible in his official capacity for enforcing a state law that violated the Fourteenth Amendment, which by its terms applies only to "states." And in rejecting the defendants' *Ex parte Young* argument, we make a similar distinction: an official who violates Title II of the ADA does not represent "the state" for purposes of the Eleventh Amendment, yet he or she nevertheless may be held responsible in an official capacity for violating Title II, which by its terms applies only to "public entit[ies]."

Carten v. *Kent State Univ.*, 282 F.3d 391, 395-396 (6th Cir. 2002) (citations omitted).

That this constitutes the proper understanding of official capacity suits is confirmed by assessing the way the statutes apply to the practices of an entity covered by these statutes. 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*, 527 U.S. at 755 (emphasis added). If a lawsuit were brought to enjoin that state policy or practice as violating Title II, it would be immaterial (again except for the Eleventh Amendment) whether the individual sued the State itself or the officials or employees 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). Thus, Title II's requirement that "public entit[ies]" not discriminate extends to the officials in their official capacities who are acting for the entity.

For this reason, this and other courts of appeals have held in a variety of statutory settings that *Ex parte Young* actions are available even when the statute imposes a duty on an entity, and not expressly on the entity's officials. See, *e.g.*, *In re Ellett*, 254 F.3d 1135, 1146 (9th Cir. 2001), cert. denied, 122 S. Ct. 1064 (2002); *Randolph* v. *Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001); *Telespectrum,*

Inc. v. *Public Serv. Comm'n*, 227 F.3d 414, 420 (6th Cir. 2000). The Supreme Court's decision in *Verizon Maryland* confirms this conclusion.

3. Defendants rely (Br. 48-49) on three cases, all from outside this circuit, which they claim support their argument that officials in their official capacity cannot be sued under Title II or Section 504. Two of the cases are not relevant because they address the distinct question whether the statutes permit officials to be sued in their *individual* capacities for damages. Thus the Fifth Circuit in *Lollar* v. *Baker*, 196 F.3d 603 (1999), held that a government official could not be sued "individually" under Section 504, but specifically noted that it was not retreating from its opinion in *Brennan* v. *Stewart*, 834 F.2d 1248 (5th Cir. 1988), which held that a Section 504 suit could proceed against a state official in his official capacity under *Ex parte Young*. See 196 F.3d at 609 n.6; see also *Helms* v. *McDaniel*, 657 F.2d 800, 806 n.10 (5th Cir. 1981) (permitting Section 504 suit to proceed under *Ex parte Young*), cert. denied, 455 U.S. 946 (1982).

Similarly, the Eighth Circuit in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999) (en banc), held that "the commissioners may not be sued in their *individual* capacities directly under the provisions of Title II." *Id*. at 1005 n.8 (emphasis added). It did not address the question of official capacity suits and *Ex parte Young* because the claims for injunctive relief were moot. *Id*. at 1003. The Eighth Circuit subsequently held that suits against state officials in their *official* capacities are available under Title II. See *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001); see also *Gorman* v. *Bartch*, 152 F.3d 907, 913-914, 916 (8th Cir. 1998)

(dismissing claims against government officials in individual capacities but remanding for trial claims against officials in official capacities under Title II and Section 504).

It is true that the Seventh Circuit in *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied *sub nom. United States* v. *Snyder*, 531 U.S. 1190 (2001), did ultimately hold that official-capacity suits were not available under Title II. But the Court appears at a critical moment to conflate individual and official capacity suits. *Walker* held, first, that because Title II applies to "public entit[ies]," its duties do not extend to the "employees or managers of these organizations" individually and thus there was no "personal liability." 213 F.3d at 346. But *Walker* correctly noted that a state official sued in his official, as opposed to individual, capacity "stands in for the agency he manages" and thus officials in their official capacities are simply "proxies for the state." *Ibid*. As such, the Court holds that the officials "have been sued and could be liable only in their official capacities." *Ibid*. But at the very end of the opinion, with no analysis, the Court incorrectly summarizes its discussion as holding that "the only proper defendant in a [sic] action under the provisions of the ADA at issue here is the public body as an entity" and thus *Ex parte Young* was not available. *Id*. at 347. In doing so, it ignores not only its own reasoning, but the text, structure, legislative history, and case law we recount above. Subsequently, the Seventh Circuit has described *Walker* as holding that suits under Title II may "proceed against the public entity – either in its own name, or through suits against its officers in their official

capacities." *Stanley* v. *Litscher*, 213 F.3d 340, 343 (7th Cir. 2000).

For the reasons discussed above, *Verizon Maryland* severely undermined the rationale of *Walker*. Another of *Walker*'s underpinnings was undermined by the Supreme Court's decision in *Garrett*. The panel in *Walker* stated that the "ADA does not draw any distinction [between Title I and Title II] for the purpose of identifying the appropriate defendants." 213 F.3d at 346. The Supreme Court stated in *Garrett* that Title I of the ADA (concerning employment) "can be enforced * * * by private individuals in actions for injunctive relief under *Ex parte Young*." 531 U.S. at 374 n.9. Thus, the Seventh Circuit's intent to synchronize the appropriate defendants under Titles I and II now weighs in favor of permitting suits against officials in their official capacities under Title II. See also *Armstrong* v. *Davis*, 275 F.3d 849, 879 (9th Cir. 2001) (relying on discussion in *Garrett* to hold that Title II may be enforced through *Ex parte Young*), petition for cert. filed (Apr. 9, 2002) (No. 01-1501).

4. While this Court has not addressed the precise statutory argument raised by the defendants, previous opinions have accepted that government officials in their official capacities are appropriate defendants under Section 504 and Title II. See *Thompson* v. *Davis*, 2002 WL 1477873 (9th Cir. July 3, 2002); *Armstrong* v. *Davis*, 275 F.3d at 879; *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Duffy* v. *Riveland*, 98 F.3d 447, 452 n.4 (9th Cir. 1996); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 589-590 (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 foreclose Title II and Section 504 suits proceeding against state officials in their official capacities, this Court should join the courts of appeals that have held after *Seminole Tribe* that individuals could rely on *Ex parte Young* to enforce Title II against state officials in their official capacities. See, *e.g.*, *Carten*, 282 F.3d at 395-396; *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001); *Roe No. 2* v. *Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001); *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999); *Nelson* v. *Miller*, 170 F.3d 641, 646-647 (6th Cir. 1999).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Challenges to the constitutionality of Title II's abrogation and 42 U.S.C. 2000d-7 are also pending in *Lovell* v. *Chandler*, No. 98-16545 and consolidated appeals (supplemental briefing completed August 2001), *Patrick and Kathy W.* v. *Lemahieu*, No. 01-15944 and consolidated appeals (supplemental briefing completed in June 2002), *Thomas* v. *Nakatani*, No. 01-16310 (oral argument heard May 9, 2002), and *Phiffer* v. *Oregon Department of Corrections*, No. 01-35984 (briefing scheduled to be completed July 2002).

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief of the United States as Intervenor were sent by Federal Express this 23d day of July, 2002, to the following counsel of record:

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