NO ORAL ARGUMENT REQUESTED

No. 99-1045

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHOEBE THOMPSON, DEAN ECOFF, and MARCIA E. WADE,
on behalf of themselves and all others similarly situated

Plaintiffs-Appellees

v.

STATE OF COLORADO

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(Honorable Daniel B. Sparr)

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF RELATED CASES

There are no prior appeals.

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STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the abrogation of States' Eleventh Amendment immunity in the Americans with Disabilities Act is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

2. Whether the Eleventh Amendment bars an individual from suing a state official in his or her official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act.

STATEMENT OF THE CASE

1. The Americans with Disabilities Act (ADA) targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses

discrimination by employers; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II, which 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.

The prohibition on discrimination may be enforced through private suits against public entities and their officials. See 42 U.S.C. 12133; see also Olmstead v. L.C., 527 U.S. 581, 590 & n.4 (1999). Title II incorporates by reference the enforcement provisions of Section 504 of the Rehabilitation Act, 42 U.S.C. 12133, which in turn incorporate by reference the remedies available under Title VI of the Civil Rights Act of 1964. See 29 U.S.C. 794a(a)(2). The Act expressly abrogates the States' Eleventh Amendment immunity. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

2. Plaintiffs are three individuals representing a class of persons with disabilities who use removable automobile parking placards to meet their transportation needs (App. 1, 21). The Colorado Department of Motor Vehicles charges $1.25 every three years for the placards (App. 24). (Special license plates for

persons with disabilities, by contrast, are available at the same cost as regular license plates (App. 21)). The plaintiffs filed suit against the State of Colorado seeking reimbursement of previously paid fees, prospective injunctive relief, and attorneys' fees (App. 10-11). On cross-motions for summary judgment, the magistrate judge issued a report recommending entry of judgment for the plaintiffs on the merits, holding that the assessment of the annual placard fee violated a Department of Justice regulation, 28 C.F.R. 35.130(f), implementing the ADA (App. 217-220, 231). In doing so, the magistrate judge rejected Colorado's contention that the ADA did not validly abrogate its Eleventh Amendment immunity (App. 220-228).

The district court adopted the recommendation and issued an injunction prohibiting the State from requiring payment of a fee for removable parking placards (App. 265).

3. On appeal from the injunction, Colorado argued that the fee did not violate the ADA and that the ADA's abrogation was not a valid exercise of Congress' authority to enforce the Fourteenth Amendment. Plaintiffs defended the lower court's judgment and opinion. They also asked, in the alternative, that if the Court held that the ADA's abrogation of Eleventh Amendment immunity was not valid, the case be "remanded with instructions that the district court consider allowing any necessary amendments which would enable enforcement of the existing injunction consistent with Ex parte Young." Br. of Appellees at 51. Briefing was completed on April 21, 1999.

On August 19, 1999, this Court issued its opinion in Martin v. Kansas, 190 F.3d 1120, 1126 (1999), which held "that Congress's statutory abrogation of Eleventh Amendment immunity in the ADA was a valid exercise of its Section 5 enforcement powers." Oral argument in this case was held on November 15, 1999. On January 26, 2000, after the Supreme Court granted a writ of certiorari in Florida Department of Corrections v. Dickson, 120 S. Ct. 976 (2000), the panel abated the appeal pending the outcome of Dickson. On March 14, 2000, after the Dickson case had been dismissed due to settlement, see 120 S. Ct. 1236 (2000), the panel reactivated the case. On April 19, 2000, the court issued an order to the Attorney General certifying the fact that the constitutionality of the ADA's abrogation was challenged and inviting a brief addressing "the constitutional issue raised by the Defendant-Appellant and whether the decision of the Supreme Court in Kimel v. Florida Board of Regents has application to this appeal, and any legislative history of the Americans With Disabilities Act which will be of assistance to this court in resolving the constitutional issue raised" (citation omitted).

A subsequent motion by the parties to abate the appeal pending the Supreme Court's decision in University of Alabama Board of Trustees v. Garrett, No. 99-1240, was denied on May 23, 2000.

SUMMARY OF ARGUMENT

In the interest of judicial economy, 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, it should adhere to its prior decision in Martin v. Kansas that the ADA is a valid exercise of Congress' Section 5 authority and validly abrogates States' Eleventh Amendment immunity.

Even if this Court holds that the ADA's abrogation is not valid, the case could continue on the claim for injunctive relief. The Eleventh Amendment would be no bar to this case continuing if plaintiffs are granted leave to add an appropriate state official in his or her 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. To hold otherwise would deprive individuals of an established tool to vindicate federal rights without intruding on States' sovereign immunity.

ARGUMENT

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, 120 S. Ct. 1669 (2000). In the

interest of judicial economy, this Court should hold this appeal until Garrett is decided. For if this Court issues an opinion that addresses the Eleventh Amendment issue before Garrett is resolved, the losing party will likely seek certiorari, adding further delay and costs to this action.

I

THE AMERICANS WITH DISABILITIES ACT
VALIDLY ABROGATES ELEVENTH AMENDMENT IMMUNITY

The Americans with Disabilities Act provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. 12202. In Martin v. Kansas, 190 F.3d 1120, 1126 (1999), this Court held "that Congress's statutory abrogation of Eleventh Amendment immunity in the ADA was a valid exercise of its Section 5 enforcement powers."

This Court's well-established rule is that a panel lacks the power to reconsider another panel's published decision. See Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996); Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996). Even when there has been an intervening Supreme Court decision, respect for other panels of this Court requires adherence to the prior panel decision unless and until the Supreme Court's case law "mandate[s] a contrary rule." Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1234 (10th Cir. 1999); see also United States v. Jones, 194 F.3d 1178, 1185-1186 (10th Cir. 1999) (panel must follow prior panel opinions unless intervening

Supreme Court decision "mandates" different conclusion), petition for cert. pending, No. 99-8176; United States v. Smith, 122 F.3d 1355, 1359 (11th Cir.) ("even where it has been weakened, but not overruled, by a Supreme Court decision, prior panel precedent must be followed"), cert. denied, 522 U.S. 1021 (1997). This is especially true when the intervening Supreme Court decision does not alter the legal standard used by the prior panel, but simply applies the same legal standard in a different context. See United States v. Brittain, 41 F.3d 1409, 1416 (10th Cir. 1994) (so long as a panel "purported to apply the proper test," intervening Supreme Court decision applying same test did not permit subsequent panel to disregard prior panel's holding).

The Supreme Court's decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), holding that the Age Discrimination in Employment Act (ADEA) was not a valid exercise of Congress' Section 5 authority, did not alter the legal analysis used in assessing the validity of congressional legislation enacted under Section 5 of the Fourteenth Amendment. To the contrary, the Court expressly noted, id. at 645, that it was "[a]pplying the same 'congruence and proportionality' test" that it had in City of Boerne v. Flores, 521 U.S. 507 (1997), and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999). Thus, this Court's holding in Martin that "the ADA does not run afoul of the 'congruent and proportional' requirement" articulated in those cases, 190 F.3d at 1127, is dispositive.

Martin relied on several grounds for distinguishing the Supreme Court's prior opinions that are equally applicable in distinguishing Kimel. The Court in Kimel relied on the fact that it had never held that an age classification violated the Equal Protection Clause. See 120 S. Ct. at 645-647. But as Martin noted, "[t]he Supreme Court has held that arbitrary discrimination by the state against disabled persons violates the Equal Protection Clause. Thus, under [City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)], the disabled are protected by the Fourteenth Amendment, and Congress is entitled to enforce this protection against the states." 190 F.3d at 1127-1128; see also Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

Second, the Court in Kimel explained that Congress had not, in either the statute or the legislative history of the ADEA, identified unconstitutional conduct by the States relating to older workers. See 120 S. Ct. at 648-650. In contrast, the ADA includes express findings that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion * * * and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," as well as having been subject to "a history of purposeful unequal treatment" and "unfair and unnecessary discrimination and prejudice" that continues to exist. 42 U.S.C. 12101(a)(5), (7), and (9). These findings were based on

substantial evidence: 14 congressional hearings and 63 field hearings held by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess., at 24-28, 31 (1990); id., Pt. 3, at 24-25; id., Pt. 4, at 28-29; see also T. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to it by the Executive Branch. See S. Rep. No. 116, supra, at 6 (citing United States Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983); National Council on Disability, Toward Independence (1986); and National Council on Disability, On the Threshold of Independence (1988)); H.R. Rep. No. 485, supra, Pt. 2, at 28 (same).[1] In Martin, this Court relied on the fact that "Congress, when it enacted the ADA, made numerous findings of fact regarding the pervasiveness of discrimination against disabled persons" and properly determined that the findings "establishing the existence of widespread discrimination

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[1] To give but one example of the evidence regarding state discrimination against persons with disabilities, the report of the Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (Apr. 1989), reflects the results of a survey of state officials on the perceived impediments to employment of persons with disabilities in state governments. Forty-eight percent of state officials considered negative attitudes and misconceptions to be a moderate impediment to employment of persons with disabilities, while thirty-four percent considered those reasons to be strong impediments, for a total of eighty-two percent. Id. at 72-73.

against the disabled are entitled to deference." 190 F.3d at 1127, 1128.

Finally, the Court in Kimel held that the remedial scheme enacted by the ADEA was not proportionate to the constitutional problem Congress was addressing. See 120 S. Ct. at 647-648. But the remedial scheme of the ADA is very different. As this Court explained:

> the remedial purposes of the ADA are tailored to remedying and preventing the discriminatory conduct, and are thus congruent and proportional to the injury to be prevented or remedied. The Act only prohibits discrimination against "qualified individuals," and it requires only "reasonable accommodations" that do not impose an "undue burden" on the employer.
>
> In sum, [t]he ADA, unlike [the Religious Freedom Restoration Act], is not attempting to impose a strict scrutiny standard on all state laws or actions in the absence of evidence of discrimination. . . . Rather, the ADA seeks to impose a scheme that will adequately prevent or remedy a well-documented problem of discrimination without unduly burdening the state prison system. It subjects some laws and official actions to a "reasonable accommodation" requirement only to the point that the accommodation is not unduly burdensome. Such a scheme, unlike RFRA, does not redefine or expand [disabled persons'] constitutional protections, but simply proportionally acts to remedy and prevent documented constitutional wrongs.

Martin, 190 F.3d at 1128 (citation and indentation omitted).

Kimel thus provides no basis for deviating from this Court's previous decision in Martin. The Eleventh Amendment is, therefore, no bar to this suit continuing in toto because the abrogation in the ADA is valid Section 5 legislation.

II

PLAINTIFFS MAY SEEK INJUNCTIVE RELIEF AGAINST STATE OFFICIALS SUED IN THEIR OFFICIAL CAPACITY TO ENJOIN CONTINUING VIOLATIONS OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Even if this Court disagrees and holds the ADA's abrogation invalid, that does not mean 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 v. Maine, 527 U.S. 706 (1999), that 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." Id. at 754-755.

It was to reconcile these very principles--that States have Eleventh Amendment immunity from private suits but are still bound by federal law--that the Supreme Court adopted the rule of Ex parte Young. Id. at 756-757.[2] 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 or she is acting ultra vires and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective injunctive

[2] The Eleventh Amendment is also no bar to the United States suing the State. See Alden, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); id. at 759-760 (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 in that sense, however, and takes no position on the merits.

relief. See Edelman v. Jordan, 415 U.S. 651, 664, 667-668 (1974). Because any monetary award against state officials in their official capacity to remedy past injuries "must inevitably come from the general revenues of the State," such an award "resembles far more closely the monetary award against the State itself" and thus is prohibited by the Eleventh Amendment. Id. at 665. 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, 527 U.S. at 757 ("The principle of sovereign immunity as reflected in our 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." (citations omitted)).

Indeed, this Court held in J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1283 n.2, 1287 (1999), that a private suit brought against state "officers in their official capacities" for an injunction enforcing Title II of the ADA could go forward because "the Ex parte Young doctrine precludes defendants' Eleventh Amendment immunity defense." Accord Nelson v. Miller, 170 F.3d 641, 646-647 (6th Cir. 1999); Armstrong v. Wilson, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see also Ellis v. University of Kan. Med. Ctr., 163 F.3d 1186, 1196-1198 (10th Cir. 1998) (permitting private plaintiff's suit to enforce federal statutory rights to proceed under Ex parte Young); Johns v. Stewart, 57 F.3d 1544, 1552, 1555 (10th Cir. 1995) (same).[3]

Plaintiffs did not name a state official in their original complaint and apparently sought leave to do so only in their response brief on appeal. We take no position as to whether

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[3] The Seventh Circuit in Walker v. Snyder, No. 98-3308, 2000 WL 626752, at *2 (May 16, 2000), held that a suit for prospective injunctive relief under the doctrine of Ex parte Young was not available under the ADA because an Ex parte Young suit may only be brought against a state official in his individual capacity. Such a holding is inconsistent with a long line of Supreme Court decisions holding that the Eleventh Amendment did not bar injunctive suits against state officials in their official capacity, see, e.g., Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 n.3 (1991); Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 737 n.16 (1980); Hutto v. Finney, 437 U.S. 678, 690 (1978), as well as similar holdings of this Court cited in the text.

plaintiffs should be granted leave to add appropriate state officials in their official capacity as defendants under Fed. R. Civ. P. 21, or whether such a request would better be considered in the first instance by this Court[4] or the district court.[5] We simply wish to make clear that it is the position of the United States that even if this Court holds that the ADA does not validly abrogate States' Eleventh Amendment immunity, federal courts will continue to have jurisdiction to hear private actions seeking to enjoin state officials from ongoing violations of the ADA.

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[4] See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 221 n.6 (1985) (permitting plaintiffs to amend complaint on appeal to add named state officials to avoid Eleventh Amendment bar); Balgowan v. New Jersey, 115 F.3d 214, 216-217 (3d Cir. 1997) (same); Sims v. Florida, 862 F.2d 1449, 1460 (11th Cir.) (en banc) (same), cert. denied, 493 U.S. 815 (1989).

[5] Cf. Tuck v. United Servs. Auto. Ass'n, 859 F.2d 842, 845-846 (10th Cir. 1988) (while "[f]airness and the need to conserve judicial resources all weigh in favor of allowing the [plaintiffs] to amend the complaint so that this action may reach a conclusion in federal court," question about identity of parties to add "is more appropriately remanded to the district court"), cert. denied, 489 U.S. 1080 (1989); Penteco Corp. Ltd. Partnership-1985A v. Union Gas Sys., Inc., 929 F.2d 1519, 1523 (10th Cir. 1991) ("we believe the interests of justice, fairness and judicial economy require some additional opportunity to 'cure' such pleading defects, if possible," and the "district court is the proper forum to determine if a curative amendment can be made").

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, this Court should adhere to the holding of Martin v. Kansas and reaffirm that the Americans with Disabilities Act validly abrogates States' Eleventh Amendment immunity. If this Court holds otherwise, the Eleventh Amendment is no bar to this action proceeding against state officials in their official capacity under the doctrine of Ex parte Young.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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