No. 02-1730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIAN BRUGGEMAN, by and through his parents, Kenneth and Carol Bruggeman, FRANCES CORSELLO, by and through his parents,
Vincent and Agnes Corsello, et al.,

Plaintiffs - Appellants

v.

ROD BLAGOJEVICH, in his official capacity as Governor of the State of Illinois, ANN PATLA, in her official capacity as Director of the Illinois Department of Public Aid, LINDA BAKER, in her official capacity as Secretary of the Illinois Department of Human Services, MELISSA WRIGHT, in her official capacity as Associate Director of the Office of Developmental Disabilities,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Honorable John F. Grady

RESPONSE FOR THE UNITED STATES TO APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION & STATUTES:

RULES:

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STATEMENT OF THE CASE

Individuals with disabilities brought suit against state officials, in their official capacities, alleging that their practices violated, *inter alia*, the Medicaid Act, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act, and seeking purely prospective injunctive relief. The state officials moved to dismiss the action on the ground that the Eleventh Amendment barred the suit. *Id.* at 6. The district court denied the motion as to the Medicaid

claims, holding that, under the *Ex parte Young* doctrine, state officials sued in their official capacities for prospective injunctive relief are not entitled to Eleventh Amendment immunity. *Id.* at 6-9. The district court also denied the motion to dismiss the Section 504 claim on Eleventh Amendment grounds, relying on this Court's holding in *Stanley* v. *Litscher*, 213 F.3d 340, 344 (2000), that Congress validly conditioned the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. *Id.* at 6. The district court granted the defendants' motion to dismiss the Title II claims, relying on this Court's holding in *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied, 531 U.S. 1190 (2001), that Congress did not validly abrogate States' Eleventh Amendment immunity to Title II claims. *Id.* at 9. The district court also held that the *Ex parte Young* doctrine was "inapplicable to Title II cases." *Ibid.* After an evidentiary hearing, the court dismissed the Medicaid claims. Without referring to the remaining claim, based on Section 504, the district court entered a final judgment dismissing the action. This timely appeal followed.

The United States filed a brief on appeal as *amicus curiae* in support of the plaintiffs-appellants, arguing that this Court should overturn the holding in *Walker* that *Ex parte Young* suits are not available to enforce Title II claims. In its brief as appellee, the state defendant asserted (Def. Br. 61-64), *inter alia*, that it enjoys Eleventh Amendment immunity to suits brought under Section 504 because it did not waive its sovereign immunity by accepting federal financial assistance. The United States then intervened pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of 42 U.S.C. 2000d-7, which conditions the state defendant's receipt of federal financial assistance on its voluntary and knowing agreement to waive its Eleventh

Amendment immunity to private suits under Section 504. See *Bruggeman* v. *Ryan*, 318 F.3d 716 (7th Cir. 2002) (order allowing United States to file separate briefs as amicus and as intervenor).

A panel of this Court found that the plaintiffs could not prevail on the merits of their Medicaid claims, but found that they could proceed on their Section 504 claims. The panel also held that the plaintiffs could proceed on their Title II claims against the defendants, state officials, under the doctrine of *Ex parte Young*. The panel found that the holding of this Court's decision in *Walker* v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), that only the state, and not state officials, may be sued for violating Title II of the ADA, has been "uniformly rejected by the other courts to have considered the issue" and "did not survive" the Supreme Court's decision in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). See *Bruggeman* v. *Blagojevich*, No. 02-1730, slip. op. at 9-10.

On April 21, 2003, the defendants filed a petition for rehearing en banc on the question whether a plaintiff may sue state officials in their official capacities under Title II of the ADA for prospective injunctive relief under the doctrine of *Ex parte Young*. On April 24, 2003, this Court ordered the plaintiffs to file a response to the defendants' petition.

ARGUMENT

The defendants ask this Court to consider en banc the question whether a plaintiff may pursue an action against a state official in his official capacity for prospective injunctive relief under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.* Although the defendants imply in their petition for rehearing that allowing such an *Ex parte Young* suit to proceed would seriously erode the constitutional protection afforded to states by the Eleventh Amendment, the validity of *Ex parte Young* suits in general is not at issue in this case. For a

hundred years, the Supreme Court has consistently permitted *Ex parte Young* suits to enforce federal requirements that are, by their terms, directed at state entities rather than at state officials even though the Eleventh Amendment would bar such a suit against the State or state agency directly. See, *e.g.*, *Prout* v. *Starr*, 188 U.S. 537, 543-544 (1903); *Ex parte Young*, 209 U.S. 123 (1908); *Verizon Maryland, Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002). This Court has also consistently allowed *Ex parte Young* suits to enforce federal requirements in a variety of statutory contexts. See, *e.g.*, *Illinois Ass'n of Mortgage Brokers* v. *Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002) (noting that "*Ex parte Young* eliminates any constitutional impediment to suit" against state official in official capacity for declaratory suit under 42 U.S.C. 1983); *Ameritech Corp.* v. *McCann*, 297 F.3d 582, 586-588 (7th Cir. 2002) (same for suit under Electronic Communications Privacy Act); *MCI Telecomm. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 348 (7th Cir. 2000) (same for suit under the Telecommunications Act of 1996), cert. denied, 531 U.S. 1132 (2001); *Marie O.* v. *Edgar*, 131 F.3d 610, 617 (7th Cir. 1997) (same for suit under the Individuals with Disabilities Education Act).

The real question presented in the defendants' petition for rehearing is whether there is anything in the statutory language or scheme of Title II of the ADA to indicate that Congress intended to depart from the general rule that *Ex parte Young* suits are available against state officials in their official capacities to enforce federal rights. The *Bruggeman* panel held that the *Walker* panel erred in concluding that Congress intended to preclude such official-capacity suits. That holding was correct and brought this Court into agreement with every other court of appeals to consider this question. Thus, there is no reason for this Court to reconsider this issue en banc.

I. *There Is No Dispute In This Circuit That In General The Eleventh Amendment Is No Bar To Private Suits Against State Officials In Their Official Capacities To Enjoin Future Violations Of Federal Law*

The defendants would have this Court believe that this case should be reheard en banc because the *Bruggeman* panel's overruling of *Walker* implicates core principles of States' sovereign immunity under the Eleventh Amendment. But the *Walker* and *Bruggeman* panels are in complete agreement that, although the Eleventh Amendment bars private suits against a State sued in its own name, absent a valid abrogation by Congress or a valid and effective waiver by the State, the Eleventh Amendment does not authorize States to violate 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* v. *Maine*, 527 U.S. 706, 756 (1999). "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."). The Court held, in *Ex parte Young*, 209 U.S. 123 (1908), 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 *Ex parte Young* doctrine has been described as a legal fiction, but it was adopted by the Supreme Court a century ago to serve a critical function in permitting federal courts to bring state policies and practices into compliance with the constitution and other federal laws. The doctrine permits only prospective relief, see *Edelman* v. *Jordan*, 415 U.S. 651, 664, 667-668 (1974), against an official in his or her official capacity, see *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985). 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 in their official capacities) from continuing illegal action. Thus, the Eleventh Amendment is no bar to a suit proceeding against a state official in his official capacity for prospective injunctive relief.

The defendants' contention (Petition at 7) that *Ex parte Young* – and, consequently, *Bruggeman* – "converts an official-capacity claim to an individual or personal-capacity action" simply misunderstands the nature of a suit under *Ex parte Young*. In *Ameritech Corp.* v. *McCann*, this Court explored one of the rationales for allowing *Ex parte Young* suits against officials in their official capacities:

> The twin goals served by the *Young* exception to Eleventh Amendment immunity – vindicating federal rights and holding state officials responsible to federal law – cannot be achieved by a lawsuit against a state official in his or her individual capacity. The reason is that individual (or personal) capacity suits do not seek to conform the State's conduct to federal law; rather, such suits seek recovery from the defendant personally.

297 F.3d at 586. This Court also noted that, while *Ex parte Young* suits are an exception to general Eleventh Amendment principles, "individual capacity suits do not implicate the Eleventh Amendment's protections, making an *exception* to Eleventh Amendment immunity obviously unnecessary." *Ameritech*, 297 F.3d at 586 (emphasis in original). Nothing in the *Bruggeman*

decision runs counter to the settled understanding that officials who act contrary to federal law may be sued in their official capacities for prospective injunctive relief notwithstanding the Eleventh Amendment.

As to all of these principles, there is no conflict between the *Walker* and *Bruggeman* panels.

II. *The Bruggeman Panel Correctly Held That Congress Did Not Display Any Intent To Foreclose Jurisdiction Under Ex parte Young For Suits Under Title II*

The *Bruggeman* panel correctly held that the *Walker* panel's conclusion – 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 – is no longer viable. For the reasons stated below, there is no reason for the full Court to reconsider the *Bruggeman* panel's conclusion.

1. As the *Bruggeman* panel noted, one of *Walker*'s underpinnings was undermined by the Supreme Court's subsequent decision in *Garrett.* The *Walker* panel recognized 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 *Walker* panel's intent to synchronize the appropriate defendants under Titles I and II has been effectuated by the *Bruggeman* panel's holding permitting suits for prospective injunctive relief against officials in their official capacities under Title II.

2. Another of *Walker*'s underpinnings was undermined by the Supreme Court's decision in *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635 (2002). *Verizon Maryland* undermines *Walker*'s rationale that the text of the statute demonstrated that official-capacity suits were not available under Title II. *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 panel held 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 panel incorrectly summarized 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.[1] *Walker* is the only court of appeals decision to reach that conclusion.

a. *Verizon Maryland* counsels a different result. 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

[1] Subsequently, this Court 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 (2000).

individual commissioners, or the carriers benefitting from the state commission's order." 535 U.S. at 647.

Like the Telecommunications Act of 1996 in *Verizon Maryland*, Title II imposes obligations on public entities but does not identify who the defendants in a suit for injunctive relief 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 *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001); *Cannon* v. *University of Chic.*, 441 U.S. 677, 696-697, 699-701 (1979). In cases decided prior to the enactment of the ADA, courts permitted suits for prospective injunctive relief 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, although "injunctive relief against the Board itself" under Title VI was barred by the Eleventh Amendment, "such relief against Board members in their official capacities is permitted."[2]

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[2] 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

(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 state officials in their official capacities,[3] 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.[4] 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

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[2](...continued)
injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny.").

[3] 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).

[4] 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.) (finding *Ex parte Young* inapplicable because relief sought was not prospective), cert. denied, 459 U.S. 909 (1982); *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 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).

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 thereby incorporated the right to sue government officials in their official capacities into Title II.

b. The holding of *Verizon Maryland*, and its implicit rejection of the rationale of *Walker*, is consistent with the fundamental legal doctrine that a suit against a state official in his or her official capacity is, except for purposes of Eleventh Amendment immunity, a suit 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 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, 165-166 (1985) (citation omitted); see also *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991). Thus, by definition, an official in his or her official capacity is 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 statute applies to the practices of an entity covered by Title II. 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 the governor or an attorney general is sued in his official capacity, 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, the other courts of appeals have held in a variety of statutory settings that *Ex parte Young* suits are available even when the statute imposes a duty on a state entity, and not expressly on the state entity's officials. See, *e.g.*, *In re Ellett*, 254 F.3d 1135, 1146 (9th Cir. 2001), cert. denied, 534 U.S. 1127 (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, and, as the *Bruggeman* panel noted, every other court of appeals to consider whether *Ex parte Young* suits are available to enforce the requirements of Title II since the Supreme Court's holding in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), have held that they are. 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); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); cf. *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 suits proceeding against state officials in their official capacities, this Court need not reconsider the *Bruggeman* panel's holding that individuals may rely on *Ex parte Young* to enforce Title II against a state official in his official capacity for prospective injunctive relief.

CONCLUSION

The defendants' petition for rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 7, 2003, two copies of the foregoing Response for the United States To Appellees' Petition For Rehearing En Banc, along with a digital copy of the response, were served by overnight mail, postage prepaid, on the following counsel:

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