No. 06-1308

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Plaintiffs-Appellees

v.

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This appeal involves the ability of individuals to seek judicial enforcement of Title II of the Americans with Disabilities Act against state officials for injunctive relief. The Attorney General has authority to enforce Title II. See 42 U.S.C. 12133. However, because of the inherent resource limitations of the United States, the United States has an interest in ensuring that the Disabilities Act can be

enforced in federal court by private parties to the extent permitted by the statute and the Constitution.

STATEMENT OF THE ISSUE

The United States will address the following question:

Whether an individual may sue a state official in his official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act. *Ex parte Young*, 209 U.S. 123 (1908); *Randolph* v. *Rodgers*, 253 F.3d 342 (8th Cir. 2001).

STATEMENT OF THE CASE

1. 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). 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.

This case involves a suit filed under, *inter alia*, Title II. 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). The language of Title II contemplates private suits against public entities. 42 U.S.C. 12133.

2. In this case, the plaintiffs sued Nebraska state officials in their official capacities, challenging the validity of a provision in Nebraska's state constitution ("Initiative 300"), which states that "No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching." Neb. Const. art. XII, § 8. Initiative 300 provides a variety of exceptions to this general prohibition, including an exception for a "family farm or ranch corporation." In order to qualify as a family farm or ranch corporation, a majority of the voting stock in the corporation must be "held by members of a

family * * * at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." *Ibid.* The plaintiffs argue that Initiative 300 violates various provisions of the federal constitution, 42 U.S.C. 1983, and Title II of the Americans with Disabilities Act, 42 U.S.C. 12131, *et seq.* and seek declaratory and injunctive relief. See generally, *Jones* v. *Gale*, 405 F. Supp.2d 1066 (D. Neb. 2005).

Plaintiffs Dahlgren and Ehler contend that they are individuals with disabilities, and that their disabilities prevent them from performing daily physical labor on farms or feedlots. *Jones*, 405 F. Supp.2d at 1076-1077, 1086. Dahlgren also contends that he cannot live on a farm or feedlot because his disability requires that he have ready access to medical care. *Id.* at 1086. Dahlgren and Ehler claim that the ownership standards in Initiative 300 have the effect of denying them the benefits of owning agricultural property in limited liability companies because of their disabilities. *Ibid.*

The district court found in favor of the plaintiffs, holding that Initiative 300 violates the "dormant Commerce Clause" and Title II of the ADA. *Jones*, 405 F. Supp.2d at 1088. The defendants appealed, asserting, *inter alia*, that they enjoy Eleventh Amendment immunity to the plaintiffs' claims under the ADA.

ARGUMENT

THIS COURT HAS HELD THAT PRIVATE PLAINTIFFS MAY ENFORCE THE REQUIREMENTS OF TITLE II OF THE ADA THROUGH *EX PARTE YOUNG* SUITS

The defendants assert (Def. Br. 43-47) for the first time on appeal that they have Eleventh Amendment immunity to the plaintiffs' claims under the ADA. As the defendants acknowledge (Def. Br. 46), the plaintiffs have not sued the State nor any state agency; rather, the only defendants are state officials sued in their official capacities. The defendants also acknowledge (Def. Br. 44) that the plaintiffs are seeking only prospective injunctive and declaratory relief, rather than damages. Nevertheless, the defendants claim that they enjoy Eleventh Amendment immunity to the plaintiffs' claims, relying on this Court's holding in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), that Title II of the ADA does not validly abrogate States' immunity.

The defendants simply misunderstand the reach of the Eleventh Amendment. The plaintiffs filed the instant action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which permits private plaintiffs to ensure that state entities comply with the requirements of federal law by suing state officials in their official capacities for prospective injunctive relief. Where a plaintiff seeks relief in an *Ex parte Young* action, a State's Eleventh Amendment immunity is not implicated.

Thus, the defendants' argument that Congress has not validly abrogated Nebraska's Eleventh Amendment immunity to claims under Title II of the ADA is irrelevant.

1. This Court has already held that private plaintiffs may enforce the requirements of Title II through *Ex parte Young* suits. In *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001), this Court held that, notwithstanding the holding of *Alsbrook*, plaintiffs may pursue claims for prospective injunctive relief against state officials in their official capacities. The defendants in the instant case acknowledge the holding of *Randolph* and do not even attempt to argue that *Randolph* was wrongly decided. The defendants assert (Def. Br. 46) that, "if Congress did not have the authority to abrogate the state's sovereign immunity, then Plaintiffs should not be allowed to end-run around the state's sovereign immunity and be allowed to enforce a law, under the auspices of *Ex parte Young*, [that] Congress did not have the authority to adopt." But it is long-settled that plaintiffs are permitted to do exactly that: to enforce the requirements of federal law against state officials regardless of whether plaintiffs could sue the State directly to enforce such requirements or seek money damages for a State's failure to adhere to such requirements.

For over a hundred years, the Supreme Court has consistently permitted *Ex parte Young* suits to enforce federal requirements such as those in Title II 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). Although the Eleventh Amendment bars private suits against a State sued in its own name (absent a valid abrogation by Congress or a 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 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. Indeed, every court of appeals to consider whether plaintiffs may enforce Title II through *Ex parte Young* suits – including this Court – has concluded that such suits are permitted. See, *e.g.*, *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 287-288 (2d Cir.), cert. denied, 541 U.S. 936 (2003); *Wessel* v. *Glendening*, 306 F.3d 203, 207 n.4 (4th Cir. 2002); *Reickenbacker* v.

Foster, 274 F.3d 974, 976 (5th Cir. 2001); *Carten* v. *Kent State Univ.*, 282 F.3d 391, 395-397 (6th Cir. 2002); *Bruggeman* v. *Blagojevich*, 324 F.3d 906, 912-913 (7th Cir. 2003); *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Roe No. 2* v. *Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001).

2. As this Court acknowledged in *Randolph*, "Congress enacted the ADA invoking its powers under both Section 5 of the Fourteenth Amendment and the Commerce Clause." 253 F.3d at 348 n.12. In their brief, the defendants argue only that Title II is not valid Section 5 legislation, relying on *Alsbrook*. The defendants failed to challenge the constitutionality of the ADA in their summary judgment briefs before the district court and should not be permitted to raise this issue for the first time on appeal. See *International Broth. of Elec. Workers, Local Union No. 545* v. *Hope Elec. Corp.*, 380 F.3d 1084, 1096 (8th Cir. 2004) (noting that this Court "ordinarily do[es] not address issues that a party raises for the first time on appeal and failed to raise in the district court"). In any case, it is the position of the United States that *Alsbrook* was superceded by the Supreme Court's holding in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), that Title II validly abrogates States' Eleventh Amendment immunity in at least some applications. See also *United States* v. *Georgia*, 126 S. Ct. 877 (2006). Although this Court rejected that

position in *Bill M.* v. *Nebraska Department of Health & Human Services Finance & Support*, 408 F.3d 1096, 1099-1100 (2005), the Supreme Court recently vacated that decision, see *United States* v. *Nebraska Dept. of Health & Hum. Servs. Fin. & Support*, No. 05-777, 2006 WL 985631 (U.S. Apr. 17, 2006), thereby reopening the question whether Title II validly abrogates States' immunity in a variety of contexts. As the United States has argued to this Court in previous cases, Title II is a valid exercise of Congress's authority under both Section 5 of the Fourteenth Amendment and the Commerce Clause.[1]

Moreover, nowhere do the defendants assert or argue that Title II is not a valid exercise of Congress's authority under the Commerce Clause. By failing to raise such an argument in their opening brief, the defendants have waived their right to raise it in this appeal, see, *e.g.*, *K.D.* v. *County of Crow Wing*, 434 F.3d

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[1] Because the plaintiffs are proceeding under the doctrine of *Ex parte Young* and do not challenge the validity of Title II under the Commerce Clause, this case does not directly raise the question whether Title II is constitutional under either Section 5 of the Fourteenth Amendment or the Commerce Clause. The Supreme Court has long held that a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). Accordingly, this Court should not pass on the constitutionality of Title II. However, if the Court feels that it is necessary to do so, the United States requests that the Court certify the constitutional question to the Attorney General, as required by Federal Rule of Appellate Procedure 44, and permit the United States an opportunity to intervene to defend the constitutionality of Title II.

1051, 1055 n.4 (8th Cir. 2006) ("Plaintiffs failed to raise the issue or make an argument in their opening brief referencing these claims. Therefore, Plaintiffs have waived the appeal of these claims."), and this Court should assume that Title II is a valid exercise of Congress's Commerce Clause authority, see *Randolph*, 253 F.3d at 348 n.12 (assuming that Title II is valid Commerce Clause legislation because neither party asserted that it is not).

Thus, this Court must adhere to its holding in *Randolph* that private plaintiffs may enforce the requirements of Title II of the ADA by seeking prospective injunctive relief from state officials in their official capacities.

CONCLUSION

This Court should reject the defendants' assertion of Eleventh Amendment immunity to the plaintiffs' claims under Title II of the ADA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE is proportionally spaced, has a typeface of 14 points, contains 2,337 words, and was prepared using WordPerfect 12.0. I further certify that the diskettes submitted to Court and counsel, on which an electronic version of this brief is stored, have been scanned for viruses and are virus-free.

Date: May 25, 2006

SARAH E. HARRINGTON
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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE were served by overnight mail, postage prepaid, on the following counsel:

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