02-7022, 02-7074

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRIETTA D., HENRIETTA S., SIMONE A., EZZARD S., JOHN R., and PEDRO R., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

v.

RUDOLPH GIULIANI, Mayor of the City of New York, MARVA HAMMONS, Administrator of the New York City Human Resources Administration and Commissioner of the New York City Department of Social Services, and MARVA E. GLASS, Commissioner of the New York State Department of Social Services,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLEES AND URGING AFFIRMANCE

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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 and Section 504 of the Rehabilitation Act of 1973 against state officials for injunctive relief. The Attorney General has authority to enforce Title II and Section 504. See 42 U.S.C. 12133; 29 U.S.C. 794a. However, because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that these statutes can

be enforced in federal court by private parties acting as "private attorneys general" to the fullest extent permitted by the statutes and the Constitution.

STATEMENT OF THE ISSUES

The United States will address the following question:

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

2. This case involves a suit filed under Title II 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 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.

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). As with Title II, 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. Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Rothschild* v. *Grottenthaler*, 907 F.2d 286, 289 (2d Cir. 1990). Congress expressly conditioned the receipt of federal financial assistance on the States' waiver of Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

3. In this case, a class of individuals with disabilities brought suit against city and state officials alleging that their practices violated, *inter alia*, Title II and Section 504, and seeking injunctive relief. The Commissioner of the New York State Department of Social Services, sued in her official capacity, moved to dismiss the action on the grounds that the Eleventh Amendment barred the suit. The district court denied that motion, holding that the suit could proceed under the *Ex parte Young* doctrine. See 81 F. Supp. 2d 425, 429-430 (E.D.N.Y. 2000). After a bench trial, the district court found the defendants had violated the statutes, see 119 F. Supp. 2d 181 (E.D.N.Y. 2000), and subsequently issued an injunction ordering changes in the way the defendants administered the public benefits program, see 2001 WL 1602114 (E.D.N.Y. Dec. 11, 2001). This timely appeal followed.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action proceeding on the claims for injunctive relief against defendant State Commissioner, a state official sued in 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. In enacting Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, Congress intended to permit suits against state officials in their official capacity. The language of the statutes 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 found 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. To hold otherwise would deprive individuals of an established tool to vindicate federal rights without intruding on States' sovereign immunity.

ARGUMENT

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

Defendant-appellant Commissioner of the New York State Department of Social Services contends (State Br. 50-58) that the district court erred in holding that this suit could proceed against her in her official capacity for prospective relief without violating the Eleventh Amendment. 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). In *Garcia* v. *SUNY*, 280 F.3d 98 (2d Cir. 2001), this Court held that Congress's abrogation of Eleventh Amendment immunity for claims under Title II of the Americans with Disabilities Act only extended to claims that the state had acted or failed to act due to "discriminatory animus or ill will towards the disabled." *Id*. at 111. In addition, this Court held that while Congress had clearly conditioned the receipt of federal funds on a state agency's waiver of its immunity, that waiver was not knowing (and thus ineffective) because the state agency did not "know" in 1995 (the latest point the alleged discrimination in *Garcia* had occurred) that its waiver of immunity under

Section 504 would have a substantial fiscal effect, rather than simply result in liability substantially similar to that under Title II. *Id*. at 113-114. According to the Court, since "by all reasonable appearances state sovereign immunity [to claims of disability discrimination under the ADA] had already been lost" by virtue of the Title II abrogation, the State "could not have understood that in [accepting federal funds] it was actually abandoning its sovereign immunity from private damages suits" for the same disability discrimination under Section 504. *Id*. at 114.[1] Thus, if this private suit had been brought against the State in its own name, under current Second Circuit precedent it might well be barred by the State's Eleventh Amendment immunity.[2] But this Court need not reach that question, as this suit was brought against a state official in her official capacity

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[1] The United States intervened in *Garcia* to defend the constitutionality of the provisions and unsuccessfully sought rehearing en banc on the panel's holding regarding Section 504. We continue to believe that *Garcia*'s holding was incorrect, but recognize that this panel is bound to follow it absent intervening Supreme Court precedent to the contrary.

[2] This Court suggested in *Garcia* that at the point when there was a "colorable basis for the state to suspect" that it had retained its immunity to suit, the waiver for Section 504 would regain effectiveness "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity." 280 F.3d at 114 n.4. It is not clear whether and how this rationale would apply to suits, such as this, seeking only injunctive relief. Claims of injunctive relief are usually focused on preventing future violations, relying on proof of past violations simply as evidence of the likelihood of future misconduct. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983). Because of the difficulty in applying the holding of *Garcia* to this situation, and the relative ease of the statutory question discussed in the text, we do not explore this issue further.

seeking only prospective injunctive relief.

Even without a valid abrogation or waiver, it does not follow that States no longer need to comply with the ADA or Section 504 or that private parties cannot seek relief in federal court. The Supreme Court reaffirmed in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), 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.[3] *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

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[3] 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 United States could sue a State to recover damages under the ADA); *Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.").

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 *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). By limiting relief to prospective injunctions 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, 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*

The State Commissioner appears to concede (State Br. 55) that a suit against a state official in his or her official capacity for prospective relief is permitted by the Eleventh Amendment but contends (State Br. 55-58) 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*. In assessing the availability of *Ex parte Young* under Title II of the ADA, it is useful to note that the Court in *Garrett* recognized 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. The question, then, is whether Congress intended a different result for suits brought to enforce Title II.

In arguing that it did, the State Commissioner relies on the secondary holding of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). The Court in *Seminole Tribe* reaffirmed that, under *Ex parte Young*, the Eleventh Amendment did not bar actions against state officials in their official capacities seeking prospective injunctive relief. *Id*. at 75. 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). *Id*. at 75 n.17. As we discuss below, none of the indicia of congressional intent relied

upon by the Court in *Seminole Tribe* is present in this case.

The Supreme Court, in *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, Nos. 00-1531 & 00-1711, 2002 WL 1008485 (May 20, 2002), recently explained the holding in *Seminole Tribe* and affirmed the general availability of *Ex parte Young* actions to enforce federal statutes. The statute at issue in that case, 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*." 2002 WL 1008485 at *7. The Court recounted that in *Seminole Tribe*

> an Indian Tribe sued the State of Florida for violating a duty to negotiate imposed under that Act, 25 U.S.C. § 2710(d)(3). 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)." 517 U.S. at 74. 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. *Id*. at 74-75. 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*. 517 U.S. at 75. Permitting

> suit under *Ex parte Young* was thus inconsistent with the "detailed remedial scheme," 517 U. S. at 74 -- and the limited one -- that Congress had prescribed to enforce the State's statutory duty to negotiate.

Ibid.

Applying this understanding of *Seminole Tribe* to the Telecommunications Act of 1996, the Court determined that the defendant had not shown Congress intended to remove the availability of suits 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 benefitting 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.

Like the Telecommunications Act of 1996, and unlike IGRA, neither Section 504 nor Title II display any intent by Congress to bar a suit against state officials in their official capacities for injunctive relief.

1. 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." 2002 WL 1008485, at *7 (quoting *Seminole Tribe*, 517 U. S. at 74).[4]

In enacting Section 504 and Title II, Congress did not limit the availability of equitable remedies. To the contrary, Congress expressly incorporated the remedies of Title VI. See 42 U.S.C. 12133; 29 U.S.C. 794a; *Garcia*, 280 F.3d at 111. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that the remedies available under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, 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. This Court has held that the holding of *Franklin* applies to Section 504 and Title II as well. See *Bartlett* v. *New York State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999).

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[4] The courts of appeals had reached the same conclusion before *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).

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.[5] Instead, as in *Verizon Maryland*, Congress manifested no intent to limit equitable remedies and thus no "intent to

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[5] 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).

foreclose jurisdiction under *Ex parte Young*." 2002 WL 1008485 at *7.[6]

2. The State Commissioner relies (State Br. 55-56) on *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied *sub nom. United States* v. *Snyder*, 531 U.S. 1190 (2001). It is true that *Walker* did ultimately hold that official-capacity suits were not available under Title II. But the opinion is internally inconsistent, appears at a critical moment to conflate individual and official capacity suits, and has been undermined by subsequent Supreme Court decisions.

Walker holds, 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." *Id*. at 346. But *Walker* correctly notes 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

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[6] 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 and Section 504 do not address an entity's formal relations with other sovereigns, this circumstance has no application to these statutes. See *Gibson*, 265 F.3d at 722.

entity" and thus *Ex parte Young* was not available. *Id*. at 347.[7]

a. The rationale of *Walker* is not persuasive because it ignores 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 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.

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[7] 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).

> 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).

b. 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 violated Title II or Section 504, it would be immaterial (again except for the Eleventh Amendment) whether the individual sued the State itself or the official or employee in their official capacities. Under rules of equity, if the State was sued and enjoined, all its officers and agents would be automatically covered by the injunction. See Fed. R. Civ. P. 65(d) (every injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys"). If an official sued in his

official capacity was the defendant, an injunction entered against him likewise binds other government officials as if the suit had been brought against the State. See *ACLU* v. *Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Hendrickson* v. *Griggs*, 672 F. Supp. 1126, 1142 n.26 (N.D. Iowa 1987). 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 courts of appeals (other than the Seventh Circuit in *Walker*) have held 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 of Ky.*, 227 F.3d 414, 420 (6th Cir. 2000). The Supreme Court's decision in *Verizon Maryland* confirms this conclusion. 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 benefitting from the state commission's order." 2002 WL 1008485, at *7.

c. Like the Telecommunications Act of 1996 in *Verizon Maryland*, Title II does not identify who the defendants should be. Instead, it provides that the

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

Title VI does not contain an express private cause of action that identifies potential defendants; instead, the courts have implied one. See *Garcia*, 280 F.3d at 111; *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."[8]

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

The same was true under Section 504. In addition to a number of Supreme Court cases in which Section 504 actions were brought against government officials in their official capacities,[9] courts of appeals held, prior to the enactment of the ADA, that the implied private right of action under Section 504 could be enforced against state officials in their official capacities, noting that they were relying on the doctrine of *Ex parte Young* to avoid States' Eleventh Amendment immunity.[10] Congress, of course, is assumed to know the law and is generally

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[9] 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).

[10] 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 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

(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 Title VI, Congress incorporated the right to sue government officials in their official capacities into Section 504 and Title II.

d. Finally, *Walker*'s rationale has been undermined by the Supreme Court's subsequent decision in *Garrett*. The Supreme Court stated in *Garrett* that Title I of the ADA could be enforced against state officials through *Ex parte Young*. See 531 U.S. at 374 n.9. The Seventh Circuit 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. 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 *Boudreau* v. *Ryan*, 2001 WL 840583, at *6 n.5 (N.D. Ill. May 2, 2001), appeal pending, No. 02-1730 (7th Cir.).

e. While this Court has not addressed the precise argument raised by the State Commissioner, previous opinions have accepted that government officials in their official capacities are appropriate defendants under Section 504 and Title II.

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[10](...continued)
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).

In *Garcia*, for example, while holding that named officials were not appropriate defendants under Title II and Section 504 in their *individual* capacities, this Court did not dismiss the claims against the state officials in their *official* capacities on this ground. See 280 F.3d at 107; see also *Doe* v. *Pfrommer*, 148 F.3d 73 (2d Cir. 1998) (adjudicating Title II and Section 504 claims against state officials in their official capacities on the merits); *Flight* v. *Gloeckler*, 68 F.3d 61 (2d Cir. 1995) (same); *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 Section 504 and Title II suits proceeding against state officials in their official capacity, this Court should follow the majority of the courts of appeals that have held after *Seminole Tribe* that individuals could rely on *Ex parte Young* to enforce Title II and Section 504 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); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

CONCLUSION

The district court's holding that this suit could proceed against the Commissioner of the New York State Department of Social Services in her official capacity for prospective injunctive relief and is not barred by the Eleventh Amendment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(d), that the attached Brief for the United States as Amicus Curiae is proportionally spaced, has a typeface of 14 points, and contains 6,332 words.

May 29, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2002, two copies of the foregoing Brief for the United States as Amicus Curiae Supporting Appellees and Urging Affirmance were served by First Class mail, on each of the following persons:

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