Nos. 01-15944, 01-16240, 01-16328 & 01-16582

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK W., on his own behalf; KATHY W., on her own behalf;
ANDREW W., on his own behalf and on behalf of all children similarly situated,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor

v.

BRUCE S. ANDERSON, in his official capacity as Director of the Department of Health; PAUL LEMAHIEU, in his official capacity as
Superintendent of the Hawaii Public Schools,

Defendants-Appellants

AND CONSOLIDATED APPEALS

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF JURISDICTION

The United States agrees with defendants' statement of jurisdiction with the following clarification. This Court has jurisdiction over these four appeals from interlocutory orders denying defendants' motion to dismiss the claims on the grounds of Eleventh Amendment immunity pursuant to 28 U.S.C. 1291 as interpreted in *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*,

506 U.S. 139 (1993). However, as we discuss on pp. 7-8, *infra*, this Court's jurisdiction extends only to claims of complete immunity from suit, not to immunity defenses to a particular type of relief. See *Burns-Vidlak* v. *Chandler*, 165 F.3d 1257 (9th Cir. 1999). It is those claims that can be reached on interlocutory appeal.

STATEMENT OF THE ISSUES

1. Whether the statutory provision removing Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

2. Whether the Eleventh Amendment bars an individual from suing a state official in his official capacity for prospective injunctive relief to cure violations of Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

STATEMENT OF THE CASE

These appeals involve four suits filed under, *inter alia*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, against state agencies and state officials for damages and injunctive relief. Section 504 contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as

employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

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

Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980). Congress conditioned the receipt of federal financial assistance on the state agencies' waiver of Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to these actions brought by private plaintiffs under Section 504 of the Rehabilitation Act of 1973 to remedy discrimination against persons with disabilities.

In *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998), this Court held that in enacting 42 U.S.C. 2000d-7, Congress put state agencies clearly on notice that federal financial assistance was conditioned on a waiver of their immunity to private suits under Section 504. In the last year, this Court has twice reaffirmed that holding. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir. 2001); *Armstrong* v. *Davis*, No. 00-15132, 2001 WL 1506518, at *21 (9th Cir. Nov. 28, 2001). Defendants object to these rulings, but concede that, in light of this line of cases, this panel is bound to reject three of their appellate arguments to the contrary. Indeed, even absent defendants' concession, defendants' first three arguments regarding Section 2000d-7 and the Spending Clause are not properly before this Court. Defendants' remaining argument, that it is coercive to ask a state agency to waive its immunity from suit in exchange for federal financial assistance, is likewise unavailing under controlling Ninth Circuit and Supreme Court precedent.

In all events, these actions may proceed against the named state officials in their official capacities for prospective injunctive relief under the doctrine of *Ex parte Young*. The district courts' judgments should therefore be affirmed.

ARGUMENT

I

42 U.S.C. 2000d-7 VALIDLY CONDITIONED THE RECEIPT OF FEDERAL FINANCIAL ASSISTANCE ON THE WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964."

Seven courts of appeals have held that 42 U.S.C. 2000d-7 clearly puts state agencies on notice that federal financial assistance is conditioned on a waiver of their Eleventh Amendment immunity to private suits alleging violations of Section 504 and the other non-discrimination statutes tied to federal financial assistance and that an agency's acceptance of the funds therefore constitutes a waiver of immunity.[1] This Court was one of the earliest courts to have so ruled. See *Clark*

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[1] See *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 121 S. Ct. 2591 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 523 U.S. 275 (2001);
(continued...)

v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). In the last year, this Court has twice reaffirmed that central holding. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir. 2001); *Armstrong* v. *Davis*, No. 00-15132, 2001 WL 1506518, at *21 (9th Cir. Nov. 28, 2001).

Defendants press four arguments why their acceptance of federal financial assistance did not effect a valid waiver of their Eleventh Amendment immunity: (1) they did not understand the consequences of their waiver; (2) the waiver does not extend to money damages; (3) there is no express private cause of action; and (4) the waiver condition is coercive. Candidly, they admit (Def. Br. 9) that "*Douglas* forecloses panel consideration of the [first] three arguments." See also Def. Br. 44 (the "holding [of *Douglas*] would foreclose all but one of the arguments Hawaii makes against valid waiver"). Therefore, we need not address the merits of arguments (1) through (3). However, because defendants have indicated (Def. Br. 9) that they may seek to overturn *Douglas* by raising these arguments en banc, we wish to bring to the Court's attention procedural and jurisdictional impediments to the Court's consideration of arguments (1) through (3).

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[1](...continued)
Litman v. *George Mason Univ.*, 186 F.3d 544, 554 (1999) (Title IX), cert. denied, 528 U.S. 1181 (2000). But see *Garcia* v. *SUNY Health Sci. Ctr.,* No. 00-9223, 2001 WL 1159970 (2d Cir. Sept. 26, 2001), petition for reh'g en banc filed (Nov. 19, 2001).

1. Defendants' first argument (Def. Br. 27-30) is that they did not knowingly waive their immunity to Section 504 suits because Congress had removed their immunity to suits under Title II of the Americans with Disabilities Act. This argument was not pressed or considered below in any of these cases, despite multiple rounds of briefing on the Eleventh Amendment issue in each of the cases. Such an omission bars defendants from pressing the argument on appeal. See *United States* v. *Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991); cf. Ninth Cir. Rule 28-2.5 (requiring appellant to "state where in the record on appeal the issue was raised").[2]

2. Defendants' second argument (Def. Br. 31-35) is that the waiver of immunity in Section 2000d-7 does not extend to claims for money damages, but only to claims for injunctive relief. This argument also was not pressed below. In any event, this Court lacks jurisdiction in this interlocutory appeal to address this argument. In *Burns-Vidlak* v. *Chandler*, 165 F.3d 1257 (9th Cir. 1999), this Court held that the interlocutory appeal available to States claiming immunity from suit

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[2] In addition, defendants appear to have forfeited any claim that they did not waive their immunity to suits for prospective injunctive relief. In their answers in *Patricia N.*, *Mark H.*, and *Stephen L.*, defendants raised the affirmative defense of Eleventh Amendment immunity to the federal law claims only for "damages and retrospective injunctive relief" and "monetary damages" (E.R. 89-90 ¶¶ 3, 5; E.R. 187-188 ¶¶ 3, 5; E.R. 277-278 ¶¶ 3, 5). Thus, under this Court's decision in *Hill* v. *Blind Industries & Services*, 179 F.3d 754, 758-759 (9th Cir. 1999), amended, 201 F.3d 1186 (2000), defendants are barred from raising a broader argument at this stage. Application of the *Hill* holding is even more compelling in the *Patrick W.* case, in which defendants did not assert Eleventh Amendment or sovereign immunity in their answer (E.R. 10-17) and first raised the issue in the district court twenty-three months after the complaint was filed (R. 72 at 17-22).

under the Eleventh Amendment was not available when a State admitted that it could be sued, but contested only what remedies were available. In *Burns-Vidlak*, Hawaii had admitted that Section 2000d-7 waived its immunity for compensatory damages, but argued that the waiver did not extend to punitive damages. *Id*. at 1260. This Court held that a mere "defense to the payment of money" is an unappealable collateral order, even if framed in terms of the scope of an Eleventh Amendment waiver. *Ibid*. Similarly, defendants here argue that, although they can be sued for injunctive relief, they are immune from suit for damages under their reading of Section 2000d-7. That issue cannot be the subject of an interlocutory appeal because it is merely a "defense to the payment of money." Even if defendants prevailed on this argument, they would still be subject to suit by plaintiffs. They are seeking to raise a defense to a form of relief that can be addressed and vindicated on appeal from a final judgment, if plaintiffs prevail.

3. Defendants' third argument (Def. Br. 35-37) is that even if Section 2000d-7 clearly put States on notice that they were waiving their immunity for Section 504 claims, the waiver does not extend to money damages because Congress did not create an express cause of action for money damages under Section 504. Since this argument, too, is limited to suit for "money damages" (Def. Br. 36, 37), it cannot be raised by interlocutory appeal for the reasons stated above. In addition, this argument is not based on whether defendants are *immune* from suit, but whether Congress created a cause of action. Even assuming that this were an open question, it is not a question of immunity from suit. As

such, it is not properly raised in this interlocutory appeal. See *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 546, 547-548 (7th Cir. 2001) (holding that there was no appellate jurisdiction to address State's argument on interlocutory appeal of denial of Eleventh Amendment immunity regarding whether cause of action was implicitly repealed when it was clear that Congress had intended to remove States' immunity for any cause of action that did exist).

Thus, even without defendants' concession that their first three arguments are barred by this Court's decisions in *Clark*, *Douglas,* and *Armstrong*, this Court should not entertain these arguments because they are not the proper subject of interlocutory appeals.

4. Turning to the sole argument that defendants wish this panel to address, defendants contend (Def. Br. 37-41) that Section 504 is not valid Spending Clause legislation because it is "coercive," at least as applied to the Hawaii Department of Education. In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the Supreme Court articulated four general limitations on Congress's power under the Spending Clause to impose conditions on the receipt of federal funds: (1) the conditions must further "the general welfare;" (2) the legislation must make clear that the conditions exist; (3) the conditions must not be "unrelated 'to the federal interest in particular national projects or programs;'" and (4) the conditions must not require the recipient to violate the constitutional rights of others. *Id*. at 207-208. Defendants did not contest below, and do not assert on appeal, that any of those requirements has not been met.

While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" *id*. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)), it saw no reason generally to inquire into whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid*. The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid*. (quoting *Steward Mach.*, 301 U.S. at 590). Accordingly, this Court has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997).

Any argument that Section 504 is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to difficult or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency"

that would regulate health services within the State. *Id*. at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id*. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[3]

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not denying "equal access" to

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[3] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976).

students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[4]

These cases demonstrate that the federal government can place conditions on federal funding that require States to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. See *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en

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[4] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude an entity from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally condition the federal funds to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

banc), cert. denied, 121 S. Ct. 2591 (2001).

Defendants also claim (Def. Br. 39, 41) that the amount of money involved for Hawaii's Department of Education makes the statutory scheme unduly coercive.[5] Defendants have elected to apply for and accept a wide array of federal grants (E.R. 41-47). When the federal government is justified in placing conditions on modest receipts of federal resources, it is no less justified in placing those conditions on recipients that avail themselves of greater federal assistance. As the First Circuit has explained, "[w]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game." *New Hampshire Dep't of Employment Sec.* v. *Marshall*, 616 F.2d 240, 246 (1st Cir.), appeal dismissed and cert. denied, 449 U.S. 806 (1980).

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("In this context, a difficult choice remains a choice, and a

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[5] Defendants limit their argument to the Hawaii Department of Education. They have thus abandoned this argument as it applies to the Hawaii Department of Health, sued in *Patrick W.* through defendant Anderson in his official capacity as Director of the Department of Public Health.

tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000).[6]

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden* v. *Maine*, 527 U.S. 706, 750 (1999), it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency waive its immunity to suit in federal court for damages, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992); cf. Haw. Rev. Stat. § 29-2(3) ("encourag[ing]" state agencies to apply for federal grants). But once defendants have accepted federal financial assistance, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

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[6] Spending Clause statutes are often analogized to contracts. In this vein, we note that when a plaintiff is seeking to void a contract on the grounds "economic duress," it must show "acts on the part of the defendant which produced" the financial circumstances that made it impossible to decline the offer, and that it is not enough to show that the plaintiff wants, or even needs, the money being offered. *Undersea Eng'g & Constr. Co.* v. *International Tel. & Tel. Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); accord *United States* v. *Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994).

For these reasons, Section 504 and Section 2000d-7 are valid conditions on the receipt of all federal financial assistance authorized by the Spending Clause.[7]

II

SECTION 504 MAY BE ENFORCED AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR PROSPECTIVE RELIEF EVEN IF CONGRESS DID NOT VALIDLY REMOVE THE STATES' IMMUNITY

At some points in their brief, defendants limit their immunity claim to suits brought against the State or state agencies. As defendants note (Br. 2), however, plaintiffs have also brought these suits against state officials seeking prospective injunctive relief. At some points in their brief, defendants seem to argue that these claims should be dismissed as well. To the extent that defendants are seeking to dismiss plaintiffs' claims for prospective relief against a state official sued in his or her official capacity on Eleventh Amendment grounds, such an argument is barred by the doctrine of *Ex parte Young*.

While the Eleventh Amendment may immunize States from some suits by private individuals, the Supreme Court has recently reaffirmed that the Eleventh Amendment immunity does not authorize States to violate federal law. In *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the Court held that "Congress did not validly abrogate the States' sovereign immunity from suit by

[7] Because Section 2000d-7 can clearly be upheld as valid Spending Clause legislation, there is no need to address whether it can also be upheld as a valid exercise of Congress's authority to abrogate States' Eleventh Amendment immunity, as this Court held in *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

private individuals for money damages" under Title I of the Americans with Disabilities Act, but pointed out that its holding "does not mean that persons with disabilities have no federal recourse against discrimination." *Id.* at 374 n.9; see also *Alden* v. *Maine*, 527 U.S. 706, 754-755 (1999) ("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.[8]

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 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). By limiting relief to prospective injunctions of officials in their official capacities, the Court was able to avoid a judgment that would run directly against the State, while, at the same time, preventing the State (through its officials) from continuing to engage in illegal action.

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[8] 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).

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. "[T]he 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.").

This Court recognized the applicability of *Ex parte Young* to suits under Section 504 in *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). In *Armstrong*, this Court held that "[s]overeign immunity presents no bar to this suit against state officials seeking prospective injunctive relief against ongoing violations of the * * * R[ehabiliation] A[ct]." *Id.* at 1026; accord *Armstrong* v. *Davis*, No. 00-15132, 2001 WL 1506518, at *22 (9th Cir. Nov. 28, 2001); see also *Garrett*, 531 U.S. at 374 n.9. Thus, regardless of this Court's holding regarding whether defendants have waived their immunity to Section 504 suits, these suits should proceed against the named state officials sued in their official capacities for prospective injunctive relief.

CONCLUSION

The Eleventh Amendment is no bar to these cases proceeding in district courts. The district courts' judgments should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

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