No. 03-50608

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTY McCARTHY, by and through her next friend
JAMIE TRAVIS, *et al.*,

Plaintiffs-Appellees

v.

KAREN F. HALE, in her official capacity as Commissioner of the Texas Department of Mental Health & Retardation, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

INTERVENOR UNITED STATES' RESPONSE TO DEFENDANTS' PETITION FOR REHEARING EN BANC

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Pursuant to this Court's order of September 21, 2004, the United States submits this response to the defendant-appellant's petition for rehearing en banc.

ARGUMENT

I

THE PANEL CORRECTLY HELD THAT DEFENDANTS' CHALLENGE TO THE CONSTITUTIONALITY OF THE STATUTES AT ISSUE IN THIS CASE SHOULD NOT BE CONSIDERED IN THIS INTERLOCUTORY APPEAL

Defendants ask this Court to consider en banc the question whether a district court, when a state official is sued in his official capacity pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), must first determine whether the statutes under which the official is sued – here, Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 – are constitutional. A majority of the panel answered this question in the negative, finding that "the constitutionality of Title II and § 504 can be reviewed effectively on appeal from a final judgment" rather than on interlocutory appeal as an Eleventh Amendment immunity issue. *McCarthy ex rel. Travis* v. *Hawkins*, No. 03-50608, 2004 WL 1789945, at *6 (5th Cir. Aug. 11, 2004). That ruling is not appropriate for rehearing en banc because, regardless of its disposition, defendants will continue to be subject to suit in the district court on remand. Moreover, it does not conflict with the holding of this Court, of any other court of appeals, or of the Supreme Court, and it is correct.

A. This case is not en banc worthy because all three members of the panel

agreed that plaintiffs may proceed with their claims for prospective injunctive relief under Section 504. Although Judge Garza did not agree with the majority's analysis, he made clear that he believed Section 504 to be constitutional and, therefore, a valid basis for an *Ex parte Young* suit. Thus, regardless of the resolution of the issues raised in the petition for rehearing en banc, defendants will be subject to suit in the district court. The rationale for permitting interlocutory appeal of Eleventh Amendment issues – that the State's immunity protects it from being forced to go to trial – is absent here. Postponing decision on the State's constitutional challenge to Title II will not force the State to go to trial on issues it might otherwise avoid. Section 504 provides the same rights and remedies as the ADA in this area.[1]

The Eleventh Amendment bars private suits against a State sued in its own name absent a valid abrogation of sovereign immunity by Congress or waiver of immunity by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). The Eleventh Amendment, however, does not bar suits against officials in their official capacities seeking prospective injunctive relief to end ongoing violations of federal law. That is the rule articulated in *Ex parte Young*, 209 U.S. 123 (1908),

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[1] In their petition for rehearing en banc, defendants do not reassert their challenge to the validity of Section 504 except in a footnote. See Pet. 14 n.5. For the reasons asserted by the United States in multiple briefs previously filed before this en banc Court, Section 504 is a valid exercise of Congress's authority under the Spending Clause. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 01-31026, *Miller* v. *Texas Tech. Univ.*, No. 02-10190, *Johnson* v. *Louisiana Dep't of Educ.*, No. 02-30318.

and confirmed by subsequent Supreme Court decisions, see, *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).

The district court rejected defendants' argument that the Eleventh Amendment barred this suit by private individuals for prospective injunctive relief against Texas state officials, sued in their official capacity, to enforce the requirements of, *inter alia*, Title II of the ADA and Section 504. The State took an interlocutory appeal of that decision to this Court, arguing that *Ex parte Young* relief is not available to enforce Title II because Congress intended Title II to be enforced against public entities only, and not against public officials. The panel rejected that argument, Judge Garza did not dissent from that holding, and the State does not challenge that ruling in its petition for rehearing en banc. *McCarthy*, 2004 WL 1789945, at *4-*5.[2] The majority of the panel was correct in determining that the question whether Congress intended to preclude resort to *Ex parte Young* suits to enforce Title II was the only question appropriately before the panel in this interlocutory appeal.

The State argues in its petition for rehearing en banc that Judge Garza's dissenting opinion in this case should be adopted by this Court. Judge Garza and

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[2] That holding is in accord with every other court of appeals to consider that question. See *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 288 (2d Cir. 2003), cert. denied, 124 S. Ct. 1658 (2004); *Carten* v. *Kent State Univ.*, 282 F.3d 391, 396-397 (6th Cir. 2002); *Bruggeman* v. *Blagojevich*, 324 F.3d 906, 912-913 (7th Cir. 2003); *Randolph* v. *Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001); *Miranda B.* v. *Kitzhaber*, 328 F.3d 1181, 1187-1188 (9th Cir. 2003); *Miller* v. *King*, No. 02-13348, 2004 WL 2035197, at *10-*11 (11th Cir. Sept. 14, 2004).

the panel majority agree that, as Judge Garza puts it:

> As there is no final order in this case, we are limited to considering the question of whether Texas is entitled to Eleventh Amendment immunity from the Plaintiffs' suit. All other issues are beyond the scope of this appeal.

McCarthy, 2004 WL 1789945, at *8 (Garza, J., dissenting). The disagreement in this case is over whether the State may pursue its argument that Title II of the ADA and Section 504 are unconstitutional exercises of Congress's enumerated powers in this interlocutory appeal. Because the State's challenges to the statutes' constitutionality go to the merits of plaintiffs' claims, the panel majority was correct in holding that those claims may not be heard in this interlocutory posture, but may be heard by this Court at a later time.

Although the State and Judge Garza are surely right that a valid federal law or regulation is a requirement for a *successful* suit under *Ex parte Young*, and a prerequisite for any injunctive relief, a determination of the law's validity is not a prerequisite to the court's jurisdiction to adjudicate the merits of the claim. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002).

The question is whether the complaint "alleges" a violation of federal law, not whether that allegation is correct. See *Verizon*, 535 U.S. at 646 ("[T]he

inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."). Accordingly, a claim under *Ex parte Young* may fail for many reasons – the plaintiff may not state a claim under the relevant legal provision, a regulation may be an invalid interpretation of the statute it enforces, the statute may be unconstitutional, or the plaintiff's case may falter for lack of proof. But these failures do not deprive the court of jurisdiction to consider the claim.

Indeed, to hold otherwise would be to convert every merits challenge in an *Ex parte Young* case into a jurisdictional issue that can be reviewed by immediate appeal. There is no sound basis for allowing an immediate appeal on the question of a statute's constitutionality but not on other merits questions such as standing or failure to state a claim. Even if only the constitutional validity of the federal statute were considered a jurisdictional prerequisite under *Ex parte Young*, this would require courts to consider the constitutionality of a federal statute in every *Ex parte Young* case before considering nonconstitutional grounds. There is no legal basis for such a requirement. "[U]nless the suit 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or 'wholly insubstantial and frivolous,' a federal court always has jurisdiction of a suit seeking to enjoin state officials from violating federal law." *Brennan* v. *Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988) (citation omitted).

The State argues (Pet. 6) that the panel majority mistakenly relied upon the Supreme Court's decision in *Verizon* in holding that "resolution of the

constitutional questions urged by Defendants is irrelevant to the question whether Texas's Eleventh Amendment immunity from suit has been infringed." *McCarthy*, 2004 WL 1789945, at *6. The panel majority found that the State's constitutional challenges constitute "defenses to liability" that "do not challenge the district court's power under *Ex parte Young* to adjudicate Plaintiffs' claims." *Ibid.* The State argues, however, that if the underlying statutes are invalid, there is no federal right to be vindicated here and, consequently, no jurisdiction under *Ex parte Young*. But the Supreme Court made clear in *Verizon* that jurisdiction exists under *Ex parte Young* even where it is an open question whether any federal law has been violated or, indeed, whether any federal law applies at all. As the panel majority noted, 2004 WL 1789945, at *5, the *Verizon* Court acknowledged that the court of appeals in that case had found that the challenged state action "was probably *not* inconsistent with federal law after all." 535 U.S. at 646. The plaintiff in *Verizon* alleged a violation of a FCC ruling and of a federal statute. The Supreme Court noted that the FCC ruling had been vacated and that there was a substantial question whether state rather than federal law governed the dispute altogether. Nevertheless, the Court emphasized that "[a]n *allegation* of an ongoing violation of federal law ... is ordinarily sufficient," 535 U.S. at 646 (quoting *Idaho* v. *Coeur d'Alene*, 521 U.S. 261, 281 (1997) (emphasis and ellipsis added by *Verizon* Court)), and held that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim," *ibid.* Nothing about the State's challenges here would remove the instant case from the

rationale of *Verizon*.

In this case, as in others, "[c]onstitutionality is an issue on the merits, not a jurisdictional one." *United States* v. *Lipscomb*, 299 F.3d 303, 350 (5th Cir. 2002) (Duhé, J., concurring in part and dissenting in part). Accordingly, the constitutionality of Title II and Section 504 are not properly before this Court at this stage in the litigation. See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 41-48 (1995); *Lewis* v. *New Mexico Dep't of Health*, 261 F.3d 970, 978-979 (10th Cir. 2001); *Gros* v. *City of Grand Praire*, 209 F.3d 431, 436-437 (5th Cir. 2000).

B. Even if this Court had discretion to entertain the State's constitutional claims, there are substantial reasons not to do so in this case. First, this Court will not need to decide the constitutionality of Title II and Section 504 unless the Plaintiffs prevail on the merits upon remand. Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). "It ought to go without saying, but apparently the circumstances call for a reminder, that the federal courts should not reach a constitutional question, especially one concerning the validity of an act of Congress, if the merits of the case may be settled on nonconstitutional grounds." *White* v. *United States Pipe & Foundry Co.*, 646 F.2d 203, 206 (5th Cir. 1981). "Moreover, if a constitutional question is presented on appeal, it should not be addressed if there is a possibility the case can be decided on narrower statutory grounds on remand." *Jordan* v. *City of Greenwood*, 711 F.2d 667, 669 (5th Cir.

1983).

Second, this Court, sitting en banc, is considering how to apply the teachings of the Supreme Court's decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), to future challenges to Title II in *Pace* v. *Bogalusa City School Board*, No. 01-31026 (5th Cir.). A decision in *Pace* will also resolve questions regarding the State's immunity under Section 504 as well as that statute's validity under the Spending Clause.

Finally, the district court did not address the State's novel constitutional arguments below (see R-6-1118). "Generally this court will not reach the merits of an issue not considered by the district court." *Baker* v. *Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980). Moreover, the United States raised on appeal substantial arguments in favor of the constitutionality of Section 504 and Title II which were not fully briefed before the district court. Thus, the limited briefing and evaluation of the State's present claims in the district court further counsels against premature adjudication of those issues for the first time on appeal.

II

TITLE II IS VALID LEGISLATION UNDER THE FOURTEENTH AMENDMENT AND UNDER THE COMMERCE CLAUSE

A. Viewed in light of the teachings and example of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), Title II is valid Fourteenth Amendment legislation as applied to cases implicating the constitutional rights of institutionalized persons. *Lane* applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), asking (1) what "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 124

S. Ct. at 1988; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 1992; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," *ibid*. The Court conclusively resolved the first two questions and indicated that the third should be addressed on a category-by-category basis.

1. Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 124 S. Ct. at 1988. In the context of this case, Title II acts to enforce the Equal Protection Clause's prohibition against arbitrary treatment based on irrational stereotypes or hostility, as well as to enforce the heightened constitutional protection applied to the "treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, *e.g.*, *Jackson* v. *Indiana*, 406 U.S. 715 (1972); [and] the abuse and neglect of persons committed to state mental health hospitals, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982)." *Id*. at 1989 (parallel citations omitted). As was true of the right of access to courts at issue in *Lane*, "ordinary considerations of cost and convenience alone cannot justify" institutionalization decisions or the denial of institutionalized persons accommodations necessary to ensure their basic rights. *Id*. at 1994; see, *e.g.*, *O'Connor* v. *Donaldson*, 422 U.S. 563, 575-576 (1975); *Youngberg*, 457 U.S. at 324-325. Finally, as described below, the integration mandate of Title II assists in

the prevention of constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. See *Lane*, 124 S. Ct. at 1989.

2. In step two of the *Boerne* analysis, the Supreme Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 124 S. Ct. at 1989. The Court held that Congress's legislative finding of persistent "discrimination against individuals with disabilities * * * [in] access to public services," 42 U.S.C. 12101(a)(3), taken "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 124 S. Ct. at 1992.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Court found that the record included not only "a pattern of unconstitutional treatment in the administration of justice," *Lane*, 124 S. Ct. at 1990, but also violations of constitutional rights in the context of voting, marriage, jury service, zoning, the penal system, public education, law enforcement, and treatment of institutionalized persons. *Id.* at 1989. This history, the Court held, warranted prophylactic legislation addressing "public services" generally. *Id.* at 1992.

Thus, the adequacy of the historical predicate for Title II is no longer open

to dispute. Even if it were, the United States' original brief before the panel in this case provides ample additional support for the Supreme Court's conclusion in the context of institutionalization. See U.S. Br. 25-33.[3]

3. "The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 124 S. Ct. at 1992. To answer that question, this Court must decide whether Title II is congruent and proportional legislation as applied to the class of cases implicating the constitutional rights of institutionalized persons. See *ibid*. As was true of access to courts, the "unequal treatment of disabled persons" in the area of institutionalization "has a long history, and has persisted despite several legislative efforts." *Lane*, 124 S. Ct. at 1993; see *id*. at 1991; *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999); U.S. Br. 26-32. Thus, Congress faced a "difficult and intractable proble[m]," *Lane*, 124 S. Ct. at 1993, which it could conclude would "require powerful remedies." *Id*. at 1989.

Nonetheless, the remedy imposed by Title II is "a limited one." *Lane*, 124 S. Ct. at 1993. Even though it requires States to take some affirmative steps to avoid discrimination, "it does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," *id*. at 1993, and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the

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[3] Due to the extreme page limitations imposed on a response to a petition for rehearing en banc, as well as the number of complex legal issues raised in this case, there is insufficient room in this response for the United States to repeat our recitation of the record of disability discrimination in institutionalization here.

service," *id*. at 1994. See also *Olmstead*, 527 U.S. at 603-606 (plurality).

Title II's carefully circumscribed integration mandate is consistent with the commands of the Constitution in this area. Congress was well aware of the long history of state institutionalization decisions being driven by insufficient or illegitimate state purposes, irrational stereotypes and even outright hostility toward people with disabilities. See U.S. Br. 26-32. Title II provides a proportionate response to that history, congruent with the requirements of the Due Process and Equal Protection Clauses, by requiring the State to treat people with disabilities in accordance with their individual needs and capabilities. Compare *Olmstead*, 527 U.S. at 602 with *O'Connor*, 422 U.S. at 575-576 (requiring individualized assessment prior to involuntary commitment); *Parham* v. *J.R.*, 442 U.S. 584, 600, 606-607 (1979) (same for voluntary commitment of a child); *Youngberg*, 457 U.S. at 321-323 (requiring individualized consideration in context of conditions of confinement within institutions).

Moreover, given the history of unconstitutional compulsory institutionalization, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make placement decisions based on hidden invidious class-based stereotypes or animus that would be difficult to detect or prove. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 732-733, 735-736 (2003). Title II appropriately balances the need to protect against that risk and the State's legitimate interests. *Olmstead* generally permits a State to limit services to an institutional setting when the State's treating professionals determine that a restrictive setting is necessary for an individual patient, or when

providing a community placement would impose unwarranted burdens on the State's ability to "maintain a range of facilities and to administer services with an even hand." 527 U.S. at 605 (plurality). But when a State persistently refuses to follow the advice of its own professionals and is unable to demonstrate that its decision is justified by sufficient administrative or financial considerations, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. Compare *Hibbs*, 538 U.S. at 736-737 (Congress may respond to risk of "subtle discrimination that may be difficult to detect on a case-by-case basis" by "creating an across-the-board, routine employment benefit for all eligible employees").

Title II also serves broader remedial and prophylactic purposes. The integration accomplished by Title II is a proper remedy for continuing segregative effects of the historical exclusion of people with disabilities from their communities, schools, and other government services. See *Lane*, 124 S. Ct. at 1989-1990; *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) ("A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future.") (internal punctuation omitted). It is also a reasonable prophylaxis against the risk of future unconstitutional discrimination in government services. "[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 600-601. Much of the discrimination Congress documented occurred in the context of individual state officials making discretionary decisions driven by just such "false

presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies," H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 30 (1990). Congress could reasonably expect that Title II's integration mandate would reduce the risk of unconstitutional state action by ameliorating one of its root causes through "increasing social contact and interaction of nonhandicapped and handicapped people." Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 43 (1983).

Thus, the integration mandate plays an important role in Title II's larger goal of relieving the isolation and invisibility of people with disabilities that is both a legacy of past unconstitutional treatment and a contributor to continuing denials of basic constitutional rights. Accordingly, in the context presented by this case, Title II "cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct. at 1994.

B. Title II is also a valid exercise of Congress's authority under the Commerce Clause, a power Congress specifically invoked in enacting the ADA. See 42 U.S.C. 12101(b)(4). This Court recently upheld the Fair Housing Amendments Act (FHAA), 42 U.S.C. 3604, which, like Title II, prohibits disability discrimination by public entities, as valid Commerce Clause legislation. *Groome Res. Ltd.* v. *Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000). In that decision, this Court found that, "[i]n reviewing an act of Congress passed under its Commerce Clause authority," the Court asks whether "a rational basis exist[s] for concluding that the regulated activity sufficiently affect[s] interstate commerce." *Groome*, 234 F.3d at 203-204.

As explained fully in our brief before the panel, under the reasoning of *Groome*, which applies the teachings of *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), Title II is valid Commerce Clause legislation because, in prohibiting discrimination in the State's residential treatment services for individuals with mental retardation, Title II regulates a service that is both economic in nature and substantially affects interstate commerce. Such services are part of a national market in which both private and public entities participate. The Supreme Court has recognized in certain situations that when similar economic activities are undertaken by nonprofit entities or state hospitals, they fall within Congress's Commerce Clause authority. See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997).

CONCLUSION

This Court should deny defendants' petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the above INTERVENOR UNITED STATES' RESPONSE TO DEFENDANT'S PETITION FOR REHEARING EN BANC, along with a computer disk containing an electronic version of the response, were served by overnight mail, postage prepaid, on September 30, 2004, on the following parties:

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