No. 02-13348

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TRACY MILLER,

Plaintiff-Appellant

v.

RONALD KING,

Defendant-Appellee

WAYNE GARNER, et al.,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS INTERVENOR

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5010
950 Pennsylvania Ave. N.W.
Washington, DC 20530
(202) 305-4584

Miller v. *King*
No. 02-13348

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Intervenor United States hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, that the following persons may have an interest in the outcome of this case:

R. Alexander Acosta, Assistant Attorney General, United States Department of Justice

Thurbert E. Baker, Attorney General, State of Georgia

Stephen E. Curry, Attorney for Defendants/Appellees

Hon. Avant Edenfield, United States District Judge

Wayne Garner, Defendant/Appellee

State of Georgia, Defendant/Appellee

Georgia Department of Corrections, Defendant/Appellee

Gordon L. Hamrick IV, Attorney for Plaintiff/Appellant

John C. Jones, Senior Assistant Attorney General, State of Georgia

Ronald King, Defendant/Appellee

Tracy Miller, Plaintiff/Appellant

Kathleen M. Pacious, Deputy Attorney General, State of Georgia

Kevin Russell, Attorney, Civil Rights Division, United States Department of Justice

Johnny Sikes, Defendant/Appellee

Jessica Dunsay Silver, Attorney, Civil Rights Division, United States Department of Justice

David V. Weber, Attorney for Defendants/Appellees

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: **PAGE**

STATUTES: **PAGE**

REGULATIONS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-13348

TRACY MILLER,

Plaintiff-Appellant

v.

RONALD KING,

Defendant-Appellee

WAYNE GARNER, et al.,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF JURISDICTION

The United States concurs with Appellee's statement of jurisdiction.

STATEMENT OF THE ISSUE

The United States will address the following questions:

1. Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C.

12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether the Eleventh Amendment bars an individual's suit against a state official in his official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act.

STATEMENT OF THE CASE

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers,

> overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). As a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities,

including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case involves a suit filed under Title II. That Title 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). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified 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); 28 C.F.R. 35.140.[1]

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a

---

[1] Congress instructed the Attorney General to issue regulations to implement Title II based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that each "service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

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.

2. Plaintiff is an inmate in a Georgia state prison who has a disability. (See R-6-135-1 (Order)).[2] In 1998, Plaintiff filed a pro se action against the State of Georgia, the Georgia Department of Corrections, and certain prison officials, alleging that the defendants violated his rights under Title II of the Disabilities Act by failing to reasonably accommodate his disability. (Order at 1). Plaintiff sued the officials in both their individual and official capacities, and sought injunctive and declaratory relief, as well as money damages. (R-1-2-8 (Complaint)).

On January 29, 2002, the district court entered summary judgment against Plaintiff on his Title II claims in their entirety. (Order at 3-5). The court first held that Congress did not constitutionally abrogate the State's Eleventh Amendment immunity to private suits under Title II. (Order at 3). Accordingly, Plaintiff's claims against the State and its agencies were barred by sovereign immunity. (Order at 4). The court also entered summary judgment in favor of defendant Ronald King on the ground that Title II does not impose liability upon public officials in their personal capacities. The court did not address whether Plaintiff stated a valid claim for injunctive relief against King in his *official* capacity pursuant to the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

---

[2] References to "R-__-__-__" are to the volume, document number and page or page range in the record.

Plaintiff appealed. After receiving the State's Brief as Appellee, this Court appointed counsel and ordered supplemental briefing. Among other things, the Court ordered counsel to address (1) "whether Congress validly abrogated the States' sovereign immunity from suit by private individuals for money damages under Title II of the Americans with Disabilities Act" and (2) "[w]hether the trial court properly granted summary judgment to the State of Georgia and the Georgia Department of Corrections on Miller's claims under the Americans with Disabilities Act, in so far as Miller seeks injunctive and declaratory relief." (Order of Nov. 25, 2003).

SUMMARY OF ARGUMENT

The Supreme Court has before it for plenary review a case raising the validity of Congress's abrogation of a State's Eleventh Amendment immunity to claims under Title II of the Disabilities Act. See *Tennessee* v. *Lane*, No. 02-1667. The United States has fully briefed the question in the Supreme Court as well as in two cases currently pending before this Court. See *Goodman* v. *Ray*, No. 02-10168; *Association of Disabled Ams.* v. *Florida Int'l Univ.*, No. 02-10360. We do not undertake to repeat those arguments again in this case. Instead, this Court should delay consideration of the State's Eleventh Amendment challenge to Title II until that question is decided by the Supreme Court.

Even if the Supreme Court holds the Title II abrogation provision unconstitutional, however, the Eleventh Amendment will pose no bar to claims for prospective injunctive relief to enforce Title II under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). The Supreme Court has repeatedly affirmed that even when Congress lacks the power to abrogate a State's Eleventh Amendment immunity, the State is still bound to comply with the valid requirements of federal law. See, *e.g.*, *University of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001); *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). The Court has further reaffirmed that those obligations may be enforced through suits for prospective relief against public officials in their official capacities to end ongoing violations of federal statutes like the Disabilities Act. See, *e.g.*, *Garrett*, 531 U.S. at 374 n.9. Thus, even those Circuits holding the Title II abrogation provision invalid have recognized the continuing availability of *Ex parte Young* actions to enforce the requirements of Title II.

ARGUMENT

I

THIS PANEL SHOULD DELAY CONSIDERATION OF THE STATE'S ELEVENTH AMENDMENT CHALLENGE TO TITLE II PENDING RESOLUTION OF THE SAME CHALLENGE BY THE SUPREME COURT IN *TENNESSEE* v. *LANE* AND BY OTHER PANELS OF THIS COURT ALREADY CONSIDERING THE SAME ISSUE

The validity of Congress's abrogation of the State's Eleventh Amendment immunity to private suits under Title II of the Disabilities Act is currently before the Supreme Court in *Tennessee* v. *Lane*, No. 02-1667. The Court heard oral argument on January 13, 2004, and a decision will be issued before the end of the Term in July. The State of Georgia has also raised the same challenge in *Goodman* v. *Ray*, No. 02-10168, a case currently under submission before a panel of this Court. The United States intervened in that case as well, and filed an extensive brief on the issue.[3] On July 3, 2003, the *Goodman* panel stayed further consideration of the appeal pending the Supreme Court's decision in *Lane*. This Court should likewise delay consideration of the Eleventh Amendment challenge in this appeal until the Supreme Court issues its decision in *Lane*. Because the question will soon be decided by the Supreme Court, and because we have

---

[3] The United States also briefed the question in *Association of Disabled Ams.* v. *Florida Int'l Univ.*, No. 02-10360, which is under consideration with *Goodman*.

extensively briefed the issue for this Court in another pending case with the same defendant, we will not repeat those arguments in this brief.[4]

II

THE ELEVENTH AMENDMENT IS NO BAR TO PRIVATE SUITS AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES TO ENJOIN FUTURE VIOLATIONS OF TITLE II OF THE DISABILITIES ACT

In appointing counsel, this Court also asked for separate briefing on the question of whether Plaintiff's claims for injunctive and declaratory relief were properly dismissed. The analysis of that question varies depending on the particular party against whom the relief is sought. The Eleventh Amendment protects the State and its agencies from suit in federal court, regardless of the relief sought. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999); *Cory* v. *White*, 457 U.S. 85, 90-91 (1982). Thus, if the abrogation provision is held invalid, Plaintiff's claims for declaratory and injunctive relief against the State and its agencies are

---

[4] The United States' briefs in *Goodman* and *Association of Disabled Americans* are available in the dockets of those cases, and at the Department of Justice web site. See *www.usdoj.gov/crt/briefs/goodman.pdf* and *www.usdoj.gov/crt/briefs/assocdisabled.pdf*. The United States' brief in *Lane* is available at the Solicitor General's web site. See *www.usdoj.gov/osg/briefs/2003/3mer/2mer/2002-1667.mer.aa.pdf* (Brief) and *www.usdoj.gov/osg/briefs/2003/3mer/2mer/2002-1667.mer.aa.app.pdf* (Appendix). If this Court believes that further briefing on the question would be helpful at this time, the United States will file a supplemental brief setting forth these arguments.

barred by the Eleventh Amendment unless the State has waived its sovereign immunity.[5] See *Seminole Tribe of Fla*. v. *Florida*, 517 U.S. 44, 58 (1996). Conversely, if the Supreme Court upholds the Title II abrogation in *Tennessee* v. *Lane*, No. 02-1667, Plaintiff may proceed with all his claims for relief against the State defendants, including his claims for injunctive and declaratory relief.

Regardless of the disposition of the abrogation issue, however, Plaintiff's claims for injunctive relief against defendant King in his official capacity[6] may proceed under the doctrine of *Ex parte Young* 209 U.S. 123 (1908).[7] See generally, *Florida Ass'n of Rehab. Facilities* v. *Fla. Dep't of Health and Rehab. Svs.*, 225 F.3d 1208, 1219 (11th Cir. 2000) ("Under the doctrine of *Ex parte Young,* there is a long and well-recognized exception to [Eleventh Amendment

---

[5] Plaintiff argued in his pro se brief that the State waived its sovereign immunity in a number of ways, which the State denies. (See State Br. 19-21). The United States takes no position on this question.

[6] The Eleventh Amendment does not apply to public officials in their *individual* capacities. See *Alden*, 527 U.S. at 757. The district court entered summary judgment in favor of defendant King in his individual capacity on other grounds. (See Order at 4 (King not liable in his individual capacity because Title II does not impose personal liability on public officials)).

[7] The State has not argued otherwise in its brief to this Court. Nor did the district court conclude that *Ex parte Young* relief was unavailable. Instead, it appears that the court did not consider the question when it granted summary judgment against Plaintiff's Title II claims in their entirety. (See Order at 4-5).

immunity] for suits against state officers seeking prospective equitable relief to end continuing violations of federal law.") (citation omitted). The Supreme Court, in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), reaffirmed 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."); *Osteen* v. *Henley*, 13 F.3d 221, 223 (7th Cir. 1993) ("The immunity that the Eleventh Amendment grants does not go so far as to allow state officials to ignore federal law with impunity.").

It was to reconcile these very principles — that States have Eleventh Amendment immunity from private suits, yet 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] The Court held in *Ex parte Young*, 209 U.S. 123 (1908), that, when a state

[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 the United States could sue a State to recover damages under the ADA); *Alden*, 527 U.S. at 755.

official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is deemed to be acting *ultra vires* and is no longer entitled to the State's immunity from suit. The 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).[9] 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 in their official capacities) 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

---

[9] For this reason, Plaintiff's claims for injunctive relief against the State or its agencies are not covered by the *Ex parte Young* exception.

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.").

Accordingly, even those Circuits that have held that Congress lacked the power to abrogate a State's Eleventh Amendment immunity to Title II claims have continued to permit *Ex parte Young* suits to enforce the Act's requirements. See *Bruggeman* v. *Blagojevich*, 324 F.3d 906, 912-913 (7th Cir. 2003); *Wessel* v. *Glendening*, 306 F.3d 203, 207 n.4 (4th Cir. 2002); *Carten* v. *Kent State Univ.*, 282 F.3d 391, 395-397 (6th Cir. 2002); *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 115 (2d Cir. 2001); *Randolph* v. *Rodgers*, 253 F.3d 342, 345-348 (8th Cir. 2001); *Reickenbacker* v. *Foster*, 274 F.3d 974, 976 (5th Cir. 2001); *Roe No. 2* v. *Ogden*, 253 F.3d 1225, 1233-1234 (10th Cir. 2001).[10] There is no basis for this Court to reach a contrary conclusion and create a division of authority in the Circuits.

---

[10] The Second and Sixth Circuits have held that the Title II abrogation is unconstitutional in some applications, but constitutional in others. See *Garcia*, 280 F.3d at 108-112; *Popovich* v. *Cuyahoga County Ct. of C.P.*, 276 F.3d 808, 811-816 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).

CONCLUSION

The Eleventh Amendment is no bar to the plaintiff's claims under Title II of the Americans with Disabilities Act.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5010
950 Pennsylvania Ave. N.W.
Washington, DC 20530
(202) 305-4584

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 2,990 words.

February 10, 2004

KEVIN RUSSELL
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR were served by overnight delivery on the following parties and counsel of record:

Gordon L. Hamrick, IV
Bondurant, Mixson & Elmore, LLP
1201 W Peachtree St., N.W.
Suite 900
Atlanta, GA 30309-3464

David V. Weber
119 Davis Rd., Suite 9-C
Augusta, GA 30907

Stephen E. Curry
Special Assistant Attorney General
1 George C. Wilson Ct.
Suite B
Augusta, GA 30909

KEVIN RUSSELL
Attorney