No. 02-3657

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONNA RADASZEWSKI, Guardian, on behalf of Eric Radaszewski,

Plaintiff - Appellant

v.

JACKIE GARNER, Director, Illinois Department of Public Aid,

Defendant - Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Honorable John W. Darrah

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This appeal involves the ability of individuals to seek judicial enforcement of Title II of the Americans with Disabilities Act against state officials for injunctive relief. The Attorney General has authority to enforce Title II. See 42 U.S.C. 12133. However, because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that the Disabilities Act can be enforced in federal court by private parties to the extent permitted by the statute and the

Constitution. The United States filed a brief addressing this issue in another case in this Court, *Boudreau* v. *Ryan*, No. 02-1730.

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.

STATEMENT OF THE CASE

1. Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case involves a suit filed under, *inter alia*, Title II. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or

local government" and its components. 42 U.S.C. 12131(1)(A) and (B). A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2). The language of Title II contemplates private suits against public entities. 42 U.S.C. 12133.

2. In this case, Donna Radaszewski brought suit on behalf of her son, Eric, an individual with disabilities, against a state official, sued in her official capacity, alleging that his practices violated, *inter alia*, Title II and Section 504 of the Rehabilitation Act, and seeking injunctive relief. Because of his disabilities, Eric Radaszewski requires nursing care 24 hours per day. When Eric turned 21, the defendant agency sought to reduce Medicaid reimbursement funding for in-home nursing care to such an extent that Eric would have to be placed in an institution in order to receive the care that he requires. After the plaintiff filed suit, the defendant filed a motion for judgment on the pleadings, arguing, *inter alia*, that she enjoys Eleventh Amendment immunity from suits under Title II of the ADA. She did not raise an Eleventh Amendment immunity defense to the claims under Section 504.

The district court granted the defendant's motion to dismiss the Title II claim, relying on this Court's holding in *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied, 531 U.S. 1190 (2001), that the *Ex parte Young* doctrine is not available to enforce Title II claims because "the proper defendant in a Title II, ADA claim, is a public entity not an individual." *Radaszewski* v. *Garner*, 2002

WL 31045384, No. 01-9551, at *1 (N. D. Ill. Sept. 11, 2002). While the court noted that the Supreme Court's recent decision in *University of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001), suggested that *Ex parte Young* was available to enforce Title I of the Americans with Disabilities Act, the district court determined that it was bound by this Court's holding in *Walker* that the doctrine was not available to enforce Title II. *Id*. at *2.

The court also dismissed the Section 504 claims after concluding that the IDPA's in-home nursing reimbursement scheme does not discriminate on the basis of disability, and therefore does not violate Section 504. *Id.* at *2-*3. This timely appeal followed.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action proceeding under Title II on the claims for injunctive relief against the defendant, a state official sued in his 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), Congress intended to permit suits against state officials in their official capacities. The language of the statute clearly permits such a reading. Moreover, Title II of the ADA specifically incorporates the remedial scheme of Section 504 of the Rehabilitation Act, 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 interpreted 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.

This Court in *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied, 531 U.S. 1190 (2001), held that Title II suits could not be brought against state officials in their official capacities. We believe this Court should re-examine that holding in light of two intervening Supreme Court decisions, as well as other circumstances, and conclude that it was wrongly decided.

ARGUMENT

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

In *Walker* v. *Snyder*, 213 F.3d 344, 347 (2000), cert. denied, 531 U.S. 1190 (2001), this Court held that *Ex parte Young* suits were unavailable under Title II of the Americans with Disabilities Act (ADA). There are three substantial bases for re-examining *Walker*'s holding on this point. First, as the district court noted, slip op. at *2, intervening Supreme Court decisions have drawn this holding into doubt. See *Ashley* v. *United States*, 266 F.3d 671, 674 (7th Cir. 2001) (relying on "strands of analysis" of intervening Supreme Court opinion to overrule recent panel decision). Second, the issue was not fully briefed in *Walker* – the plaintiff was *pro se* and the United States, participating as intervenor, focused on the validity of the abrogation – and thus the panel was not presented with the arguments contained herein regarding the text, structure, legislative history, and prior interpretations of

earlier statutes. See *Whetsel* v. *Network Prop. Servs., LLC*, 246 F.3d 897, 903 (7th Cir. 2001) (that a panel "might not have had [a particular] argument before it" is "a sufficient reason for reconsidering" the panel's holding); see also *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 709 & n.6 (1978) (Powell, J., concurring). And finally, the decision in *Walker* has created a split with the four other circuits to address the issue. "In the interest of promoting uniformity of federal law," this Court has "an obligation to reconsider [its] now isolated position." *United States* v. *Carlos-Colmenares*, 253 F.3d 276, 277 (7th Cir.), cert. denied, 122 S. Ct. 258 (2001). We thus urge this Court to re-examine and overrule *Walker* and permit this suit to proceed against the state officials in their official capacities.

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 *Walker*, 213 F.3d at 347, this Court held that Congress's abrogation of Eleventh Amendment immunity for claims under Title II of the Americans with Disabilities Act involving reasonable accommodations was not a valid exercise of Congress's authority to enforce the Fourteenth Amendment. Thus, if this private suit had been brought against the State in its own name, under current circuit precedent it might well be barred by the State's Eleventh Amendment immunity. Cf. *Edwards* v. *Illinois Bd. of Admissions*, 261 F.3d 723, 731 (7th Cir. 2001) (suggesting that validity of abrogation for Title II

was an open question). But this Court need not reach that question, as this suit was brought against a state official in his official capacity seeking only prospective injunctive relief.

The absence of a valid abrogation or waiver does not mean that States may ignore the ADA or, if they do, that private parties have no remedy in federal court. 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, 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.[1] The Court held in *Ex parte Young*, 209 U.S. 123 (1908), that, when a state official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is deemed to be acting *ultra vires* and is no longer entitled to the State's immunity from suit. The 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);

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[1] 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); *EEOC* v. *Board of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 299-300 (7th Cir. 2002).

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*

In *Walker*, 213 F.3d at 347, this Court acknowledged that a suit against a state official in his or her official capacity for prospective relief is permitted by the Eleventh Amendment, but held that a suit against a state official for injunctive relief to cure a continuing violation of federal law is not available under Title II because Congress only intended States, and not their officials, to be named as defendants. For the reasons stated below, *Walker*'s interpretation of the statute should be re-examined and overruled.

1. One of *Walker*'s underpinnings was undermined by the Supreme Court's subsequent decision in *Garrett*. The panel 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. The Supreme Court stated in *Garrett* 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. Thus, this Court'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.

2. Another of *Walker*'s underpinnings was undermined by the Supreme Court's recent decision in *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 122 S. Ct. 1753 (2002). *Verizon Maryland* clarified the holding regarding *Ex parte Young* in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), that the panel in *Walker* appeared to rely upon in reaching its conclusion.

While the Court in *Seminole Tribe* reaffirmed that the Eleventh Amendment did not bar actions against state officials in their official capacities seeking prospective injunctive relief, it held, 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). 517 U.S. at 75 & n.17. In *Verizon Maryland*, the Supreme Court affirmed the general availability of *Ex parte Young* actions to enforce federal statutes and clarified the holding in *Seminole Tribe* in this regard.

The statute at issue in *Verizon Maryland*, 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*." 122 S. Ct. at 1761. The Court recounted that in *Seminole Tribe* "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).'" *Ibid*. The statute in *Seminole Tribe* limited the remedies available to the Court. "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. 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*." *Ibid*. (citations omitted). Applying this understanding of *Seminole Tribe* to the Telecommunications Act of 1996, the Court determined that the defendant had not shown that Congress intended to limit available relief in a way that would preclude actions 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 benefiting 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.

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." 122 S. Ct. at 1761 (quoting *Seminole Tribe*, 517 U. S. at 74).[2] In enacting Title II, Congress did not limit the availability of equitable remedies. To the contrary, Congress expressly incorporated the remedies of Title VI of the Civil Rights Act of 1964. See 42 U.S.C. 12133; 29 U.S.C. 794a. 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

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[2] The courts of appeals had reached the same conclusion prior to *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).

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. The holding of *Franklin* applies to Title II as well. See *Barnes* v. *Gorman*, No. 01-682, 2002 WL 1305773 (June 17, 2002).

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. See *Lieberman* v. *University of Chicago*, 660 F.2d 1185, 1188 (7th Cir. 1981), cert. denied, 456 U.S. 937 (1982); 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.[3] Instead, as in *Verizon Maryland*, Congress manifested no intent to limit equitable remedies and thus no "intent to foreclose jurisdiction under *Ex parte Young*." 122 S. Ct. at 1761.[4]

3. *Verizon Maryland* also undermines *Walker*'s rationale that the text of the statute demonstrated that official-capacity suits were not available under Title II. *Walker* held, 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." 213 F.3d at 346. But *Walker* correctly noted 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

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[3] 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).

[4] 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 does not address an entity's formal relations with other sovereigns, this circumstance has no application. See *Gibson*, 265 F.3d at 722.

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 entity" and thus *Ex parte Young* was not available. *Id*. at 347.[5]

a. *Verizon Maryland* counsels a different result. 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 benefiting from the state commission's order." 122 S. Ct. at 1761.

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

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[5] Subsequently, this Court 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 (2000).

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 *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001); *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."[6]

The same was true under Section 504 prior to the enactment of the ADA. In addition to a number of Supreme Court cases in which Section 504 actions were brought against government officials in their official capacities,[7] courts of appeals had held that the implied private right of action under Section 504 could be enforced against state officials in their official capacities, noting that they were

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[6] 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.").

[7] 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).

relying on the doctrine of *Ex parte Young* to avoid States' Eleventh Amendment immunity.[8] Congress, of course, is assumed to know the law and is generally 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 Section 504 and Title VI, Congress

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[8] 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 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).

incorporated the right to sue government officials in their official capacities into Title II.

b. The holding of *Verizon Maryland*, and its implicit rejection of the rationale of *Walker*, is consistent with the fundamental legal doctrine that a suit against a state official in his or her official capacity 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, an official in his or her official capacity is 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. 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).

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 as violating Title II, it would be immaterial (again except for the Eleventh Amendment) whether the individual sued the State itself or the officials or employees 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 the governor or an attorney general is sued in his official capacity, 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.[9]

For this reason, the other courts of appeals have held in a variety of statutory settings 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*, 227 F.3d 414, 420 (6th Cir. 2000). The Supreme Court's decision in *Verizon Maryland* confirms this conclusion.

4. 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 Title II suits proceeding against state

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[9] This Court reached a similar conclusion in *Smith* v. *Metropolitan School District*, 128 F.3d 1014 (1997), cert. denied, 524 U.S. 951 (1998). *Smith* involved a suit under Title IX brought against the school district and various school officials. This Court held that the suit against the school principal in his official capacity should be dismissed because the principal was not a sufficiently senior official to be treated as an alter ego of the school district. *Id*. at 1020-1021. This Court suggested, however, that a suit brought against members of the school board in their official capacities would have been permitted because it would have been the same as a suit against the school district itself. *Id*. at 1021 n.3.

officials in their official capacities, this Court should join the courts of appeals that have held after *Seminole Tribe* that individuals could rely on *Ex parte Young* to enforce Title II against a state official in his official capacity. 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); cf. *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).

CONCLUSION

The district court's holding that this suit could not proceed against the defendant in his official capacity for prospective injunctive relief should be reversed and the case remanded for further proceedings.

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 5,768 words.

November 29, 2002

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief for the United States as Amicus Curiae were served on the following counsel of record on the 29th Day of November, 2002:

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