2003 WL 24016588 (C.A.5) (Appellate Brief)
United States Court of Appeals,
Fifth Circuit.

Christy MCCARTHY, by and Through her Next Friend Jamie Trav1s; Todd Gordon, by and Through his Next Friend Trjsha Gordon; Allison Pratt, by and Through her Next Friend Paula Pratt; Gail Truman, by and Through her Next Friend Ken Truman; Jim Flo Yd, Jr., by and Through his Next Friend Jim Floyd, Sr.; Sam Lindsay, by and Through his Next Friend Betty Lindsay; Oshea Brooks; Joe Ray Comacho; Micha Chastaln, by and Through his Next Friend Lori Chastain; Al, by and Through his Next Friend Ll; Arc of Texas, on Behalf of its Members and for those Similarly Situated; Sue Ann Ortiz; Patrick Sostack, by and Through their Parents and Next Friends Gary and Lisa Sostack; Scott Sostack, by and Through their Parents and Next Friends Gary and Lisa Sostack; Shyan Forough, by and Through his Parents and Next Friends Reza and Arzu Forough; David Zweifel, by and Through his Parents and Next Friends Linda and Leroy Zweifel; Ashton Bowlen, by and Through her Motion and Next Friend Patricia Bowlen; Tyler Blanchard, by and Through his Mother and Next Friend Faith Blanchard; Garrett Gn.Lard. by and Through his Mother and Next Friend Keeya Gillard; Kameron Lane, by and Through his Mother and Next Friend Angie Lanea;madison Polk, by and Through her Father and Next Friend John Polk; Paige Smith, by and Titoough her Mother and Next Friend Gretta Smith, Plaintiffs-Appellees,

v.

Karen F. HALE, in her Official Capacity as Commissioner of the Texas Department of Mental Health & Mental Retardation; James R. Hine, in his Official Capacity as Commissioner of the Texas Department of Human Services; Albert Hawkins, in his Official Capacity as Commissioner of the Texas Health and Human Services Commission, Defendants-Appellants.

No. 03-50608.
October 20, 2003.

On Appeal from the United States District Court for the Western District of Texas Austin Division

Brief of Plaintiffs-Appellees

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***iiiSTATEMENT REGARDING ORAL ARGUMENT**

Appellees respectfully request oral argument. This interlocutory appeal involves a direct and unmitigated attack on the protections provided to the rights of individuals with disabilities clearly established by federal law and prior decisions of this court. Adoption of Defendants-Appellants contentions would decimate the safeguards that have existed in federal law for individuals with disabilities for decades. Oral argument is warranted.

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***2JURISDICTIO1NAL STATEMENT**

Within the ambit of this proceeding, Karen F. Hale, Defendant-Appellant, ("Hale") is attempting to argue issues which are not intertwined with Eleventh Amendment immunity, "in determining whether the doctrine *of Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635, 642-43 (2002). Male's argument ignores the fundamental difference, long recognized by the Supreme Court, between questions of jurisdiction and questions of the validity of a cause of action. See e.g., *Davis* v. *Passman*, 442 U.S. 228, 239 n. 18 (1979).

A denial of Eleventh Amendment immunity may be challenged by an interlocutory appeal because the Eleventh Amendment creates an immunity from suit. *Puerto Rico Aqueduct & Sewer A nth.* v. *Metcalf& Eddy, Inc.*, 506 U.S. 139. 143-145 (1993). However, the scope of such interlocutory appeal is limited to claims that the defendant is immune from suit, mere defenses to liability are off limits. *Swim* v. *Chambers Counny Comm'n*, 514 U.S. 35, 41-43 (1995). In the instant case, only Hale's argument that Title II of the Americans with Disabilities Act ("ADA") is incompatible with *Ex part e Young* is related to Eleventh Amendment immunity. See *Brief of Defendant-Appellants*, 20-22. None of the other arguments raised by Hale are intertwined with considerations of Eleventh Amendment immunity. These arguments are mere defenses to liability, and should not be made part of an interlocutory appeal. *Verizon.* at 646.

***3SUMMARY OF THE ARGUMENT**

Although citizens may not generally sue states in federal court under the Eleventh Amendment, the *Young* doctrine has carved out an alternative, permitting citizens to seek prospective equitable relief for violations of federal law committed by state officials in their official capacities. *Ex parte Young*, 209 U.S. 123, 159-60, 52 L. Ed. 714,28 S.Ct.441 (1908). These are not suits against the state. McCarthy may proceed against Hale, in that following four requirements are met: (1) the plaintiffs are suing state officials, rather than the state itself; (2) the plaintiffs have alleged a non-frivolous violation of federal law; (3) the plaintiffs seek prospective equitable relief, rather than retroactive monetary relief from the state treasury; and (4) the suit does not implicate "special sovereignty interests." *Idaho v, Coeurd'Alene Tribe*, 521 U.S. 261 (1997); *Florida v. Treasure Salvors. Inc.*, 458 U.S. 670 (1982).

From *Plaintiffs' Second Amended Complaint* there is no dispute that McCarthy has sued state officials for prospective equitable relief. 2R228-231. It is also clear that a "state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application *of Ex pane Young." J.B. ex rel.*

Hart v. *Valdez*, 186 F.3d 1280, 1287 (1 Olh Cir. 1999).

Hale focuses on the merits of McCarthy's claims. Such a focus is misplaced. *Verizon*, at 646. At the immunity stage, federal courts apply the limited jurisdictional standard used to assess whether a claim sufficiently confers subject matter jurisdiction, asking only whether the claim is "wholly insubstantial and frivolous," ***4** rather than reaching the legal merits of the claim. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, (1949).

The contention that Congress preempted *Exparle Young* suits for violations of Title II of the Americans with Disabilities Act by prohibiting discrimination by public *entities* is the only argument raised by Hale which examines subject matter jurisdiction, and is therefore the only argument which is intertwined with Eleventh Amendment immunity. *Brief of Defendanls-Appellants*, 20-22. However, Hate's contention has not been accepted by any court of appeals, has been rejected by the Fifth, Sixth, Seventh, Eighth, Ninth & Tenth Circuit Courts of Appeals, and has been rejected by the courts which originally asserted the argument. *Infra*, 15-18. Hale's argument is also been rejected by the Supreme Court. *Verizon*, at 643-44 (Allowing E.v *pane\ oung* suit against commissioners although statute is directed at the commission).

In that there is no question that McCarthy's claims confer subject matter jurisdiction, this cause should be remanded to the district court for further proceedings.

***5STANDARD OF REVIEW**

This Court must conduct a de novo review of the district court's order denying Eleventh Amendment immunity. *Cono v. Tangipahoa Parish Council-President Gov*'/, 279 F.3d. 273, 280 (5*l*h Cir. 2002). In that the claims of Eleventh Amendment immunity were raised in the context of a motion to dismiss, the Court must accept all well pled facts in the complaint as true and view them in the light most favorable to the Plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5'h Cir. 1996).

***6ARGUMENT**

I. Eleventh Amendment Immunity Is Irrelevant to the Fact That Medicaid Act Provisions Are Enforceable Under the *Ex Parte Young* Doctrine and Pursuant to 42 U.S.C. § 1983

Hale is incorrect in claiming that the Eleventh Amendment bars *Exparte Young* claims brought under Title XIX of the Medicaid Act. The *Young* doctrine can be used to enforce the Medicaid Act provisions, including 42 U.S.C. §§ 1396a(a)(3), (a)(8) and (a)(10)(B) and 1396n(c)(2)(C), as it can be used to enforce any other federal law. And, because these provisions establish federal rights consistent with *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997), and *Wilder* v. *Virginia Hosp. Ass'n.*, 496 U.S. 498 (1990) such rights can be enforced pursuant to § 1983.

Demonstrating that these Medicaid Act provisions can be enforced pursuant to *Exparte Young* or that they establish a federal right upon a particular class of persons consistent with *Blessing* and *Wilder* are not Eleventh Amendment immunity determinations. In the instant appeal. Hale is not challenging any decision in regards to Eleventh Amendment immunity, but seeks to appeal the district court's decision that McCarthy's claims under 42 U.S.C. § 1396a(a)(3) should not be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In making its argument. Hale relies upon an alleged fact-that there are no slots open in the waiver programs. *Brief of Defendants-Appellants*, p. 17. In so far as there has been no discovery allowed in this case, and Hale has not even filed an answer, McCarthy has no information what, if any, slots are open in the waiver programs. ***7** However, the answer to these factual questions is important to determining the extent to which a statute confers rights upon a particular class of persons and the merits of a claim.

The existence of this factual assumption illustrates why an interlocutory appeal is not permitted to consider a defense to liability, but limited to questions of immunity. Incases where a claim of Eleventh Amendment immunity has precluded all discovery and any development of the facts, broadening the issues for which an interlocutory appeal is permitted, serves to

deny the due process rights of plaintiffs.[1] When faced with a similar issue regarding 42 U.S.C. § 1396a(a)(8), the Tenth Circuit found that "the inquiry [regarding the creation of a federal right] is more appropriately reserved for resolution on the merits of the case." *Lewis v. New Mexico Dep 't of Health*, 261 F.3d 970, 976-977 (10th Cir. 2001). This court should not entertain an interlocutor)' appeal to consider whether 42. U.S.C. § 1396a(a)(3) confers a federal right.[2]

A. *Ex Parte Young* Can Be Used to Enforce Medicaid Act Claims

In order to reconcile the principles that states have Eleventh Amendment immunity from private suits, but are still bound by federal law, the Supreme Court adopted the rule *ofExparte Young.* See *Alden v. Maine, 527* U.S. 706, 753 (1999). ***8** As such, when a state official acts in violation of the Constitution or federal law, made the "supreme court of the land" by the Constitution's supremacy clause, the official is deemed to be acting *ultra vires* and is no longer entitled to the state's immunity from suit. *Ex pane Young*, 209 U.S. 123 (1908). Accordingly, the doctrine permits prospective relief against a state official in his or her official capacity. See *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985); *Edelman v. Jordan*, 415 U.S. 651, 664, 667-668 (1974). By limiting relief to prospective injunctions against state officials, *Ex parte Young* precludes courts from entering judgments directly against the state while preventing state officials from continuing in actions which violate federal law.

The *Young* doctrine is described as a legal fiction, but its adoption by the Supreme Court, almost a century ago, serves the critical function of 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. [That is,] [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. *Mansout*\ 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").

Recently, this Court has specifically found that Medicaid Act provisions are enforceable under *Ex parte Young. Frazar v. Gilbert*, 300 F.3d 530, 550-51 (5*l*h Cir. 2002).[3] In specifically rejecting Bale's claim (See *Brief of Defendant-Appellants*, 13.) ***9** that the *Ex pane Young* doctrine cannot be used to enjoin the state's noncompliance with Medicaid Act provisions, the Fifth Circuit recognized the fundamental legal principle that "laws passed by Congress under its spending powers are the supreme law of the land." The Court went on to say that Texas is not immune under the Eleventh Amendment for prospective injunctive relief when it violates Medicaid Act provisions. According to the Court,

.... *Ex Parte Young* cannot be swept aside because the state is the real party in interest. The raison d'etre for *Ex parte Young* and its continuing significance in our constitutional scheme is that it provides an exception to the Eleventh Amendment allowing injunctive relief against state officials where the state itself is for all practical purposes the real part) in interest in order to accommodate the Supremacy clause. In all such suits the state is sued in their official capacities, although the state is the real party in interest.

Id. at551&n.!09.

More recently, the First Circuit Court of Appeals also held that "the Eleventh Amendment does not prevent Medicaid beneficiaries seeking prospective injunctive relief against state officials in a federal court." *Rosie D.* v. *Swift*, 310 F.3d 230, 237 (Pl Cir. 2002). In so holding, the Court observed that its refusal to construe the Eleventh Amendment to prohibit suits for prospective injunctive relief involving the Medicaid Act was preserving three decades of case law. *Id.* Moreover, the First Circuit observed that its holding in *Rosie* D., aligned it with "a broad coalition of other courts [including the Fifth Circuit's decision in *Frazar]* which, subsequent to *Seminole Tribe of Florida v. Florida.* 517 U.S. 44 (1996), have rejected similar arguments aimed at barring suits for prospective injunctive relief commenced by ***10** Medicaid beneficiaries against state actors." *Id.*, citing *Frazar*, 300 F.3d at 550-51 & n.9;*Missouri' Child Care Ass'n v. Cross** 294 F.3d 1034, 1038 (8'h Cir. 2002); *Antrican* v. *Odom*, 290 F.3d 178, 190 (4*l*h Cir. 2002); *Westside Mothers*\ \ *Haverman*, 289 F.3d 852, 862 (6" Cir. 2002); *and Joseph A. ex re!. Corrinc Wolfe* v. *Ingram* 275 F.3d 1253, 1264 (10th Cir. 2002). See also, *Boulelv. Cellucci*, 107 F.Supp.2d 61, 74 (D.Mass. 2000) (citing *Ex pane Young*, the court concluded that a suit challenging the constitutionality of a state official's action, pursuant to the Medicaid Act, is not a suit against the state barred by Eleventh Amendment immunity.)

B. Medicaid Act Provisions Are Enforceable Under 42 U.S.C. § 1983

Contrary to Hale's claims (See *Brief of Defendant-Appellants* ***** 13-19.) and irrelevant to considerations of Eleventh Amendment immunity, it is well settled that § 1983 is an available remedy for claimed violations of federal statutes as well as violations of the Constitution. *Maine v. Thiboutot, 448* U.S. I (1980); *Wilder*, 496 U.S. 498. The threshold test of whether a federal statute creates an enforceable right within the meaning of § 1983 is determined by whether there is a violation of an actual federal right, as opposed to merely a federal law. See *Blessing*, 520 U.S. 329 (citing *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103 (1989)). "[A] plainti ff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983 or (2) Congress has foreclosed such enforcement of the statute in the enactment itself." *Wilder*, 496 U.S. at 508 (quoting *Wrightv. Roanoke Redev. and Hous.Auth.*, 479 U.S. 418,423(1987).

***11** Courts look at three factors when determining whether a particular statutory provision gives rise to a federal right: (1) the plainti ff must be the intended beneficiary of the statute; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) the statute must impose a binding obligation on the states (i.e., the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms). See *Blessing*, 520 at 340; *Wilder*, 496 U.S. at 509; and *Golden State*, 493 U.S. at 1061.

In applying this threshold test in *Wilder*, the Supreme Court stressed the heavy burden the defendants have in showing that Congress has foreclosed § 1983 as a remedy, noting that kl[o]n only two occasions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in § 1983." *Id.* at 521 (citations omitted).[4] In applying this test in *Gonzaga* v. *Doe*, 536 U.S. 273 (2002), the Supreme Court emphasized the first prong: that the plaintiff must be the intended beneficiary of the statute that the plaintiff must have "unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga*, at 283.

Numerous provisions of the Medicaid Act have been found to be enforceable under § 1983. See *Biyson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) (reasonable promptness; post *Gonzaga); Wood* v. *Tompkins*, 33 F.3d 600 (6th Cir. 1994) (due process methods of administration as well as amount, duration, and scope); *Sobky* v. ***12***Smolev*, 855 F. Supp. 1 123 (E.D.Cal. 1994) (state wideness, equal access, as well as amount, duration, and scope)*Chenyv. Tompkins*, 1995 VVL 502403 (S.D. OH 1995) (eligibility for Medicaid waiver services, notice, and reasonable standards); *Wood v. Wallace*, 835 F.Supp. 177, 182-84 (S.D.Ohio 1993) (Medicaid waiver right to community care instead of institutionalization); *Blanchardv. Forrest71* F.3d 1 163, 1167-68 (5th Cir. 1996) (assuming 1396a(a)(10)(B) enforceable under § 1983 without expressly ruling). Further, as the Supreme Court explicitly declared in *Wilder*, "The Medicaid Act contains no provision for precluding private judicial or administrative enforcement." *Wilder*, 496 U.S. at 521-522.

C. Medicaid Act Due Process Provision at § 1396a(a)(3) is Enforceable

Although it deals with the merits of McCarthy's claims and not immunity, the Constitutional standards that guide due process for Medicaid beneficiaries were settled over 30 years ago by the United Slates Supreme Court in *Goldberg* v. *Kelly*, 397 U.S. 245 (1970). As described by *Goldberg*, the Due Process Clause of the Constitution requires the state and its agents to provide, among other things, prior written notice "tailored to the capacities and circumstances" of the beneficiary, explaining a decision to deny or terminate benefits and a fair hearing "at a meaningful time and in a meaningful manner" before an impartial decision maker. *Id.* at 267-71.

Based on *Goldberg*, the Medicaid Act, 42 U.S.C. § 1396a(a)(3), requires the state Medicaid Agency to grant an opportunity for a fair hearing "to any individual whose claim for medical assistance under the plan is denied or is not acted upon with "reasonable promptness." Additionally, the regulations implementing the statute require written notice when services are denied, reduced, terminated, or suspended. ***13** See 42U. S.C. § 1396a(a)(3); 42 C.F.R. § 431.21 1. *SeeCheny*, 1995 WL 502403 *17 (§ 1396a(a)(3) and its implementing regulations are coextensive with constitutional due process requirements). Courts have consistently upheld these principles. For example, in *Meachem v. Wing*, 77 F.Supp.2d 431, 440 (S.D.N.Y. 1999), the district court found that in light of *Goldberg.*§ 1396a(a)(3)'s fair hearing provision creates an enforceable legal right, stating:

> The standards required for Medicaid fair hearings are clearly set forth in the applicable statutes and regulations and would not be difficult to enforce. In fact, the implementing regulations specifically invoke the due process standard used by the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 253 (1970)...as one requirement for Medicaid fair hearings. See 42 C.F.R § 431.205. A court is surely able to assess compliance with this standard since the standard itself was designed for courts to apply.

Id. See *Blanchard*, 71 F.3d 1163 (the Court found ample authority to hold that Congress unambiguously conferred a private right of action under $ 1396a(a)(3)); *Wright*, 479 U.S. at 423;*Wilder*, 496 U.S. at 522, (the Supreme Court held that Medicaid does not include a sufficiently comprehensive remedial scheme to preclude enforcement of the Medicaid Act under § 1983); *Kosie*D., 310 F.3d 230.

Here, purportedly because of the cap on waivers. Hale routinely denies Medicaid waivers without providing an opportunity for a fair hearing. Hale cites to nothing in the Medicaid Act, the Constitution's due process clause, or case law to support this policy and practice. Without proper notice and the right to challenge Kale's denial of services, an individual would never be able to: (1) challenge the claim that there are no available waivers, when in fact there may be available waivers, (2) challenge the decisions regarding who gets waivers and who is placed on the waiting list, (3) challenge the failure to provide waiver services in a reasonably prompt ***14** manner: a requirement under § 1396a(a)(3) that applies whether or not there are available waivers, or (4) challenge the failure to offer a choice between ICF/MR services and waiver programs. See *Lewis.* 94 F.Supp.2d 1217;*Boulet*, 107 F.Supp.2d 61.

Thus, given the clarity of the law and the practical reasons for ensuring due process, the contention that § 1396a(a)(3) is not enforceable or does not meet the requirements of *Blessing*, is without merit. See *Cramer*, 33 F.Supp.2d at 1352 (individualized due process notices required when a state statutory change denied beneficiaries a choice between an ICF/MR facility or a home and community-based waiver program). See also *Eder v. Beal*, 609 F.2d 695 (3rd Cir. 1979) (enjoining state from terminating its program for individuals in need of eyeglasses to correct ordinary refractive problems until it complied with Medicaid due process requirements.); *Kimble v. Solomon** 599 F.2d 599 (4*I*h Cir. 1979), *cert, denied*, 444 U.S. 950 (1979)(when individual claims are denied, rejected, suspended, or changed, proper notice is required); *Party v. Crawjbrd*, 990 F.Supp. 1250(D.Nev. 1998) (beneficiaries required to be notified of fair hearing rights when applications for placement at an ICF/MR facility rejected); *Salazar v. District of Columbia*, 954 F.Supp. 278, 327-28 (D.D.C. 1996) (Medicaid agency must provide individual notice when benefits are suspended or denied); *King v. Fallon*, 801 F. Supp. 925 (D.R.I. 1992) (Medicaid agency must provide notice regarding level-of-care assessments governing eligibility for home and community-based waiver services); *Daniels v. Wadley*, 926 F.Supp. 1305 (M.D. Term. 1996), *vacated in part*, 145 F.3d 1330 (6th Cir. 1998) (Medicaid ***15** managed care program must assure that enrollees receive due process when services are denied or delayed).

II. Hale May Be Sued Under Title 11 of the ADA

Eleventh Amendment immunity is not considered in a majority of Hale's arguments concerning Title II of the Americans with Disabilities Act. In short, most of Hate's argument attempts to have this Court consider the constitutionality of the Title II of the ADA in an interlocutory appeal. Questions of constitutionality are questions on the merits of a claim and far beyond considerations of Eleventh Amendment immunity. See *Veri-on*, at 642-43 (2002). The Court should decline to exercise pendant jurisdiction over them.

A. ADA Inclusion of Public Entities is No Bar to Its Enforcement

Relying on *Walker* v. *Snyder* 213 F.3d 344, 346 (7*I*h Cir. 2000) and *Lewis*, 94 F.Supp. 2d at 1230 (D.N.M. 2000)[5], Hale contends that "the Seventh Circuit correctly recognized an irreconcilable conflict between the *Young* fiction and Title IPs requirement that suits be brought against a public entity." *Brief of Defendants-Appellants*, at 20-22. The argument is that since Title II is directed against the state ***16** rather than a state official, the *Ex pane Young* doctrine does not apply. *Id.* at 24.

This argument misstates *Exparte Young's* fundamental premise and purpose and has been rejected by the courts.

While the Constitution and countless federal laws limit what state governments may do, the Eleventh Amendment and sovereign immunity generally bar suits against state governments. Therefore, to ensure federal law is enforced, suits against state officials are allowed. See, *Coenr d Alene Tribe Idaho*, 521 U.S. at 288. The fact that the law is directed at the entity does not preclude its enforcement through suits against officials. If Defendants1 argument is accepted, then no duty imposed on a state government by the Constitution or a statute could be enforced.

In short, the rationale of *Walker* and *Lewis* is not persuasive because it ignores the fundamental legal doctrine that suits against state officials in their official capacities are, except for purposes of Eleventh Amendment immunity, suits against the entity itself. According to the Supreme Court, "[official-capacity suits... in general 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." *Graham*, 473 U.S. at 165; see also *Hafer v. Melo,5Q2* U.S. 21,25 (1991). Thus, by definition, officials in their official capacities are no more free to violate federal law than the entity itself.

Consistent with these and other Supreme Court decisions, the Sixth Circuit rejected a *Walker/Lewis* type rationale that claims Title 11 of the ADA allows suits only against an entity and not its officials in their official capacities. According to the Court,

> ***17** The problem with this argument is that it misrepresents *Exparte Young*, insofar as it fails to recognize the nuances [of the doctrine]. The court in *[Ex pane 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 *Exparte)*og 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' *Exparte 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 may nevertheless be held responsible in an official capacity for violating Title II, which by its terms applies only to public entities].

Carten v. Kent State Univ., 282 F.3d 391, 395-396 (6*I*h Cir. 2002) (citations omitted).

And like the Sixth Circuit, the vast majority of district and appellate courts have ruled that state officials may be sued to enjoin violations of civil rights laws (like the ADA) that are directed to public entities. See *Martin v. Taft, 222* F.Supp. 960 (S.D. Ohio 2002); *Espinoza v. Tex. Dep't of Pub. Safety*, 2002 U.S. Dist. LEXIS 18465, at *18, 2002 WL 31191347 (N.D.Tex.); *Johnson v. Louisiana*, 2002 WL 83645 (E.D. La. Jan. 18, 2002); *Reickenbacker* v. *Foster*, 274 F.3d 974, 976 (5*I*h Cir. 2001).[6]

Even the Seventh Circuit has disavowed its earlier rationale delineated in *Walker* concerning the applicability *of Ex pane Young* in enforcing Title II of the ADA. *Bruggeman* v. *Blagojevich*, 324 F.3d 906 (7*I*h Cir. 2003). In *Lewis v. New Mexico Dep't of Health*, it is important to note that the Tenth Circuit did not affirm the district court's rationale concerning the availability of *Ex pane Young* in suits ***18** involving Title II; following the inclusion of some of the named plaintiffs in the waiver program and the death of the remainder, the ADA claims were voluntarily dismissed. *Lewis, 261* F.3d at 975.*Walker* has been 'uniformly rejected by the other courts to have considered the issue' and... it kdid not survive *[Garrett]* where the Supreme Court said that such a suit is indeed authorized by *Exparte Young. Opinion of Judge Sparks*, 6R1 1 I 7, citing *Bruggeman*, at 912-13. No court has adopted the only Eleventh Amendment immunity argument Hale makes in this appeal.

B. ADA Claims Against State Officials for Declaratory and Injunctive Relief Are Permitted Through *Ex Parte Young*

One of the most important and basic principles of American law is that state officials may be sued to enjoin violations of the Constitution and federal law. In its most recent decision concerning enforcement of ADA against state entities. *University of Alabama* v. *Garrett*, 531 U.S. 356, 413 (2001), the Supreme Court expressly held that state officials may be sued to enforce Title 1 of the ADA, even though it concluded that the Eleventh Amendment bars suits directly against state government under Title I. More importantly, the Court emphasized that even though it held that state governments could not be sued directly for violations of Title I of the ADA, that did not mean the law was unconstitutional as applied to the states or that state governments could ignore it. The Court explained that the law still could be enforced against state governments through suits against individual state officials pursuant to *Ex pane Young* and via suits brought by the federal government. *Garrett*, 531 U.S. 356 at n.9.

For example, in *Seminole Tribe*, 517 U.S. 44, the Supreme Court reaffirmed that under *Ex pane Young*, the Eleventh Amendment does not bar actions for prospective ***19** injunctive relief against state officials in their official capacities. *Id.* at 75. See also *Idaho* v. *Coeurd'Alene Tribe of Idaho*, 521 U.S. 261, 288 (1997) ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction.") (O1 Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in judgment); *Verizon Maryland, Inc. v. Public Service Commission oj Maryland*, 535 U.S. 635 (2002)(the Supreme Court again explained its holding in *Seminole Tribe* and affirmed the general availability *of Ex pane Young* act ions to enforce federal statutes).

Since *Garret*!, every circuit court of appeal that has ruled on the issue has held that an individual sued in his or her official capacity under the doctrine of *Ex parte Young* is subject to liability for ongoing violations of Title II of the ADA. See *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 289-90 (2nJ Cir. 2003); *Miranda B.*\ \ *Kitihaber*, 328 F.3d 1181, 1187-88 (9th Cir. 2003) (holding "Title ITs statutory language does not prohibit Miranda B.'s injunctive action against state officials in their official capacities1'); *Bruggeman*, 324 F.3d at 913 (allowing *Ex pane Young* action, noting there is "no relevant difference between Title I and Title II, which governs access to services"); *Carten*, 282 F.3d at 396-97 (holding that state officials "are public entities insofar as they represent the state when acting in their official capacity"*); Randolph* v. *Rodgers** 253 F.3d 342 (8*I*h Cir. 2001) (citing *Garrett*, holding that *Ex parte Young* permits injunctive action against a state official in his official capacity and does not require Title 11 of the ADA to provide explicit authority to sue state officials in their official capacity). See also, e.g., *Martin, 222* F. Supp.2d at 959-61; *Roe v. Ogden*, 253 F.3d 1225 (10th Cir. 2001) (post-Garreff case allowing *Ex parte Young* claim to enforce Title II).

20Garrett* and its progeny confirm that the abrogation issue raised by Hale is a "red herring," *Martin, 222* F. Supp. at 960, and that McCarthy can bring this *Exparle Young* action. 'To hold otherwise would be to create a catch-22 situation for ADA plaintiffs, and the Court [should] not follow such absurdity unless mandated to do so by relevant precedent.'*Opinion of Judge Sparks*, 6RM J 7-1118.

C. Injunctive Relief Is Still Available Under *Ex Parte Young* Even If Title II Exceeds Congress Authority to Allow a Suit Directly Against the State

This Court has held that Congress did not validly abrogate the state's Eleventh Amendment immunity because Title II of the ADA exceeds Congress1 § 5 authority in the Fourteenth Amendment. *Reickenbacker*, 274 F.3d 974[7]. However, the appeals court went on to say that sovereign immunity "... is no bar to suits for injunctive relief against state officials." *Id.* at 976, citing *Ex parle Young*, 209 U.S. at 159-60 (1908). The reason for this caveat is obvious; a failure in abrogation of Eleventh Amendment immunity does not effect the availability of injunctive relief against state officials provided by *Ex pan'e Young.*

*21D. Title II Of the ADA Was Enacted Pursuant Congress' Authority Under the Fourteenth Amendment and the Commerce Clause

Congress intended to use both the Fourteenth Amendment and the commerce clause to remedy discrimination against persons with disabilities in enacting the ADA. *United States vs. Mississippi Dep't of Public Safety*, 321 F.3d 495 (Cir. 2003). While the court in *Reickenbacker* found Congress1 abrogation of sovereign immunity in Title II of the ADA has been found to exceed its authority under § 5 of the Fourteenth Amendment, no court has decided that Title II of the ADA is impermissible

legislation undereither the Fourteenth Amendment or commerce clause authority.

Mississippi Department of Public Safety illustrates these points. The Department ("MDPS") claimed that "the ADA's regulation of state activity (here employment) is an unconstitutional exercise of congressional authority." *Id.* at 499. Moreover, MDPS claimed, as Hale does in this case, that Congress, in enacting the ADA, *re\ \ ed exclusively on* § 5 of the Fourteenth Amendment to apply the ADA to the state; as such, the ADA as applied to the states is an unconstitutional exercise of congressional power.[8] *Id.* at 499 (emphasis added). See *Brief of Defendants-Appellants*, at 22. In rejecting this contention this Court said:

[tjhis argument is flatly contradicted by the statutory language of the ADA. One of the express purposes of the ADA is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § l20*l*(b)(4)(2000). Thus, Congress'intent in enacting the ADA was to use both the Fourteenth Amendment and the commerce clause to remedy discrimination.

22Id.at* 500.

1. Title II Is Constitutional Under the Fourteenth Amendment

Contrary to Male's argument, (See *Brief of Defendant-Appellants*, 22-23.) *Rickebacker* did not find Title 11 to be unconstitutional. 274 F.3d at 983. To the contrary, *Rickenbacker* specifically says that despite *Garret/*, Title II is still good law: "This narrowing of the analysis in *Garrett* means that Title 11 of the ADA could still be a valid exercise of Congress1 § 5 power, but simply not provide the basis for a use of that power to abrogate, thus drawing a distinction between C//V *of Boerne* and *Seminole Tribe." Rickenbacker* at 982 n.60 (citing to *Thompson v. Colorado*, 258 F.3d at 1253 n. 7). As *Thompson* stated:

> As a result of the directive in *Garrett* that only congressional findings of constitutional violations by beneficiaries of the Eleventh Amendment be considered, a determination that a statute is not a valid abrogation of Eleventh Amendment immunity does not necessarily mean that the statute is not a valid exercise of Congress' power to enforce the Fourteenth Amendment. Because the Fourteenth Amendment applies to local government entities not entitled to Eleventh Amendment immunity, the analysis of whether Congress has the power to enact legislation requires inquiry into constitutional violations of these entities in addition to entities entitled to Eleventh Amendment immunity.

Thompson at 1253, n.7

Other appeals courts have reached similar conclusions. In *Garcia v. S. U.N. Y. Health Sciences Center*, 280 F.3d 98, 108 (2nd Cir. 2001), the Second Circuit found that "[w]hen operating under § 5 Congress may prohibit conduct that itself violates the Fourteenth Amendments's substantive guarantees. Congress may also remedy or deter violations of these guarantees by 'prohibiting a somewhat broader swath of conduct" than is otherwise unconstitutional, *Garrett*, 121 S.Ct. at 963 (internal quotation marks and citation omitted), subject to the requirement that there be ***23** 'congruence and proportionality between the [violation] to be prevented or remedied and the means adopted to that end."' *Id at* 108. See also, *Tennessee v. Lane*, 315 F.3d 680, 682 (6th Cir. 2003)("Based on the record before Congress in considering the Americans with Disabilities Act legislation, it was reasonable for Congress to consider that it needed to enact legislation to prevent states from unduly burdening constitutional rights."), *cen granted in part*, 123 S.Ct. 2622 (2003); *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 820 (6*l*h Cir. 2002)(Concurring, C.J. Moor, 'Title 11 may prohibit conduct which is not itself unconstitutional and intrude into legislative spheres of autonomy previously reserved to the States/').

The enforcement clause of the Fourteenth Amendment allows Congress to pass laws "that... prohibit conduct which is not

itself unconstitutional and to intrude into legislative spheres of autonomy previously reserved to the States." *United States v. Morrison*, 529 U.S. 598, 620 (2000). In other words, "[legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lope: v. Monterey County* 525 U.S. 266, 282-283 (1999). Because Title II responds to the States' historic and enduring legacy of discriminating, segregating, and isolating persons with disabilities, Title II meets this legislative requirement. The legislation is "designed to guarantee meaningful enforcement" of constitutional rights in light of the historic and enduring legacy of discrimination, segregation, and isolation against persons with disabilities by the States. *Garrett* at 967.

Title 11 is Congress' response to this history of discrimination against persons with disabilities. Moreover, Title II - consistent with other federal statutes that ***24** address historical discrimination - protects persons with disabilities against State conduct that although constitutional is nonetheless proscribed by a statute.[9] For instance, under Title II Congress requires that States be prepared to make "reasonable modifications" in providing public services. 42U.S.C. § 12131(2). Given the history' of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on discrimination would be insufficient to erase the stain of discrimination. Cf. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-498 (1968)(after unconstitutional segregation, government is "charged with the affirmative duty to take whatever steps might be necessary"" to eliminate discrimination "root and branch"). Therefore, Title II affirmatively promotes the integration of individuals with disabilities - both in order to remedy past unconstitutional conduct and to prevent future discrimination.

Without Title II, Congress could assume that states would continue to exclude, isolate, and segregate persons with disabilities, not taking responsibility for accommodating and integrating such persons into their programs or services. Congress was also correct to conclude that integrating persons with disabilities into ***25** the community reduces stereotyping, helps dispel misconceptions, and reduces the likelihood that constitutional violations will reoccur. Cf. *Olmstead v. Zimring, 527* U.S. 581,600 (1999)(segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.").

To ensure against this kind of discrimination, Congress requires states to modify their services, policies, and programs where reasonable. 42 U.S.C. § 12131(2). States need not make modifications when to do so would fundamentally change the essential nature of the program or activity. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16. Cost, available agency resources, and operational practices help determine whether the modification is reasonable or would fundamentally alter the program or activity. *Id.* Congress determined, based on the testimony of witnesses and expert studies, that contrary to the misconceptions of many, the vast majority of accommodations entail little or no cost.[10] Furthermore, these costs are mitigated when measured against the financial and human costs of denying persons with disabilities needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyer v. Doe*, 457 U.S. 202, 223-224, 227(1982).

"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." *United States* v. *Virginia*, 518 U.S. 515, 547 (J996). Section 5 of the Fourteenth Amendment thus empowers Congress to do more than simply prohibit the ***26** creation of new barriers to equality; it can enjoin states to tear down the walls erected decades earlier that excluded and discriminated against persons with disabilities. See *Id.* at 550, n. 19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access).

2. Title II is Constitutional Under the Commerce Clause

Contrary to Male's argument (See *Brief of Defendant-Appellants*, 23-26), the Supreme Court in *Garrett* made plain its view that Title 1 of the ADA still governed the conduct of states and that state officials could be subjected to actions in federal court for injunctive relief for violations of Title I, by stating:

> Our holding here that Congress did not validly abrogate the States sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no

> federal recourse against discrimination. Title 1 of the ADA still prescribes standards applicable to the States. **Those standards can be enforced** by the United States in actions for money damages as well as **by private individuals in actions for injunctive relief under *Exparte Young***, 209 U.S. 123(1908).

Garret!, 531 U.S. at n.9 (emphasis added).

Garret fs conclusion is in accord with the Supreme Court's decision under the Age Discrimination in Employment Act ("ADEA"). In *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), the court held that Congress could not validly abrogate states' Eleventh Amendment immunity under the ADE A because it was not congruent and proportional to the scope of the equal protection clause's application to age based discrimination. Thus, individuals could not sue state agencies for monetary damages under the ADEA. *Id.* at 78-91. However, the Supreme Court in *Kimel* expressly reaffirmed its holding in *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983), in which it held the ADEA was a valid exercise of Congress' power under the commerce clause.

***27*KimeL* 562 U.S. at 78.**[11]

Garretl's implicit conclusion that the ADA is valid under the commerce clause is consistent with its recent commerce clause jurisprudence. *United Stales v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), establish the current framework for assessing the validity of federal legislation under the commerce clause. The *Lopez* Court reaffirmed the rational basis test used to evaluate the constitutionality of congressional action. 514 U.S. at 557. The Court also reaffirmed the long standing rule that "Congress commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce" including "those activities that substantially affect interstate commerce." *Id*, at 558-559. In *Morrison*, the Court identified four factors to be considered in determining whether an activity "substantially affects" interstate commerce so as to be within the bounds of congressional authority: (1) the "economic nature of the regulated activity"; (2) the existence of a jurisdictional element; (3) the existence of congressional findings concerning the impact of the activity on interstate commerce; and (4) whether the link between the regulated and the interstate activity was too attenuated. *Mom'son*, 529 U.S. at 611;*United States v. Gregg*, 226 F.3d 253,263 (3rd Cir. 2000), *cert denied*, 532 U.S. 971 (2001). The following factors demonstrate that the ADA is valid commerce clause legislation:

***28a. ADA's Integration Mandate Regulates Economic Activity**

Lopez and *Morrison* require that the regulated activity be economic in nature. Congress may regulate purely intrastate activities if they either "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. The Third Circuit has recognized the "specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce." *United States* v. *Rodla*, 194 F.3d 465,481 (3rd Cir. 1999), cert, *denied.*120 S.Ct. 2008 (2000).

The ADA's integration mandate, 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d), substantially affects economic and commercial activities. The provision of community-based residential and non-residential service alternatives for persons who are unnecessarily institutionalized is an economic and commercial activity. Community-based alternatives are provided by both public and private entities under contract with Texas' county mental retardation programs. These private entities are engaged in an economic enterprise. These private providers hire and pay staff; purchase or rent houses or other facilities in which to provide the services; retain and pay attorneys, accountants, and other professional advisers; borrow money to finance the transactions; and, engage in other activities in which any other business would engage. The provision of community-based services to individuals with disabilities who are unnecessarily institutionalized or at risk of being institutionalized, therefore, implicates an entire commercial industry.

The Fifth Circuit's decision in *Groome Resources Ltd. L.L.C. v. Parish of Jefferson.* 234 F.3d 192,205-06 (5*l*h Cir. 2000), illustrates this point. In that case, the ***29** appeals court held that the "reasonable accommodation" provision of the Fair

Housing Amendments Act ("FHAA"), 42 U.S.C. § 3604(f)(3)(B) is valid under the commerce clause. *Id.* As a result, local zoning.boards were required to make reasonable accommodations to allow the operation of group homes for persons with disabilities. *Id.* The Court determined that the FHAA's reasonable accommodation provision affects commercial housing transactions, (i.e., purchases and rentals of housing by group home providers), "and, therefore fits well within the broad definition of economic activity established by the Supreme Court and other circuits." *Id.* at 205. The commercial use of property "unquestionably is an 'activity that affects commerce." *Id.* at 207. The Court also noted that the local discrimination by zoning boards which refuse reasonable accommodations for people with disabilities "may be regulated on a federal level for people if that local refusal affects the national economy." *Id.* at 210-21 I. Like the local zoning decisions that are regulated by the FHAA reasonable accommodation provision, the state's unnecessary institutionalization of people with disabilities that are regulated by the ADA's integration mandate also substantially affects providers' commercial and economic activities and the national economy.

The integration mandate affects the commercial and economic activity of a variety of groups including providers, individuals who are unnecessarily institutionalized, and individuals who are at a risk of being unnecessarily institutionalized. As Justice Ginsburg wrote for the majority in *Olmslead*,:

> [Confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

30Id.* at 60 i.

By its very nature, being institutionalized and being at risk of institutionalization can adversely affect commerce. For example, such discrimination can affect an individual's ability to work, travel, shop, go to the movies, take classes, or engage in any number of other economic or commercial transactions.

In *Gregg*, the Third Circuit upheld as valid commerce clause legislation the Freedom of Access to Clinic Entrances Act ("FACE"). This law allows the government to enjoin certain protests at abortion clinics. *Gregg, 226* F.3d at 261-67. Analyzing FACE under the *Lopez* and *Morrison* criteria, the court had little trouble concluding that interrupting health care provider services and preventing individuals from accessing abortion services is an activity "with an effect that is economic in nature." *Id.* at 262. Like activity regulated by FACE, the ADA's integration mandate impacts the provisions of community mental retardation services as well as access to these services to persons who are either unnecessarily institutionalized or at risk of being institutionalized. In both cases, the economic impact and nature of the activity is the same.
Finally, as the Fifth Circuit noted in *Groome Resources*:

... in the context of the strong tradition of civil rights enforced through the Commerce Clause - a tradition in which the FHAA firmly sits - we have long recognized the broadly defined "economic" aspect of discrimination... As long as there is recognition of an interstate effect, discrimination, even local discrimination, can be regulated under Congress's commerce power.

234 F.3d at 209 (citing *Heart of Atlanta Motel, Inc. v. United States*, 397 U.S. 241, 257-58 (1964)). Similarly, Congress has broad authority under the commerce clause to regulate disability-based discrimination through the ADA.

***31b. Absence of a Jurisdictional Element Does Not Undermine The Validity of the Integration Mandate**

While the ADA does not contain an express Jurisdictional element (i.e., a requirement that limits its application to public services, programs, and activities that impact interstate commerce), the absence of a Jurisdictional element does not render the ADA in general (and the integration mandate specifically) invalid under the commerce clause. See *Gregg*, 226 F.3d at

263;*Groome Resources*, 234 F.3d at 211. The ADA regulates activities which explicitly impact interstate commerce.

c. ADA's Congressional Findings Support The Interstate Impact of Disability Based Discrimination

In adopting the ADA, Congress expressly "invoke[d] the sweep of congressional authority, including the power... to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42U.S.C. § 12101(b)(4). Congress specifically found that isolation and segregation of individuals with disabilities is "a serious and pervasive social problem" and that discrimination "persists in such critical areas as... institutionalization." 42U.S.C. § 12IOl(a)(2M3).

Perhaps most significantly, for purposes of the commerce clause, Congress found that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

42U.S.C. § 12101(a)(9).

Congress's findings concerning the economic and commercial impact of ***32** disability-based discrimination are "entitled to judicial deference." *Gregg*, 226 F.3d al 263.

Congressional findings on the ADA support the economic effects of integrating people with disabilities into society:

> Certainly, the elimination of employment discrimination and the main streaming of persons with disabilities will result in more persons with disabilities working, in increased earning, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenue.

S. REP. NO. 101-116, at 17 (19 H.R. REP. No. 101-485, pt. 2, at 43-44 (1990), *reprinted* in 1990 U.S.C.C.A.N. 267, 325-26. *Accord* 89). The House Education and Labor Committee also noted in an "increasingly competitive international economy, our nation must adopt policies which result in a bridging of the vast gulf separating the actual from the potential contributions of people with disabilities to the economy." HR. REP. NO. 101-485, pt. at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 327. The Committee concluded by stating that there is a "compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with into the *economic* and social mainstream of American life." *Id*. at 50 (emphasis added), *reprinted* in 1990 U.S.C.C.A.N. at 332.

These formal and informal congressional findings are more than sufficient to establish the impact of disability-based discrimination on interstate commerce. See *Groome Resources*, 234 F.3d at 211-14 (evidence before Congress, indicating disability-based discrimination "place[sj burdens on the interstate movement of persons and commerce1' is sufficient to support the FH AA as valid commerce clause legislation). Indeed, "as the connection between racial discrimination and its affect ***33** on interstate commerce had been established • in *Heart of Atlanta Motel* and *[Kaizenbach v.J McChmg*, Congress was well within its institutional authority to act to prevent discrimination against the disabled." *Groom Resources*, 234 F.3d at 213.

d. Congress Had a Rational Basis to Conclude that the ADA and its Integration Mandate Have a Substantial Affect on Interstate Commerce

The final factor under *Morrison* is consideration of whether Congress had a rational basis upon which to conclude that the activities governed by the ADA and its integration mandate have a substantial effect on interstate commerce. See *Gregg*, 226 F.3d at 263. The link between the statutory requirement and interstate commerce must be sufficiently direct and not too attenuated. See *Morrison*, 529 U.S. at 610-13;*Groome Resources*, 234 F.3d at 214-15.

Upholding the FHAA's reasonable accommodation requirement, the Fifth Circuit concluded:

> We do not need to pile "inference upon inference" to see that by refusing to reasonably accommodate the disabled by discriminatory zoning laws, there will be less opportunity for handicapped individuals to buy, sell, or rent homes. The attendant financial loss to the economy from Groome Resources' failed attempt to purchase such a house in Louisiana is a case in point.

Groome Resources, 234 F.3d at 215.

There is no "need to pile inference upon inference" to determine that the failure to provide community services to persons who are unnecessarily institutionalized or at such risk means that: (1) such individuals will be burdened in their ability to engage in interstate commerce (including working and shopping) and will be burdened in their inability to engage in interstate travel; and (2) that there is a financial loss to the economy since providing community services would enable private providers to ***34** expand their services and programs. Further, as the Fifth Circuit observed, the logic of the Supreme Court's decisions in *Heart of Atlanta Motel* and *Katzenbach v. McChing* upholding links between local racial discrimination and interstate commerce, is binding. See *Groome Resources*, 234 F.3d at 215.

E. The ADA as Commerce Clause Legislation Does Not Violate the 10th Amendment

Hale cites *Reno v. Condon*, 528 U.S. J41 (2000), in which South Carolina challenged the constitutionality of the Driver's Privacy Protection Act. See *Brief of Defendant-Appellants*, 26-28. The case involved the scope of a Congressional mandate restricting the ability of the States to disclose a driver's personal information without the driver's consent, and the Tenth Amendment.

Although the holding in *Reno* is adverse to them. Hale uses it to refer to a passage in the case in which the court noted "previous invalidations'1 of commerce-related laws "not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment." *Id.* at 149. The "previous invalidations" to which the court refers are the holdings in *New York v. United States*, 505 U.S. 144 (1992), and *Print-v. United States*, 521 U.S. 898 (1997).

In *New York*, Congress "commandeered the state legislative process by requiring a state legislature to enact a particular kind of law". *Reno*, 528 U.S. at 149, ref. *Ne\ v York*, 505 U.S., at 162. And, in *Printz*, a provision of the Brady Act commanded "state and local enforcement officers to conduct background checks on prospective handgun purchasers." *Reno*, 528 U.S. at 149, citing *Printz*, 521 U.S. at 902. The *Reno* case involved a restriction of activity; the *New York* and *Printz* cases, ***35** involved affirmative requirements to establish a prescribed enforcement scheme.

Although the *Reno* Court makes reference to *New York* and *Prints* the Court still holds the federal regulation in *Reno* is constitutional, stating that the Driver's Privacy Protection Act is "consistent with the constitutional principles enunciated in *New York* and *Prinlz"* because it "does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."*Reno*, 528 U.S. at 149.

Similarly, Title 11 of the ADA does not require the Texas Legislature to enact any laws or regulations; nor does it require state officials to assist in the enforcement of federal statutes regulating private individuals. It simply prohibits discrimination, and provides a remedy when the state does not heed the law.

A case more on point is *Hicks v. Armstrong,* 16 F.Supp.2d 287 (D. Conn. 1999), where a paraplegic pretrial detainee brought a Title 1I ADA suit against the State of Connecticut and local law enforcement officials as a result of injuries he suffered because of defendants1 failure to make reasonable accommodations for his condition. The *Hicks* Court denied defendants' motion to dismiss, holding that the ADA does not violate the Tenth Amendment. In *Hicks*, the State Defendants argued that the "ADA violates the principles of federalism set forth in *New York* and *Printi* because it is one example of the federal government compelling the states to enact or administer a federal regulatory program." 116 F.Supp.2d at 293. *Hicks* addressed Defendants' contentions by stating that:
... the ADA violates neither of the prohibitions set forth in *New York* and *Printz* because Congress neither commandeers the states1 legislative processes by directly compelling them to enact or administer a federal regulatory program, as prohibited by the Court in *New York*, nor compels states to implement, enact, or administer, bv legislation or executive ***36** action, a federal regulator) program, as prohibited by the Court in *Priniz. Id.* at 293.

The *Hicks* Court goes on to say:

The ADA does not require states to pass anti-disability legislation. Moreover, the ADA does not press into federal service state officers and require them to enforce Congressional anti-disability discrimination statutes. The ADA simply requires that state officials abide by the ADA's requirements.

Id.

Further, "Title II does not compel states to implement or administer a federal regulatory program to remedy or prevent discrimination on the basis of disability. Rather, Title II of the ADA prohibits the state itself from engaging indiscrimination on the basis of disability." *Id.* at 293, citing *Thompson v. State of Colorado*, 29 F.Supp.2d 1226, 1237 (D. Colo. 1998).

III. Hale May Be Sued Under § 504 of the Rehabilitation Act of 1973

Eleventh Amendment immunity is not considered in any.of Male's arguments concerning § 504. See *Brief oj Defendant-appellants*, 28-3 1. Questions of statutory validity are not intertwined with considerations of Eleventh Amendment immunity and the Court should decline to exercise pendant jurisdiction over them. See *Le\ vis* v. *New Mexico Dep of Health*, 261 F.3d 970, 978-979 (10th Cir. 2001).

Defendants argue that § 2000d-7(a) does not waive Eleventh Amendment immunity. This claim is contrary to federal legislation, Supreme Court precedent, and the precedent of every circuit court that has addressed this issue.

Section 2000d-7 is a valid exercise of Congress's power under the spending ***37** clause, Art. I, § 8, Cl. 1, to require state agencies that voluntarily accept federal financial assistance under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postec. Ednc. Expense Bd.*, 527 U.S. 666, 674 (1999). That is, Congress may, in the exercise of its spending power, condition its grant of funds to the states upon their taking certain actions that Congress could not require them to take -"acceptance of the funds entails an agreement to the actions."[12] *Id.* at 686. Therefore, Congress may condition the receipt of federal funds on defendants' waiver of Eleventh Amendment immunity to § 504 claims.[13]

A. By Accepting Federal Funds Pursuant to § 2000d-7, States Validly Waive Eleventh Amendment Immunity

The Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987) recognizes 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)). But the Court went on to hold that although every congressional spending statute "is in some measure a temptation," the Court nonetheless recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Id.* (citing ***38***California v. UnitedStales*, 104F.3d 1086, 1092(9vhCir. 1997), *cert, denied, 522* U.S. 806 (1997)).

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, or even losing all federal funds, without crossing the line to coercion. See *Board of Education v. Mergens*, 496 U.S. 226 (1990); *North Carolina ex rel Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), affd mem., 435 U.S. 962 (1978). Further, *mJim C. v. U.S.*, 235 F.3d. 1079 (8th **Cir.** 2000), the Eight Circuit held that § 504 embodies the "ordinary quid pro quo that the Supreme Court has repeatedly approved." *Id.* at 1081-82; see also *West Virginia* v. *United States Dep*'/ *of Health & Hum. Sen's.*, 289 F.3d 281, 289 (4'h Cir. 2002)(there has been no decision from any court finding a conditional grant to be impennissibly coercive).[14]

B. By Accepting Federal Funds States are Subject to Private Suits Brought Under § 504 of the Rehabilitation Act

The issue of whether the Rehabilitation Act properly waives a State's immunity under the Eleventh Amendment has been resolved by both Congress and the courts. Congress enacted § 2000d-7 in response to the Supreme Court's decision in *Atascadero Stale Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Supreme Court held that Congress had not provided sufficiently clear statutory language to condition receipt of federal financial assistance on waiver of states ***39** Eleventh Amendment immunity for § 504 claims. See *Atascadero*, 473 U.S. at 246-47. In response to holding. Congress enacted 42 U.S.C. § 2000d-7. This statutory provision unambiguously puts states on express notice, that part of the "contract" for receiving federal funds is the requirement that it consent to suit in federal court for alleged violations of § 504.

Since the court's decision in *Atascadero*, the Supreme Court, the Fifth Circuit, and every other federal circuit court that has addressed § 2000d-7 has concluded that by accepting federal funds, a state waives its immunity under the Eleventh Amendment. In *Lane* v. *Pena*, 518 U.S. 187, 200 (1996), a case involving the Rehabilitation Act, the Supreme Court held that "Congress responded to our decision in *Atascadero* by Grafting an unambiguous waiver [in § 2000d-7] of the States Eleventh Amendment immunity..." In *Pederson v. Louisiana Slate Univ., 2*13 F.3d 858, 876 (5*l*h Cir. 2000), a case involving equal athletic opportunities for men and women at the college level, the Fifth Circuit determined that "we find that in 42 U.S.C. 2000d-7(a)(a) Congress has successfully codified a statute which clearly, unambiguously, and unequivocally conditions recipient of federal funds... on the State's waiver of Eleventh Amendment immunity'..." See also *Reickenbacket*\ 274 F.3d at 984 n. 73. Since *Reickenbacker*, three district court decisions within the Fifth Circuit's jurisdiction have held that a state waives its sovereign immunity in *Ex part e Young* proceedings under the Rehabilitation Act when the state receives federal funds. See *August* v. *Mitchell*, 205 F. Supp.2d 558, 561 (E.D. La. 2002); *Johnson v. Louisiana*, 2002 WL 83645 at *5 (E.D. La. 2002); *Espinoza* v. *Tex. Dep't of Pub. Safety*, 2002 WL 31191347 (N.D. Tex. 2002).

In accordance with the Supreme Court and the Fifth Circuit, ever)7 other federal ***40** court to address this issue has determined that § 2000d-7's provisions are unambiguous and states waive their Eleventh Amendment immunity by agreeing to accept federal funds. See *Clark v. California*, 123 F.3d 1267, 1271 (9*l*h Cir. 1997); *Douglas* v. *California Dep't oj'Youth Anth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9*l*h Cir. 2001); *Carter* 282 F.3d at 398;*Nihiser v. Ohio EPA*,269 F.3d 626, 628 (6'h Cir. 2001); *Jim C*, 235 F.3d 1079;*Stanley v. Litscher*, 213 F.3d 340 (71'1 Cir. 2000); *Litman* v. *George Mason University.*\ 86 F.3d 544,553 (4th Cir. 1999); *Koslow v. Pennsylvania, W2* F.3d 161 (3rdCir. *2Q02);Sandoval v. Hagan*, 197 F.3d484,493-94 (llth Cir. 1999) (Title VI), *rev'don other grounds*, 532 U.S. 275 (2001).

CONCLUSION

ACCORDINGLY, Hale's claims of Eleventh Amendment are invalid. McCarthy prays that this cause be remanded to the trial court for further proceedings.

Footnotes

[1] The district court relied upon a similar factual assumptions in dismissing McCarthy's claims under 42 U.S.C. § 1396n(c)(2J(CJ and 42 U.S.C. § 1396a(a)(8). See 6R1110-1111. The district court relied upon a different assumption regarding the timing in which some receive waiver services yet others remain on the waiting list in dismissing McCarthy's equal protection argument under the Fourteenth Amendment. See 6R1115. However, in that these claims were dismissed pursuant to F.R.C.P. 12(b)6, the claims can be alleged again, ifdiscovery demonstrates the claims are warranted.

[2] It is helpful to know that *Blessing* v. *Freestone*, 520 U.S. 329 (1997), *Wriht v. Roanokc Redevelopment &* Hows. *Aulh:*, 479 U.S. 418 (.1987). and *California* v. *Sierra Club*, 451 U.S. 287 (1981) followed motions for summary judgment. *Gon:aga Univ. v. Doe.* 536 U.S. 273 (2002) followed trial on the merits. Presumably, the plaintiffs in these cases were permitted opportunities for discovery, and the courts were not forced to rely upon factual assumptions.

[3] In *Frazar.* the Fifth Circuit rejected claims made in *West Side Mothers v. Havcrman.* that the Medicaid Act was not the supreme law of the land under the Supremacy clause. And as the Filth Circuit noted, this part of the district court's holding was subsequentJy reversed. See *Westside Mothers v. Havcrman*, 133 F.Supp. 549(E.D. Mich. 2001). *aff d in* part, *rev* Win part, 289 F.3d 852 (6*I*h Cir. 2002).

[4] The Supreme Court held the Boren Amendment to the Medicaid Act to be enforceable. This Amendment required the states to reimburse health care providers according to reasonable rates, adequate to meet the costs of efficient and economically operated facilities. In its finding, the Court found both that reimbursement was a mandatory obligation and the term "reasonable rates" was not ambiguous when read in light of HCFA regulations that described factors to be considered in determining the reasonableness of rates. Sec *Wilder*, 496 U.S. at 510. 519.

[5] The courts' decisions in both *Walker* r. *Snyder. 2*13 F.3d at 347 and *Le\ vis*, 94 F.Supp.2d at 1217 were rendered prior to the Supreme Court's decision in *Gurrett. Walker* holds that because Title [1 applies to "public entities]," its duties do not extend to the "employees or managers of these organizations" individually and thus there was no "personal liability." *hi* at 346. But a decision in Illinois recognizes the questionable vitality of the Seventh Circuit's rationale in *Walker* in the aftermath *ofGarrctl.* See *Boudrcau e\ rel. Boitdreau* v. *Rvan*. No. 00-5392. slip op. at 14n.5. 2001 WL 840853 (N.D. 111. May 2,2001). And the Seventh Circuit abandoned this holding in *Bruggeman* v. *Bldgojevic/i.* 324 F.3d 906 (7*I*h Cir. 2003) Similarly, the court in *Lewis* did not distinguish between claims brought against individuals in their individual capacities as distinct from their official capacities ancf did not consider the statements regarding this issue in *Gurreli.* See *Martin* v. *Tafi.* 222 F.Supp.2d 940, 957 n. 10 (S.D. Ohio 2002).

[6] See also. *Roe #2* v. *Oden.* 2001 WL 686443 (10th Cir. 2001): *Randolph v. Rogers.* 2001 WL 641599 (8*I*h Cir. 2001): See, *e.g. In re Elicit*, 254 F.3d 1135,1146 (9*I*h Cir. 2001); *Tclespectrum. Inc. v. Public Sen: Comm *n* o/A'v., 227 F.3d 414, 420 (6*I*h Cir. 2000); *Fredrick L v. Department of Public Welfare*, 157 F. Supp.2d 509. 531-32 (E.D. Pa. 2001)J.Bex rel. *Hart* v *Valdcz.* 186 F.3d 1280. 1286-87 (10*I*h Cir. 199): *Nelson v. Miller.* 1 70 F.3d 641,646-47 (9'h Cir. 1999); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-26 (9*I*h Cir. 1997). cen. denied, 524 U.S. 937 (1998).

[7] The Court in *Garrett* recognized that Title I of the ADA "can be en forced... by private individuals in actions for injunctive relief under *Exparle Young."*531 U.S. at 374 n.9. When Congress enacted Title II. it did not limit the availability of equitable remedies. To the contrary. Congress expressly incorporated the remedies of Title VI. See 42 U.S.C. § 12133; 29 U.S.C. 794a; *Garcia.* 280 F.3d at 111. In *Franklin v. Gwinmll County Public Schools.* 503 U.S. 60 (1992), the Court held that the remedies available under Title IX of the Education Amendments of 1972,20 U.S.C. § 1681, a statute modeled on Title VI. were governed by the "general rule" under which "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in cognizable causes of action brought pursuant to a federal statute." *Id.* at 70-71. The holding of *Franklin* applies to Title II as well. See *Bartleil v. New York State Bd. Oj Law Exam'rs.*\ 56 l:.3d 321.331 (2nd Cir. 1998). *vacated* on other grounds, 527 U.S. 1031 (1999).

[8] To be clear, a lack of authority to abrogate Eleventh Amendment immunity does not equate to a lack of constitutional authority to enact a statute pursuant to the Fourteenth Amendment.

[9] Legislation prohibiting or requiring modifications of rules, policies, and practices that have a discriminatory impact is a traditional and appropriate exercise of § 5 power to combat a history of invidious discrimination. Sec *Full Hove* v. *Klulznick*, 448 U.S. 448, 477(1980)(opinion of Burger C.J.H "[Congressional authority [under § 5, I4*I*h Amendment] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminator)' impact perpetuating the effects of past discrimination.") *Id.* at 502.(Povvell, J., concurring) (' 'It is beyond question that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing their continuing effects."); *Ciiv of Rome v. United Slates*, 446 U.S. 156, 176-177(1980) (Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination): *South Carolina v. Kai? enbach.* 383 U.S. 301, 325-333 (1966X" invidious discriminatory purpose may often be inferred from... the fact, if it is true, that the law bears more heavily on one ... group] than

another."); *Oregon v. Miichell.* 400 U.S. 1]2 (1970)(upholding nationwide ban on literacy tests even though they arc not unconstitutional per sc); *Guston County* v. *United Slates.* 395 U.S. 285. 293, 296-297 (1969).

[10] See S. rep. No. 116. 101st Cong., I51 Sess. at 10-12, 89,92 (1989); H.R. rep. NO. 485, 101s1 Cong. lslSess.Pt. 2, al 34(1989): 2 Leg. Hist. 1552 (EEOC Comm'r Evan Kemp); Id. at 1077 (John Nelson); Id. at 1388-1389 (Juslin Dart); *Id.* at 1456-1457: *hi.* at 1560 (Jay Rochlin); 3 leg. hist. 2190-2191 (Robert Burgdorf); Task Force Report 27: Spectrum 2, 30 70. The federal government, moreover, provides substantial funding to cover many of those costs.

[11] The Seventh Circuit has repeatedly opined that the ADA (including Title II) is valid commerce clause legislation. Sec *Walker v. Snytler*, 213 F.3d 344. 346 (7Ih Cir. 2000), *cert denied.*531 U.S. 1 190, (2001): *Erickson v. Bd Of Governors of Slate Colleges and Universities for Northeastern Illinois University.* 207 F.3d 945, 952 (7*I*h Cir. 2000). cert, denied. 53 U.S 190. (2001).

[12] Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota v. Dole*, 483 U.S. 203 (1987). a case involving Congress's spending clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits."

[13] Hale argues that *Ex parte Young* is not enforceable because the federal government has no authority to compel states to comply with conditions on funding that are unrelated to § 504 goals. *Brief of'Defendants-Appe I lams*, at 28-29. There are no such thing as § 504 funds. On its face. § 504 applies to agencies that receive federal funds from any source. See 29 U.S.C. § 794(a)(prohibuing discrimination under *any* program or activity receiving federal financial assistance)(emphasis added). The regulations implementing the Rehabilitation Act define federal financial assistance to include *any* grant, loan, or contract and *any* other forms of assistance. 28 C.F.R. $ 41.3(e)(emphasis added). And certainly the receipt of Medicaid funds would be fundamentally related to $ 504 goals.

[14] In cases where the state received federal'funding after *Garrctt*, there is no question thai the slate waived iis immunity under § 504. *Pace v. Boglausa Ciiv School Board.* 325 F.3d 609, 618 (5th Cir. 2003) en bane review granted, 339 F.3d 348;*Milter v. Texas Tech*, 330 F.3d 691, 695 (5*I*h Cir. 2003) en bane review granted. 342 F.3d 563. Other Circuits have declined to follow *Pace*, and found that states waived immunity without the *Garreit* temporal distinction. *Shepard* v. *Irving*, No. 02-1712, slip op. 7 (4'h Cir. August 20, 2003); *Garreli v. University of Alabama.* No. 02-16186. slip op. 10 (1 l'h Cir. September 1 1. 2003); *A. W.* v. *Jersey City Public Schools.* 341 F.3d 234, 253-54 (3*I*f Cir. 2003).

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