For Opinion See 391 F.3d 676 , 381 F.3d 407

United States Court of Appeals,

Fifth Circuit.

Christy MCCARTHY, by and Through her Next Friend Jamie Travis; Todd Gordon, by and Through his Next Friend Trisha Gordon; Allison Pratt, by and Through her Next Friend Paula Pratt; Gail Truman, by and Through her Next Friend Ken Truman; Jim Floyd, 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 Chastain, 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 Gillard, by and Through his Mother and Next Friend Keeye 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 Through her Mother and Next Friend Gretta Smith. Plaintiffs-Appellees,

v.

KAREN F. HALE, ETC.; ET AL., Defendants,

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.

August 18, 2003.

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

Brief of Defendants-Appellants

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents important constitutional questions concerning the Eleventh Amendment: (1) whether Congress intended to grant Plaintiffs-Appellees a federal right under 42 U.S.C. § 1983 to enforce a due-process provision of the Medicaid Act against the State; (2) whether Title II of the Americans with Disabilities Act is invalid legislation and, therefore, cannot form the basis of an *Ex pane Young* suit; and (3) whether § 504 of the Rehabilitation Act is invalid as applied to Defendants-Appellants and, therefore, cannot form the basis of an *Ex*

pane Young suit against them. Defendants-Appellants believe oral argument would aid the Court in resolving these questions.

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***2 JURISDICTIONAL STATEMENT**

Defendants-Appellants (ihe "State") filed a motion to dismiss, asserting that the district court lacked jurisdiction over the claims of Plaintiffs-Appellants ("McCarthy" or "Plaintiffs") because they are barred by the Eleventh Amendment. *See* U.S. CONST, amend. XI; 3R.465.[FN1] The district court granted the motion in part and denied it in part on May 23, 2003. 6R. 1123-24. On May 29, 2003, the State timely filed a notice of appeal. 6R.1131; *see* FED. R. app. P. 4(a)(1)(A). The Court has jurisdiction over this interlocutory appeal, which is based on Eleventh Amendment immunity. *See* 28 U.S.C. § 1291; *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-45 (1993) (discussing the interlocutory appealability of denials of Eleventh Amendment immunity).

FN1. Record references are designated "(volume #)R.(page #)."

***3 ISSUES PRESENTED**

The *Exparte Young* doctrine permits injunctive relief against state officials to enforce federal constitutional or statutory rights. This is based on the fiction that a suit against an official in his official capacity is not a suit against the State and, therefore, falls outside the Eleventh Amendment's limitation on federal jurisdiction.

1. Do individuals on the waiting list for Texas's community-based mental-retardation and developmental-disabilities programs have a "federal right" to enforce the Medicaid Act's procedural requirement of an opportunity for a hearing under 42 U.S.C. § 1983 when services under the program are delayed, even though - because there are no available slots - they have no underlying substantive right to the services?
2. Does *Young* encompass a suit for injunctive relief under Title II of the ADA, which solely applies to the States *qua* States and, therefore, cannot be reconciled with *Young's* fiction that a suit against a state official in his official capacity is *not* a suit against a State?
3. Does *Young* permit a suit seeking injunctive relief for alleged violations of Title II when that statute exceeds Congress's power under § 5 of the Fourteenth Amendment and the Commerce Clause?
4. Does *Young* permit a suit seeking injunctive relief for alleged violations of Title II, which - unlike Title I - is not a generally applicable law but a direct attempt to regulate the States in their sovereign capacity in violation of the Tenth Amendment?
5. Does *Young* permit a suit seeking injunctive relief for alleged violations of § 504 of the Rehabilitation Act when the state agency sued receives no § 504 funds and, therefore, the required nexus between the funding and the condition imposed is lacking?

***4 STATEMENT OF THE CASE**

On September 4, 2002, Plaintiffs filed a class-action suit for injunctive and declaratory relief under Title II of the Americans With Disabilities Act, 42 U.S.C. § 12131 *et seq.,zr\d* § 504 of the Rehabilitation Act of 1972,29 U.S.C. § 794. 5R.979. They also sued under 42 U.S.C. § 1983, alleging violations of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Medicaid Act"), and the Due Process and Equal Protection Clauses of the Constitution. *Id.* The State moved to transfer venue, 5R.880, and to dismiss all claims as barred by Eleventh Amendment immunity, 3R.383. The motion to transfer venue was granted, and the case was transferred from the Eastern District of Texas, Beaumont Division, to the Western District of Texas, Austin Division. 1R.11.

On May 23, 2003, the district court granted the State's motion to dismiss in part, holding that the Plaintiffs

lacked a "federal right" under § 1983 to participate in the State's community-based mental-retardation and developmental-disabilities programs because, among other things, Plaintiffs did not allege that slots were available in the programs, which are subject to a federally-mandated cap. on the number of participants. 6R.1107-10. Thus, the Plaintiffs' claims based on §§ 1396a(a)(8), (10) and 1396n(c)(2)(C) of the Medicaid Act were dismissed. *See* 6R.1107-10,1123-24. The district court also dismissed McCarthy's claims under the ***5** Due Process and Equal Protection Clauses because they failed to state a claim upon which relief could be granted. 6R.1113-15.

The district court then denied the State's motion to dismiss in part, holding that McCarthy's claims under Title II of the ADA, § 504 of the Rehabilitation Act, and § 1396a(a)(3) of the Medicaid Act were not barred by the Eleventh Amendment and could, therefore, proceed. 6R. 1112-13,1115-20. On May 29, 2003, the State timely filed a notice of appeal challenging the district court's failure to dismiss those claims. 6R.1131; *see* FED. R. App. P. 4(a)(1)(A).

STATEMENT OF FACTS

The Plaintiffs are twenty-one individuals who suffer from mental retardation or developmental disabilities such as autism or cerebral palsy, as well as the Arc of Texas, a nonprofit organization that provides programs and support for such individuals and their families. Eligible individuals requiring long-term care as a result of mental or other disabilities are entitled to treatment in intermediate care facilities for the mentally retarded ("ICFs/MR") or nursing facilities. *See* 42 U.S.C. § 1396a. Although only a handful of the individual Plaintiffs reside in such facilities,[FN2] and most of the Plaintiffs live at home, they all assert that they are entitled to receive care in their homes or communities under Texas's Home and Community-based ***6** Waiver Services ("HCS") program and Community Living Assistance and Support Services ("CLASS") program. They allege that they have been on a waiting list for the HCS and/or CLASS programs for more than one year, and they seek to represent a class of approximately 25,000 individuals who have also been on those waiting lists for more than one year. *See* 2R.237.

> FN2. ICFs/MR range in size from large congregant-care facilities to 6-bed group homes located in residential neighborhoods.

The Plaintiffs sued the heads of the following three Texas state agencies in their official capacities: the Texas Health and Human Services Commission ("HHSC"), which administers the Medicaid program in Texas; the Texas Department of Mental Health and Mental Retardation ("MHMR"), which administers the HCS program; and the Texas Department of Human Services ("DHS"), which administers the CLASS program. 2R.236.

The federal Medicaid program is a "cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hosp. Ass 'n*, 496 U.S. 498,502 (1990); *see* 42 U.S.C. § 1396a. A state's participation in the Medicaid program is voluntary. However, once a state chooses to participate, it must operate its Medicaid program pursuant to a "State Plan" that satisfies the requirements set out in the Medicaid statute. *See* 42 U.S.C. § 1396a(a).

***7** For example, the State Plan must: be in effect in all political subdivisions of the state, 42 U.S.C. § 1396a(a)(1); provide an opportunity for a hearing to an individual whose claim is denied or not acted upon with reasonable promptness, 42 U.S.C. § 1396a(a)(3); provide that covered medical assistance be furnished with reasonable promptness to all eligible individuals, 42 U.S.C. § 1396a(a)(8); provide services that are comparable in amount, duration, and scope for all groups covered under the plan, 42 U.S.C. § 1396a(a)(10)(B); employ a single standard for determining income and resource eligibility, 42 U.S.C. § 1396a(a)(10)(C)(i)(lII); and include reas-

onable standards for determining eligibility for and the extent of services, 42 U.S.C. § 1396a(a)(17).

In 1981, Congress amended the Medicaid Act by adding 42 U.S.C. § 1396n(c) to establish "waiver" programs. In waiver programs, the Secretary of Health and Human Services, through the Centers forMedicare and Medicaid Services ("CMS"),[FN3] is authorized to waive certain Medicaid Act requirements if participating states provide home- and community-based services as part of their Medicaid programs. Section § 1396n(c)[FN4] offers states the option to apply to the Secretary for approval of a waiver of certain Medicaid requirements in order to develop Medicaid-financed ***8** home- and community-based programs as alternatives to placing Medicaid-eligible individuals in hospitals, nursing facilities, or ICFs/MR under the Stale Plan. 42 U.S.C. § 1396n(c); 42 C.F.R. § 440.180; 42 C.F.R. § 44I.301(b)(1)(iii). As its name suggests, a waiver relieves states from complying with certain federal requirements that ordinarily must be followed in order to receive federal Medicaid funding under the State Plan. The Medicaid regulations describe the purpose of a Medicaid waiver program as follows:

> FN3. CMS was previously known as the Health Care Finance Administration ("HCFA").
>
> FN4. Waivers under § 1396n(c) are sometimes referred to as "§ 1915(c) waivers," referring to § 1915(c) of the Social Security Act.

Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program.

42 C.F.R. § 430.25(b).

In waiver programs, the usual requirements of statewide availability, § 1396a(a)(1), comparability of services, § 1396a(a)(10)(B), and a single standard for income and resource eligibility, § 1396a(a)(10(C)(i)(III), do not apply. 42 U.S.C. § 1396n(c)(3); 42 C.F.R. § 430.25(d)(2). To qualify for a waiver, a state must demonstrate that providing home- and community-based services to qualified individuals would not require overall expenditures in excess of those that wouJd be ***9** required to provide services in an]CF/MR or a nursing facility. 42 U.S.C. § 1396n(c)(2).

Unlike ICF/MR or nursing facility services, which must be made available to all individuals who categorically qualify for Medicaid services in conformance with the Medicaid Act, there is no statutory entitlement to waiver services. In other words, not all people who satisfy the criteria for "waiver" services are entitled to receive them. Because the waiver programs are designed to encourage innovation, each participating state has wide latitude to define the types of services that it will offer under the waiver, to limit the geographical areas where waiver services are offered, to limit the target groups to whom the services are offered, and to make waiver services available in an amount, duration and scope that may differ from the amount, duration and scope of services provided to non-waiver Medicaid recipients. 42 U.S.C. § 1396n(c)(3), (4), (9), (10); 42 C.F.R. § 441.301(b)(3), (6); 42 C.F.R. §§ 430.25(h)(3)(ii), 440.180, 441.303(0(6), 441.305(a).

Finally, and most significantly for this appeal, the Medicaid Act and applicable regulations expressly require states - in their applications to the federal government - to place a limit on the number of persons who may receive services under a waiver program. 42U.S.C § 1396n(c)(9),(10);42C.F.R. § 441.303(f)(6);42 C.F.R. § 441.305(a). Once a state's application is approved, that number "will constitute a limit on the size of the waiver

program unless the State requests and the ***10** Secretary approves a greater number of waiver participants in a waiver amendment." 42 C.F.R. § 441.303(f)(6); *see* 42 C.F.R. § 441.305(a). Indeed, the statute expressly provides that waiver programs may be limited to as few as 200 individuals. 42 U.S.C. § 1396n(c)(10).

Pursuant to 42 U.S.C. § 1396n(c), Texas has obtained approval to offer home-and community-based services to a specified number of individuals who require the level of care provided in ICFs/MR. *See* 3R.444; 4R.727-850. Plaintiffs did not allege that either the CLASS program or the HCS program had empty slots under the federally-approved cap.

SUMMARY OR THE ARGUMENT

This appeal presents important Eleventh Amendment questions regarding the proper scope of *Ex pane Young* when that doctrine is used to enforce the Medicaid Act, Title II of the ADA, and § 504 of the Rehabilitation Act. When bringing a *Young* suit to enforce a federal statute - like the Medicaid Act - that does not provide an individual right of action, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal - *law" Goniaga Univ. v. Doe*, 536 U.S. 273,282 (2002). (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

Although the district court correctly held that 42 U.S.C. § 1396a(a)(8) grants the Plaintiffs no federal right to receive community-based Medicaid services "with ***11** reasonable promptness," it erroneously held that Plaintiffs have a federal right to a "due-process" hearing when the "reasonable promptness" provision is violated. 6R.1111-13. These two holdings are incompatible. There can be no right to a due-process hearing to correct the potentially erroneous deprivation of an underlying substantive right when there is no underlying right to vindicate. Here, the Plaintiffs lacked an underlying right to reasonable promptness, so they cannot be entitled to a procedural device - like a due-process hearing - to protect that right. Because the Plaintiffs have no federal right under *Gonzaga* and *Blessing* to enforce the Medicaid Act's due-process provision and its regulations, their *Ex pane Young* claim regarding those provisions should be dismissed.

The district court also mistakenly held that the Plaintiffs could maintain their *Young* suit to enforce Title II of the ADA and § 504 of the Rehabilitation Act, even though neither of these statutes can constitutionally be applied to these defendants. Title II is not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment or under the Commerce Clause, and, even if Title II were valid Commerce Clause legislation, it would be unconstitutional under the Tenth Amendment. Because Title II is invalid, it cannot form the basis of an *Ex pane Young* action.

***12** Moreover, § 04 of the Rehabilitation Act, which was enacted pursuant to Congress's spend ing power, is also invalid as applied to these defendants because it fails to satisfy the "relatedness" requirement set forth in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Spending Clause legislation is invalid unless the funds accepted by the State are related to the condition imposed by Congress in exchange for the funds. *See id.* Because the state agencies sued in this case neither directly receive funds under § 504 nor receive funds related to the goals of § 504, *see* 4R.852-868, § 504 is invalid as applied to these defendants and cannot be enforced against them through *Ex pane Young.* Accordingly, Plaintiffs' Title II, § 504, and Medicaid Act claims are barred by the Eleventh Amendment and should be dismissed.

STANDARD OF REVIEW

As a question of statutory interpretation, the Court reviews *de novo* whether Plaintiffs have particular Medicaid-

based rights of action maintainable under § 1983. *Evergreen Presbyterian Ministries, Inc. v. Hood,* 235 F.3d 908, 918 (5th Cir. 2000). This Court also reviews Eleventh Amendment immunity determinations *de novo. Cozzo v. Tangipahoa Parish Council - President Gov't, 219* F.3d 273,280 (5th Cir. 2002).

***13 ARGUMENT**

I. McCarthy's Flawed *Ex Parte young* Suit Cannot Overcome Texas's Eleventh Amendment Immunity and, Thus, Is Barred.

Exparte Young established the "fiction" that an official-capacity suit against a state officer is not a suit against the State because an officer violating supreme federal law acts "without the authority of... the state in its sovereign or governmental capacity" and is "stripped of his official or representative character." 209 U.S. 123, 159-60 (1908). As a prerequisite to bringing a *Young* suit, however, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law." Gonzaga Univ. v. Doe*, 536 U.S. at 282 (quoting *Blessing*, 520 U.S. at 340). Moreover, the federal right must arise from a valid federal law that is enforceable against a State. *See Young*, 209 U.S. at 159-160. Neither of these prerequisites exists in this case.

A. McCarthy Cannot Assert a "Federal Right" to Enforce the "Due Process" Provision of the Medicaid Act.

A statute confers a "federal right" only if three things are true: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the asserted right must not be so "vague and amorphous" that enforcement would strain judicial competence, *Wilder*, 496 U.S. at 509, that is, it must be "sufficiently specific and definite," ***14***Wright v. Roanoke Redevelopment & Hotts. Auth.*, 479 U.S. 418, 430 (1987); and (3) the statute must "unambiguously impose a binding obligation on the States," that is, "the provision giving rise to the asserted right must be couched in mandatory terms" and reflect more than a congressional preference for certain conduct, *Blessing*, 520 U.S. at 340-41. *See Wilder*, 496 U.S. at 509. Unless all three prerequisites are satisfied, dismissal is proper. *See Blessing*, 520 U.S. at 342.

Recently, in *Gonzaga*, the Supreme Court clarified its test for determining whether a federal right exists. The Court explained that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Gonzaga, 536* U.S. at 282. "This confusion has led some courts to interpret *Blessing* as allowing Plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect." *Id.* at 283. The Court eliminated any confusion when it "rejected] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.*

The purpose of the "federal right" inquiry is not to determine whether the statute in question confers rights generally, but whether it "confer[s] rights on a particular class of persons." *Id.* at 274 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Although § 1396a(a)(3) - the Medicaid due-process provision-could bestow a federal right on some other individual in some distinct situation, it ***15** confers no federal right on these Plaintiffs because they lack an entitlement to the underlying substantive right that this procedural provision protects.

The district court rejected Plaintiffs' argument that they had a federal right to enforce § 1396a(a)(8) - the "reasonable-promptness" provision. *See6RA* 110-12. The reasonable-promptness provision provides:
A state plan for medical assistance must provide that all individuals wishing to make application for medical as-

sistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 1396a(a)(8). The district court determined that "[w]hile the Plaintiffs may technically qualify for HCS and CLASS waiver services, the cap on the number of waiver recipients functions as 'a constraint on eligibility,' and '[individuals who apply after the cap has been reached are not eligible." 6R.1111 (citation omitted). "Because the Plaintiffs have not been determined 'eligible,' they have not satisfied the first prong of *Blessing*, as they are not among the class of individuals Congress intended [§ 1396a(a)(8)J to benefit." *Id.* "Therefore, the Plaintiffs have no entitlement to reasonable promptness and cannot enforce this subsection under § 1983." 6R.1112.

When the district court proceeded to consider whether Plaintiffs could enforce the due-process provision, it did not recognize that its reasonable-promptness holding precluded - or otherwise affected - its due process evaluation. But the due-process ***16** provision and the reasonable-promptness provision are inextricably linked. The due-process provision is designed to protect against - and correct - violations of the reasonable-promptness provision, as shown by its text:

A state plan for medical assistance must provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon *with reasonable promptness.*

42 U.S.C. § 1396a(a)(3) (emphasis added). The district court's correct conclusion that Plaintiffs have no federal right to reasonable promptness also precludes them from asserting a concomitant procedural entitlement to protect against an erroneous denial of that same right.

Analogizing to constitutional due process jurisprudence, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty-" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citing *Mathews v. Eldridge*, 424 U.S. 319, 322 (1976)). "Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Id.* Here, the Plaintiffs have no protected interest in reasonable promptness. 6R.1111-12. Therefore, they have no entitlement to due process to protect against a reasonable-promptness violation. For the same reason, Plaintiffs cannot enforce any of the regulations promulgated under the dueprocess ***17** provision, although the district court apparently assumed that they could. *See* 6R.1112-13 (citing 42 C.F.R. §§ 431.201.206.210.220).

This analysis is not undermined by the district court's cited authority in support of its erroneous conclusion that the due-process provision confers a federal right on Plaintiffs. 6R.1113. In *Bryson v. Shumway*, the court merely assumed that § 1396a(a)(3) bestowed a federal right because the defendants did not argue otherwise; the defendants' concession removed the issue from the court's purview. 308 F.3d 79, 90 (1st Cir. 2002).

Moreover, unlike McCarthy, the *Bryson* plaintiffs alleged that the state had failed to fill vacant slots in its waiver program. *Id.* at 90-91. Had that been the case here, it presumably would have undermined the district court's holding that the Plaintiffs had no federal right to reasonable promptness, since that holding was premised on the lack of any allegation that the HCS and CLASS waiver programs have vacant slots. *See* 6R. 1111-12. The presence of a protected interest in reasonable promptness, in turn, would have strengthened Plaintiffs' claims of a federal right to enforce the due-process provision. However, because McCarthy does not allege that there are open slots in the waiver programs, *Bryson's* assumption that § 1396a(a)(3) conferred a federal right on the plaintiffs in that case is inapposite here. In fact, the *Bryson* court acknowledged this crucial factual difference:

***18** It is one thing to have a hearing if [the state] is obligated to create slots... It is another to contemplate a hearing if there are no available slots and there is no requirement to give the first available slot to the next person on the list. It is yet another thing if there is an available slot and the sole issue, applying pre-set criteria for priority status, is who on the waiting list should be placed in that slot.

Id.

The other case cited by the district court, *Meachem v. Wing*, 77 F.Supp.2d 431 (S.D.N. Y. 1999) is also inapposite. In *Meachem*, the plaintiffs were not on a waiting list to enter into a waiver program, but were denied services that they had already been receiving. *See* 77 F.Supp.2d at 435. Thus, the court was not confronted with the effect of the statutory cap on the number of participants in waiver programs, which is at the heart of the district court's opinion in this case. *See* 6R.1111-12.

As the Supreme Court instructed in *Gonzaga*, the purpose of the "federal right" inquiry is whether "a statute 'confer[s] rights on *a particular* class of persons."' *See* 536 U.S. at 285 (quoting *California*, 451 U.S. at 294) (emphasis added). These particular Plaintiffs - who, as the district court correctly determined, lack a federal right to enforce the reasonable-promptness provision - cannot invoke the right to due process that is intended to protect against violation of that provision. Without an underlying, substantive protected interest, there can be no right to due process. *See Am. Mfrs.,526* U.S. at 59 (citing *Mathews*, 424 U.S. at 322). Thus, the Plaintiffs have failed to show that Congress unambiguously intended to confer upon them a federal ***19** right. *SeeGonzaga*, 536 U.S. at 287. "Ambiguity precludes enforceable rights." *31 Foster Children v. Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003) (citing *Gonzaga*, 536 U.S. at 280). Accordingly, Plaintiffs lack a federal right to enforce § 1396a(a)(3), and their claim attempting to enforce that statute through § 1983 should be dismissed.

B. An *Ex Parte Young* Suit Cannot Be Brought to Enforce Title II of the ADA Because That Statute Is Not a Valid Federal Law Enforceable Against a State.

The Plaintiffs cannot bring a *Young* suit to enforce Title II of the ADA for several reasons.[FN5] First, enforcement of Title IFs based standards is fundamentally incompatible with the *Young* doctrine, which rests on the fiction that the state entity has not been sued. Second, there is no valid federal law to enforce under *Young*, because Title II exceeds Congress's lawmaking power under § 5 of the Fourteenth Amendment and the Commerce Clause. Finally, the Tenth Amendment prohibits federal laws - like Title II - that directly regulate the States *qua* States in their sovereign capacities.

> FN5. The Supreme Court's decision in *Olmstead v. Zimring*, 527 U.S. 581, 119 S.Ct. 2176 (1999), does not affect this appeal because *Olmstead* did not reach constitutional issues. In *Olmstead*, the Supreme Court held that the State of Georgia may have violated Title n and/or its regulations by failing to move qualified disabled individuals from institutions into community placements. *See* 527 U.S. at 596-97. However, the Court explicitly limited its holding to construction of Title n and its regulations and expressly disclaimed any constitutional significance, stating, "ftlhis case, as it comes to us, presents *no constitutional question."* 527 U.S. at 588 (emphasis added). Because the State raises a constitutional. Eleventh Amendment-based defense to Plaintiffs' Title II claims, *Olmstead* has no effect on - and certainly does not preclude - this defense.

***20 1. Because only public entities can be sued under Title II, a Title II suit is incompatible with *Young's* fiction that the State entity has not been sued.**

Title II, by its terms, prohibits discrimination by public entities. 42 U.S.C. § 12132. Accordingly, the proper defendant in a Title IJ suit is the entity itself. *Id.; see, e.g., Walker v. Snyder,2\3* F.3d 344, 346-47 (7th Cir. 2000); *Alsbrookv. City of Maumelle,* 184 F.3d 999, J005 n.8 (8th Cir. 1999).

The *Young* doctrine, by contrast, rests on the fiction that the State, as an entity, has not been sued. 209 U.S. at 159-60. Thus, although suits against an official in his official capacity typically are deemed suits against the entity itself, *Young* creates an exception when the official-capacity suit seeks prospective injunctive or declaratory relief against a State. *See Kentucky v. Graham,* 473 U.S. 159, 166, 167 n.]4 (1985) (distinguishing *Young* suits from other official-capacity suits).

In *Walker v. Snyder*, the Seventh Circuit correctly recognized an irreconcilable conflict between the *Young* fiction and Title II's requirement that suits be brought against a public entity. 213 F.3d at 347; *see also Lewis v. N.M. Dep't of Health,* 94 F.SupP.2d 1217, 1230 (D.N.M. 2000), *affd,* 261 F.3d 970 (10th Cir. 2001). The Seventh Circuit's reasoning reflect's the Supreme Court's recognition that, when a statute is directed at "the State" rather than a "state official," Congress did not intend to permit a *Young* suit to enforce that statute. ***21***Seminole Tribe of Florida v. Florida,* 517 U.S. 44,75 n. 17 (1996) (distinguishing statutes directed at state officials - under which congressional intent to permit a *Young* suit may be inferred - from statutes directed to the States as entities - under which no such inference lies).

The Seventh Circuit recently retreated from *Walker*. *See Bruggeman v. Blagojevich,* 324 F.3d 906 (7th Cir. 2003). The *Walker* analysis, however, correctly identifies a logical inconsistency between *Ex pane Young* and Title II's statutory framework, and this Court should reject the Seventh Circuit's erroneous conclusion in *Bruggeman* that *Walker's* reasoning did not survive *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001). *See Bruggeman,* 324 F.3d at 912-13 (citing *Garrett,* 531 U.S. at 374 n.9).

Garrett suggests, in *dicta* within a footnote, that an *Exparte Young* suit could proceed under Title I of the ADA. *See* 531 U.S. at 374 n.9. In *Garrett*, however, no *Young* claim was before the Court. Indeed, the State defendant in *Garrett* expressly disclaimed any argument that the Eleventh Amendment would bar a Title 1 *Young* claim - thus removing the issue from the Court's consideration. *See* Pet'r Reply Br., *Bd. ofTrs. of the Univ. of Ala. v. Garrett,* 2000 WL 1339204, at * 1 (Sept. 13,2000); *cf. Sandoval*, 532 U.S. at 279 (assuming that regulation was valid because petitioners did not challenge the regulation in the question presented to the Court). Because *Young* was not at issue in *Garrett*, footnote 9 could not - and did not - overrule ***22** *Walker*, as the Seventh Circuit mistakenly determined in *Bruggernan.* 324 F.3d at 912-13 (citing *Garrett,* 531 U.S. at 374 n.9).

Congress directed Title II at "public entities," assuming - erroneously - that Title II abrogated the states' immunity from suit. *See Reickenbacker v. Foster,* 274 F.3d 974, 983 (5th Cir. 2001). With the benefit of hindsight, Congress might have taken a different approach and framed Title II in terms compatible with *Young's* fiction. But this Court is not "free to rewrite the statutory scheme in order to approximate what it thinks Congress might have wanted had it known [Title II] was beyond its authority." *Seminole,* 517 U.S. at 76. *Young's* fiction cannot be reconciled with Title II, and the Court should dismiss Plaintiffs' Title II claim.

2. Title II exceeds Congress's lawmaking authority under § 5 **of the Fourteenth Amendment.**

Title II was enacted pursuant to Congress's powers under § 5 of the Fourteenth Amendment and the Commerce Clause. 42U.S.C. § 12101(b)(4). However, the Fifth Circuit has determined that Title II exceeded Congress's § 5 authority. *See Reickenbacker,* 274 F.3d at 983. In holding that Title II lacked the requisite congruence and proportionality, *Reickenbacker* observed that "Title II indisputably embodies more than merely a prohibition on un-

constitutional discrimination against the disabled" and, instead, "create[s] an affirmative accommodation obi igation on the part of public entities that far exceeds the constitutional boundaries." *Id.* Because ***23** Title II is not valid § 5 legislation, it cannot be enforced in an *Ex pane Young* suit such as this one.

3. Title II exceeds Congress's lawmaking authority under the Commerce Clause.

Moreover, Title II - which is directed at the States as sovereigns and strikes at the heart of state governance - is not a permissible exercise of Congress's Commerce Clause power. Although anti-discrimination legislation directed at *private* commercial establishments might be within Congress's Commerce Clause power, that does not mean that Congress can regulate the States *qua* States under the Commerce Clause. Indeed, such a result would patently conflict with the Supreme Court's declaration that § 5 of the Fourteenth Amendment is the *only* constitutional power through which Congress can abrogate the States' immunity. *Seminole Tribe*, 517 U.S. at 72-73. But even if the Commerce Clause could be used to regulate the States *qua* States - which it cannot under *Seminole Tribe* and its progeny - Title II does not fall within Congress's power under that clause.

A prerequisite for Commerce Clause legislation is a link to interstate commerce. The Supreme Court has identified three -broad categories of activity Congress may regulate: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "those activities that substantially ***24** affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

]t is inconceivable that the State's provision of programs and services to the disabled could be viewed as "channels" or "instrumentalities" of interstate commerce. Thus, Title II can survive only if it regulates an activity that substantially affects interstate commerce. *Lopez*, 514 U.S. at 558-59. *Lopez* clarified that it is not enough for an activity to affect commerce. Instead, the activity must "substantially" affect interstate commerce. *Id.* at 559; *see also Morrison*, 529 U.S. at 609. Several factors guide this inquiry: (1) whether the statute regulates economic activity; (2) whether the statute contains an "express jurisdictional element" limiting its application to objects or activities with an explicit connection to interstate commerce; (3) whether there are "express congressional findings regarding the effects upon interstate commerce" of the regulated object or activity; and (4) whether the alleged substantial effect on interstate commerce is "attenuated." *Morrison*, 529 U.S. at 610-13 (reaffirming Lope's guidelines for Commerce Clause inquiries). Title II meets none of these factors.

First, Title II does not regulate "economic activity." Instead, it regulates *public* programs and services. A public program or service is not an "economic activity" because it is not an "economic enterprise" or a "commercial transaction, which, ***25** viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. As *Morrison* observed, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613 (determining that gender-motivated crimes of violence are not, "in any sense of the phrase, economic activity," despite potential economic consequences). Accordingly, it would be an unprecedented departure from Supreme Court jurisprudence for this Court to hold that the Commerce Clause permits Congress to regulate non-economic activity in the form of public services and programs. *See id.* This first factor alone, therefore, demonstrates that Title TJ is not valid Commerce Clause legislation.

• Second, Title II does not contain a "jurisdictional element" that limits its application to public services, programs, and activities that affect interstate commerce. Instead, Congress cast a "wider" net, seeking to regulate all public services, programs, and activities. *Cf. Morrison*, 529 U.S. at 613. This aspect further undermines the ex-

istence of a valid connection to interstate-commerce. *See id*,; *Lopez*, 514 U.S. at 561-62. Third, there are no legislative findings regarding the effect of public services, programs, and activities on interstate commerce. *See* 42 U.S.C. § 12101(a)40. Finally, because the first three *Lopez/Morrison* factors show ***26** that Title II does not substantially affect interstate commerce, the "link" to commerce necessarily is "attenuated" under the fourth factor.

Thus, Title II fails the *Lopez/Morrison* analysis across the board. Because the public services and programs regulated by Title II are not "economic activities" that substantially affect commerce, Title II is not valid Commerce Clause legislation that Plaintiffs can enforce through a *Young* suit.

4. Title II is not enforceable Commerce Clause legislation because it regulates the States in their sovereign capacity in violation of the Tenth Amendment.

Even if the Court were to determine that Title II regulates activity that substantially affects interstate commerce, the Tenth Amendment would preclude the Plaintiffs' attempt to enforce that statute through a *Young* suit.

The Supreme Court recently emphasized that Tenth Amendment limitations on federal power apply even when a law regulates subject matter otherwise within Congress's jurisdiction - like interstate commerce. *Reno* v. *Condon*, 528 U.S. 141, 149 (2000) (noting previous invalidations 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").

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, ***27** respectively, or to the people." U.S. const, amend. X. In Grafting the nation's constitutional design, "the Framers rejected the concept of a central government that would act upon and through the States." *Printz v. United States*, 521 U.S. 898, 919 (1997). Instead, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 920 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

Title II transgresses Tenth Amendment principles by directly regulating the States, in their sovereign capacities, as "public entities," *See id.; see also* 42 U.S.C. § 12132. Accordingly, these laws fall outside the category of permissible, "generally applicable" laws, the effect of which on States is incidental. *See Condon*, 528 U.S. at 151 (holding that Driver's Privacy Protection Act is not directed at States "in their sovereign capacities" but at "States as owners of databases" and - as a "generally applicable" law - raises no Tenth Amendment concerns); *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

Title II is an impermissible federal mandate because it directly prescribes the manner in which the States govern, dictating requirements for *state* programs, services, and activities. This violates fundamental principles of federalism, because "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." ***28***New York*, 505 U.S. at 162; *See also Printz*, 521 U.S. at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.") Because Title 11 violates the Tenth Amendment and is therefore unenforceable against the States, Plaintiffs' Title II claims should be dismissed.

C. Ex Parte Young Cannot Be Used to Enforce § 504 of the Rehabilitation Act Against These Defendants Because That Statute Is Invalid as Applied to Them.

Section 504 cannot be enforced against these Plaintiffs through *Exparte Young* because it is invalid Spending Clause legislation, as applied to these defendants, under *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In *Dole*, the Supreme Court set out a four-part test for evaluating whether a statute is within Congress's authority under the Spending Clause. First, the exercise of the spending power must be in pursuit of "the general welfare." *Dole*, 483 U.S. at 207. Second, Congress must clearly and unambiguously condition States' receipt of federal funds so that the States may exercise their choice knowingly. *Id.* Third, conditions on federal grants must be related "to the federal interest in *particular* national projects or programs." *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (emphasis ***29** added)). Fourth, the conditions cannot violate other provisions of the Constitution. *Dole*, 483 U.S. at 208.

As applied to these defendants, § 504 fails to satisfy the third *Dole* requirement - the "reiatedness" prong - because the agencies sued receive no § 504 funding. *See* 4R.852-868. The Supreme Court has held that Spending Clause legislation is "much in the nature of a contract." *Banies v. Gorman*, 536 U.S. 181, 186 (2002). "Just as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power... rests on whether the [recipient] voluntarily and knowingly accepts the terms of the contract." *Id.* The federal government should not be able to impose a condition on state agencies that is not within the particular "contract" to which the agency agreed - that is, a condition outside a statute pursuant to which the agency receives funds. To allow otherwise is to deny the contractual nature of the agreement between the State and the federal government. *Cf. id.*

The agencies sued in this case do not dispute that they receive federal funding from other sources. But even if the acceptance of federal funds under one statute could trigger an obligation to comply with a condition in a separate statute, the Court should nevertheless conclude that § 504 is overinclusi ve because it requires a recipient ***30** of federal funds under any statute - no matter how unrelated to § 504's goals - to comply with § 504's provisions:

No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance.*

29 U.S.C. § 794(a) (emphasis added). Such a broad reach is impermissible because Congress has no authority to use its spending power to compel compliance with conditions that are unrelated to the federal interest in the funds accepted by the recipient. *See Dole*, 483 U.S. at 207.

Section 504 fails the "relatedness" prong of *Dole* to the extent it imposes conditions on an entity that accepts *any* federal funds - not just those funds related to § 504's goals. *See* 29 U.S.C. § 794(a). For example, the Act would require a state university to comply with § 504 as a condition of accepting federal research grants. *See id.* It cannot be argued that federal research grant money is in any way related to the goals of § 504, which involve promoting the societal integration of persons with disabilities. *See* 29 U.S.C. § 701. Thus, conditioning the grant of federal research funds on compliance with § 504 would violate *Dole's* "relatedness" requirement. Such *a* conditional grant would be beyond Congress's spending power and could not form the basis of an *Ex pane Young* suit.

***31** The Plaintiffs have identified no grant of federal funds.to these defendant agencies that is related to the conditions imposed by § 504. Therefore, § 504's conditions cannot be constitutionally applied to these defendants under *Dole.* Accordingly, the Plaintiffs cannot maintain an *Exparte Young* suit based on § 504, and that claim should be dismissed.

CONCLUSION

McCarthy's claims under the Medicaid Act, **Title** II of the ADA, and § 504 of the Rehabilitation Act should be dismissed.

Christy MCCARTHY, by and Through her Next Friend Jamie Travis; Todd Gordon, by and Through his Next Friend Trisha Gordon; Allison Pratt, by and Through her Next Friend Paula Pratt; Gail Truman, by and Through her Next Friend Ken Truman; Jim Floyd, 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 Chastain, by and Through his Next Friend Lori Chastain; Al, by and Through his Next
2003 WL 24016591 (C.A.5) (Appellate Brief)

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