UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

GARY GAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No. 2:11-CV-288-RWS**
GEORGIA DEPARTMENT OF NATURAL RESOURCES, et al.,	)	
	)	
Defendants.	)	

UNITED STATES' BRIEF AS INTERVENOR AND AMICUS CURIAE IN OPPOSITION TO MOTION TO DISMISS

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UNITED STATES' BRIEF AS INTERVENOR AND AMICUS CURIAE IN OPPOSITION TO MOTION TO DISMISS

The United States of America, by and through its undersigned counsel, respectfully submits the following brief as intervenor pursuant to 28 U.S.C. § 2403(a) and as amicus curiae. It submits this brief in opposition to the defendants' renewed motion to dismiss (Doc. 25) (Defs.' Mot.).

QUESTIONS PRESENTED

1. Whether this Court should determine whether Title II of the Americans with Disabilities Act validly abrogates sovereign immunity, where (1) the plaintiff maintains a claim under Section 504 of the Rehabilitation Act that would provide identical relief and (2) the defendants also argue that plaintiff fails to state a Title II claim.

2. Whether Title II is a valid exercise of Congress's authority under Section Five of the Fourteenth Amendment, and so validly abrogates sovereign immunity, to

the extent that it ensures physical access to government facilities such as the public parks at issue here.

3. Whether a Title II or Section 504 claim can be brought against a state officer for injunctive relief pursuant to the *Ex Parte Young* doctrine.

4. Whether the substantive regulations implementing and construing Title II and Section 504 are privately enforceable under those statutes' private rights of action.

STATEMENT OF INTEREST

The United States submits this brief as an intervenor pursuant to 28 U.S.C. § 2403(a), which permits the United States to intervene to defend any federal law of the United States, and as amicus curiae pursuant to 28 U.S.C. § 517, which permits the Attorney General to send any officer to "attend to the interests of the United States in a suit pending in a court of the United States."

This motion concerns the constitutional validity and enforceability of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* (ADA), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and those statutes' implementing regulations. The Department of Justice has authority to enforce and construe those two statutes, including the power to issue regulations implementing them. 42 U.S.C. §§ 12133-12134, 12204; *see, e.g.*, 28 C.F.R. § 41. Accordingly, the United States has a strong interest in the resolution of defendants' argument that Title II, Section 504, and their implementing regulations are unenforceable.

SUMMARY OF ARGUMENT

1. This Court need not decide whether Title II is proper Section Five legislation that validly abrogates the States' sovereign immunity. The plaintiff adequately pleaded a violation of Section 504 of the Rehabilitation Act, which requires States receiving federal funding to meet obligations identical to those of Title II and also requires them to waive sovereign immunity. Accordingly, it is unnecessary for this Court to determine whether Title II provides the same relief.

Additionally, this Court should not determine whether Title II validly abrogates sovereign immunity unless and until it finds that plaintiff has stated a claim under Title II. *See United States* v. *Georgia*, 546 U.S. 151, 159 (2006). In particular, it should conduct its abrogation analysis based on Title II's actual requirements here, not an exaggerated version.

2. Should this Court nonetheless reach the question, it should find that Title II, where it requires that public facilities be made accessible to individuals with disabilities, is a valid exercise of Congress's authority pursuant to Section Five of the Fourteenth Amendment. Title II is well tailored to remedy past discrimination against individuals with disabilities and prevent such discrimination in the future, while not imposing excessive compliance costs on public entities. It is a congruent and proportional response to a documented pattern of official discrimination in this

context, just as it is in the contexts of courthouse access and public education. *See Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Association for Disabled Ams., Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005).

3. This Court also need not determine whether plaintiff can obtain injunctive relief on his Title II and Section 504 claims pursuant to the *Ex Parte Young* doctrine. That question is entirely academic, since the defendants have waived their sovereign immunity pursuant to plaintiff's Section 504 claim. In any event, such a suit would be available, as every appellate court to consider the question has determined. The State's argument to the contrary is based on a misunderstanding of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), which has no application here.

4. A private plaintiff who sues to enforce the anti-discrimination mandates of Title II and Section 504 also may enforce regulations that authoritatively construe those mandates. *See Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001). The regulations at issue here easily meet that standard for enforceability, as every appellate court to consider the question – including the Eleventh Circuit – has found.

ARGUMENT

I. THIS COURT NEED NOT DETERMINE THE VALIDITY OF TITLE II'S ABROGATION OF SOVEREIGN IMMUNITY

1. This Court should not, on this motion to dismiss, reach the question of whether Title II validly abrogates sovereign immunity. As this Court correctly determined, the plaintiff adequately pleaded violations of Section 504 of the Rehabilitation Act. The defendants' obligations are the same pursuant to Section 504 and Title II, and so as long as the plaintiff maintains a live Section 504 claim, the constitutionality of Title II is a purely academic question that should not be decided. *See, e.g.*, *Bennett-Nelson* v. *Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (finding it unnecessary to decide whether Title II is valid Fourteenth Amendment legislation where plaintiff had identical Section 504 claim); *cf. Garrett* v. *University of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) (per curiam) (defendant liable under Section 504 for employment discrimination even though Supreme Court ruled Title I of ADA did not abrogate sovereign immunity for such claims).

In their renewed motion, the defendants do not appear to contest this Court's ruling on the Section 504 claim, and in any event that ruling was correct. As this Court correctly found, it is unrealistic to expect greater specificity at the pleading

stage, as these are matters regarding the State's internal organization and funding that are peculiarly within the defendants' knowledge. *See Rodriguez* v. *Plymouth Ambulance Serv.*, 577 F.3d 816, 830 (7th Cir. 2009) (prisoner entitled to limited discovery as to whether the defendant was a state actor, as prisoner could not be "charged fairly with knowing" defendant's contractual relationship with public entity). The defendants know far better than does the plaintiff which programs are responsible for the activities at issue here and whether those programs receive federal funding. *See Cohn* v. *KeySpan Corp.*, 713 F. Supp. 2d 143, 159 (E.D.N.Y. 2010) ("Whether or not any of the Utility defendants receives federal funding is a fact peculiarly within the possession and control of those defendants, which plaintiff is entitled to discern during discovery.").[1]

[1] Another district court in this circuit recently determined that a plaintiff in a similar case failed to plead a Section 504 claim. *See Mason* v. *City of Huntsville, Ala.*, No. 5:10-cv-2794, slip op. 11-12 (N.D. Ala. Oct. 10, 2012). That decision appears to be based on the incorrect premise that precedent from 1981 and 1982 requiring plaintiffs to show that the very facilities alleged to be inaccessible receive federal funding remains good law. *See id.* at 12 (citing *Brown* v. *Sibley*, 650 F.2d 760 (5th Cir. 1981) and *Doyle* v. *University of Ala. in Birmingham*, 680 F.2d 1323 (11th Cir. 1982)). As *Mason* acknowledged, Congress amended the Rehabilitation Act in 1987 to clarify that "all of the operations of" a state or local department or agency are subject to Section 504's requirements if "any part" of that department or agency receives federal financial assistance. *See* 29 U.S.C. § 794(b). Accordingly, *Brown* and *Doyle* no longer can be followed on this point. *See, e.g.*, *Locascio* v. *St. Petersburg*, 731 F. Supp. 1522, 1532 (M.D. Fla. 1990); *see also* (continued…)

The plaintiff ultimately must establish that the programs alleged to violate Section 504 receive federal funds, because Section 504, as Spending Clause legislation, applies only to programs or activities that receive federal financial assistance. *See, e.g.*, *Koslow* v. *Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002). The plaintiff's pleading here, while not a model of precision, is sufficient to state a claim under Section 504, as it includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). Specifically, plaintiff's allegation that the state agencies responsible for the parks at issue "are the recipient of federal funds," *see* Complaint 23 ¶ 47, permits this Court to draw the reasonable inference that the specific programs responsible for the alleged discriminatory conduct receive such funds. That is particularly true given Section 504's expansive definition of

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(…continued)
Corrales v. *Moreno Valley Unified Sch. Dist.*, No. 08-cv-040, 2010 WL 2384599, at *9 (C.D. Cal. June 10, 2010); *Innovative Health Sys., Inc.* v. *City of White Plains*, 931 F. Supp. 222, 234 (S.D.N.Y. 1996). To be sure, some courts, without evidencing knowledge of Congress's action, have continued to cite to pre-amendment cases such as *Brown* and *Doyle* as controlling law regarding federal financial assistance. *See, e.g., Muckle* v. *UNCF*, 420 F. App'x 916, 918 (11th Cir. 2011) (summary order). *Mason* appears to be the first decision to recognize that Congress specifically intended to overrule restrictive interpretations such as *Brown* yet refuse to give that legislative action the desired effect.

program, pursuant to which "all of the operations of" a state or local department or agency are subject to Section 504's requirements if "any part" of that department or agency receives federal financial assistance. *See* 29 U.S.C. § 794(b).

2. Should this Court determine after discovery that the defendant agencies do not receive federal funding that subjects them to the plaintiff's Section 504 claims, it still should not rule on the validity of Title II's abrogation unless and until it determines that plaintiff has made out a Title II claim. *See United States* v. *Georgia*, 546 U.S. 151 (2006). In *Georgia*, the Supreme Court set forth a three-step process for how such constitutional challenges in Title II cases should proceed. Courts must first determine "which aspects of the [defendant]'s alleged conduct violated Title II." *Georgia*, 546 U.S. at 159. If Title II was violated, a court next should determine "to what extent such misconduct also violated the Fourteenth Amendment."[2] *Ibid.* Finally, and only if a court finds that the alleged "misconduct violated Title II but did not violate the Fourteenth Amendment," it should reach the question whether Congress's exercise of its Section Five authority "as to that class of conduct is nevertheless valid." *Ibid.*

[2] The plaintiff contends that the conduct alleged here constitutes irrational disability discrimination in violation of his Fourteenth Amendment right to equal protection. *See* Pl.'s Opp. to Defs.' Mot. to Dismiss 9-10 (Doc. 19). The United States expresses no opinion on that question.

This rule is in keeping with the "fundamental and longstanding principle of judicial restraint" that "courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *accord Florida Ass'n of Rehab. Facilities* v. *Florida Dep't of Health and Rehabilitative Servs.*, 225 F.3d 1208, 1227 & n.14 (11th Cir. 2000). This constitutional avoidance principle is at its apex when courts address the constitutionality of an act of Congress, "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted); *accord Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2513 (2009).

Resolving the statutory issue first is particularly appropriate in this case, because resolution of the Eleventh Amendment question would determine only whether plaintiff can obtain damages. Regardless of the answer to that question, as described further in Argument III, *infra*, plaintiff has a live Title II claim for injunctive and declaratory relief.

Moreover, by definition, it is impossible to determine whether Title II's requirements are congruent and proportional to the constitutional harms they remedy in this context without first ascertaining what, if anything, Title II actually requires here. The defendants' own motion papers illustrate this problem. On the

one hand, the defendants point out – correctly – that Title II does not require public entities to modify existing facilities under all circumstances, and they argue that the plaintiff has not demonstrated that any modification is required here. *See* Defs.' Mot. 4-5. On the other hand, in order to bolster their argument that Title II provides too onerous a remedy to be congruent and proportional to any discrimination in this context, they present an exaggerated interpretation of Title II's requirements that, they say, the plaintiff advocates. For example, the defendants state: "*As alleged by Plaintiff*, the guidelines impose scoping requirements down to a fraction of an inch that must be applied to naturally occurring terrain, require nearly every area in the Parks to be accessible, and include requirements that have nothing whatsoever to do with actual accessibility." Defs.' Mot. 9 (emphasis added) (citations omitted).

The defendants make little effort to argue that Title II, as the defendants themselves construe the statute and its implementing regulations, is an inappropriate response to the long record of discrimination against individuals with disabilities. Rather, they ask this Court to adjudicate the validity of a version of the statute that bears little resemblance to the real one. There is no basis for this Court to issue such an advisory opinion on a hypothetical statute, particularly when the plaintiff does not endorse the interpretation. *See* Pl.'s Opp. to Defs.' Mot. to Dismiss 11-12.

The United States takes no position as to whether plaintiff has stated a claim in his amended complaint. The United States does observe that the defendants are correct in pointing out that their obligation to make the facilities at issue accessible differs considerably depending on what parts of the parks have been newly built or altered since 1992, a point on which the amended complaint is silent. A public entity must make "readily accessible" any facility newly constructed or altered after 1992. 28 C.F.R. § 35.151(a). In the absence of new construction or alteration, on the other hand, the defendants' obligation is only to ensure that each service, program, or activity, "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a).[3] To comply with this mandate, a public entity need not necessarily make accessible each existing facility, 28 C.F.R. § 35.150(a)(1), nor must it take any action that it can demonstrate would result in "undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3).

Under neither standard would Title II and its implementing regulations "include requirements that have nothing whatsoever to do with actual accessibility." *See* Defs.' Mot. 9. Rather, actual accessibility satisfies Title II's requirements for

[3] A new version of Title II's implementing regulations went into effect on March 15, 2011. The changes have no substantive impact here, and so this Court need not consider under which version the plaintiff's claims should be adjudicated. We cite the new version in this brief.

either existing or new/modified facilities. Any facility built in conformity with uniform federal standards – the ADA Accessibility Guidelines – is deemed to comply with this accessibility requirement, but such conformity is not required where it is "clearly evident that equivalent access to the facility or part of the facility is [otherwise] provided." 28 C.F.R. § 35.151(c)(1).

II. TITLE II PROPERLY ABROGATES STATE SOVEREIGN IMMUNITY WHERE IT ENSURES ACCESSIBLE PUBLIC FACILITIES

To the extent that Title II of the Americans with Disabilities Act requires public entities to make accessible their public facilities, such as the parks at issue here, it validly abrogates the States' sovereign immunity. In such cases, Title II is a congruent and proportional response to the extensive history of public discrimination against individuals with disabilities, including pervasive discrimination in this very context, and so it is a proper exercise of Congress's legislative authority pursuant to Section Five of the Fourteenth Amendment.

A. This Court Already Has Determined, Correctly, That Most Requirements For Abrogation Are Met

As a preliminary matter, and as the State does not appear to dispute, this Court already has determined, correctly, that the only question is whether Title II is a congruent and proportional response to the history of discrimination in this context. All other requirements for abrogation are satisfied. In particular, there is no

question that Congress unequivocally expressed its intent to abrogate the States' sovereign immunity with respect to claims under the ADA. *See* 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Similarly, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Lane*, 541 U.S. at 518. Accordingly, so long as Title II is a proper exercise of Congress's Section Five authority in this context, it validly abrogates the States' sovereign immunity.

As this Court already has found, Congress compiled an extensive record of discrimination against individuals with disabilities that was more than sufficient to trigger its broad authority to legislate pursuant to Section Five. Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. 509 at 524. This long and broad history of official discrimination suffered by individuals with disabilities authorized Congress, pursuant to Section Five of the Fourteenth Amendment, not only to bar actual constitutional violations, but also to pass prophylactic legislation that remedies past harm and protects the right of people with disabilities to receive all public services on an equal footing going forward. *Ibid.*; *accord Association for Disabled Ams., Inc.* v. *Florida Int'l*

Univ., 405 F.3d 954, 958 (11th Cir. 2005); *Bowers* v. *NCAA*, 475 F.3d 524, 554 & n.35 (3d Cir. 2007). As this Court correctly found, *see* Doc. 23 at 12, and contrary to the defendants' suggestion, it is well established that Congress is not limited to barring actual constitutional violations.[4] Rather, Congress "may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003); *accord National Ass'n of Bds. of Pharmacy* v. *Board of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1316 (11th Cir. 2011). In particular, Congress may ban "practices that are discriminatory in effect, if not in intent," notwithstanding that the Equal Protection Clause bans only intentional discrimination. *Lane*, 541 U.S. at 520.

[4] The defendants concede the point for purposes of this motion, *see* Defs.' Mot. 12 n.5, and in any event there is binding caselaw on point. In particular, the Eleventh Circuit found Title II to validly abrogate sovereign immunity in a case not involving a constitutional violation. See *Association for Disabled Ams.*, 405 F.3d at 959. Moreover, an Eleventh Circuit panel rejected this very argument from the same State this year. See *McCauley* v. *Georgia*, 466 F. App'x 832, 837 (11th Cir. 2012). As *McCauley* explained, the argument is incompatible with *Lane*: "In *Lane*, the Supreme Court held that Congress had validly abrogated states' Eleventh Amendment immunity from suit under Title II of the ADA in cases alleging a denial of access to the courts. The Court did not qualify this holding with a requirement that an actual violation must have occurred for the abrogation of immunity to be valid." *Ibid.* (citations omitted).

What Congress may not do is pass legislation "which alters the meaning of" the constitutional rights purportedly enforced. *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). "[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* at 519-520. The ultimate question is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Put another way, "the question is not *whether* Title II exceeds the boundaries of the Fourteenth Amendment, but *by how much*." *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005).

Thus, the only question for this Court is whether Title II, as applied to the class of cases at issue here, is congruent and proportional to the discrimination it remedies and prevents. The defendants offer no argument at all on this point, other than (1) reiterating their incorrect position that Title II can validly abrogate sovereign immunity only in cases involving a constitutional violation and (2) arguing that an erroneous interpretation of Title II would call into question its validity. *See* Defs.' Mot. 9-11. Accordingly, this Court can simply find that the defendants have waived the argument. But in any case, contrary to the defendants'

unsupported assertion, *see id.* 8-9, Title II does remedy a long history of disability discrimination in this context, and does so in a congruent and proportional way.

B. The Relevant Context Is The Provision Of Public Facilities

The congruence and proportionality of Title II's requirements can be adjudicated "on an individual or 'as-applied' basis in light of the particular constitutional rights at stake in the relevant category of public services."[5] *Association for Disabled Ams.*, 405 F.3d at 958. In this case, the "relevant category" of services is the provision of public facilities. At the very least, this Court should consider Title II as applied to all public recreational venues. The defendants do not explain, nor is there a reasonable basis for, their confining the analysis to the narrow context of State parks. *See* Defs.' Mot. 13.

After determining that Congress had compiled a sufficient record of official disability discrimination to trigger its Section Five authority with respect to all public services, *Lane* determined that Title II was a proportional and congruent response to such discrimination with respect to "the class of cases implicating the accessibility of judicial services." 541 U.S. at 530-531. In doing so, it neither engaged in nor endorsed a narrow, as-applied analysis, as though every application

[5] The United States maintains that Title II is constitutional in all of its applications. This case does not require this Court to consider that argument.

of Title II were a wholly separate statute. Rather, it held that some broad classes of cases are so different from others, in the rights implicated and "the manner in which the legislation operates to enforce that particular guarantee," as to make those applications of Title II fully severable. *See id.* at 530-531 & n.18. For example, Title II's protections for "the accessibility of judicial services" could readily be severed from those involving voting rights or access to hockey rinks, because it was "unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts." *Id.* at 531 & n.18.

At the same time, *Lane* made clear that a court must consider a broader context than the facts of the particular case before it. The plaintiffs in *Lane* both were paraplegics who contended that courthouses were inaccessible to individuals who relied upon wheelchairs. *See Lane*, 541 U.S. at 513. As a result, one plaintiff was unable to appear to answer charges against him, while the other could not perform her work as a court reporter. *Id.* at 513-514. The Supreme Court did not limit the abrogation question before it to either the specific judicial services (such as criminal adjudication) alleged to be inaccessible or the particular sort of access sought (wheelchair access to a courtroom). Rather, it framed the question broadly, with respect "to the class of cases implicating the accessibility of judicial services."

Id. at 531. Accordingly, the Court found relevant to its analysis a number of constitutional rights and fact patterns even though they were not implicated by the plaintiffs' claims – including exclusion from jury service, violation of First Amendment rights, and failure to make available measures such as sign-language interpreters or materials in Braille.

Similarly, in *Association for Disabled Americans*, the Eleventh Circuit properly looked at Title II's application "in the context of a public education institution," *see* 405 F.3d at 957. It did not limit its focus to the particular defendant (a university) or the disabilities of particular plaintiffs. Other courts likewise have correctly declined to focus their inquiries on the narrow sub-category of public education, such as community colleges, at issue in the particular cases before them. *See Toledo* v. *Sanchez*, 454 F.3d 24, 36 (1st Cir. 2006) (rejecting argument that Congress was required to show history of discrimination in higher education in particular); *accord Bowers*, 475 F.3d at 555.

There is good reason for these courts' determination that the validity of Title II as Fourteenth Amendment legislation must be adjudicated as applied to broad categories of services provided by public entities. Title II is sweeping legislation that remedies a long history of discrimination across a variety of activities undertaken by public entities. Congress was entitled to pass legislation broadly

remedying such discrimination "even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518. Accordingly, it is expected and permissible for Section Five legislation to apply in situations where the constitutional rights it protects are not violated.

Following *Lane* and *Association for Disabled Americans*, this Court should determine the congruence and proportionality of Title II within the entire "class of cases" involving the provision of public facilities. *See Lane*, 541 U.S. at 531. Individuals with disabilities face similar discrimination in this class of cases, while "the manner in which the legislation operates" to remedy such discrimination is comparable in such cases. *See id.* at 531 n.18. Moreover, individuals with disabilities often suffer multiple related discriminatory actions arising out of a public entity's failure to make accessible a public facility, which often can house multiple services and programs. For example, a public park can be used for many purposes other than recreation – including educational programs, with respect to which the Eleventh Circuit already has held that Title II validly abrogates sovereign immunity. *See Association for Disabled Ams.*, 405 F.3d at 958.[6] Accordingly, this class of

[6] Indeed, the website for one of the state parks at issue states that the park "host[s] outstanding programs ranging from craft festivals and concerts, to animal programs and educational hikes." *See* http://www.gastateparks.org/Unicoi. The (continued…)

cases meaningfully can be severed from other Title II applications and considered together for purposes of the congruence and proportionality analysis.

In the alternative, this Court should determine the congruence and proportionality of Title II within the class of cases involving access to public entertainment and recreation venues – with the awareness that such venues can serve a variety of purposes. *See Mason* v. *City of Huntsville*, No. 10-cv-2794, 2012 WL 4815518, at *12 (N.D. Ala. Oct. 10, 2012).

C. The Rights At Stake In This Context Are Important Ones That Have Long Been Denied To Individuals With Disabilities

In addition to enforcing the constitutional guarantee against irrational disability discrimination, Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 541 U.S. at 522-523. For example, the accessibility of courthouses at issue in *Lane* implicated the exercise of the Due Process Clause, the

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park also is a popular venue for "weddings, reunions, parties and conferences." *Ibid.* Meanwhile, the other park at issue has a museum that tells the story of "the Civilian Conservation Corp during our nation's Great Depression." *See* http://www.gastateparks.org/Vogel. It is irrelevant that plaintiff does not allege an intent to use the park for this purpose; the defendants have the same enforceable obligation to make the park accessible to all individuals with disabilities.

Confrontation Clause, the Sixth Amendment right to a representative jury, and the First Amendment right of the public to access trial proceedings. *Id.* at 523.

Similarly important constitutional rights are implicated where a government fails to make its public facilities accessible. "The appropriateness of remedial measures must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530. Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," *Lane*, 541 U.S. at 524-525. In particular, evidence before Congress demonstrated systematic failure by States and municipalities to provide accessible public facilities. It also demonstrated that, as a result, individuals with disabilities regularly were burdened in their exercise of fundamental rights as well as basic civil participation.

1. As a result of the isolation and invisibility of individuals with disabilities – isolation and invisibility that have been perpetuated by government policies and practices – public facilities in this country historically have been constructed without the needs of disabled individuals in mind. One study commissioned by Congress found in 1967 that "virtually all of the buildings and facilities most commonly used by the public have features that bar the handicapped." *See* National Commission on Architectural Barriers to Rehabilitation of the Handicapped, *Design For All*

Americans 3 (1967).[7] And despite the passage of state and federal legislation aimed at this problem, progress has been slow. As *Lane* observed, one report before Congress noted that, as of 1980, a full seventy-six percent of "public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities." 541 U.S. at 527 (citing United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 39 (1983) (*Spectrum*)).[8] Often, the result was the denial of, or serious burden on, the exercise of fundamental rights. Testimony before Congress, as well as by individual stories submitted to the Task Force on the Rights and Empowerment of Americans with Disabilities – a body appointed by Congress that took written and oral testimony from numerous individuals with disabilities as to the obstacles they faced – illustrated these burdens. *See Lane*, 541 U.S. at 527 (relying on Task Force's "numerous examples of the exclusion of persons with disabilities from state judicial services and programs").[9]

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[7] This report is available at http://www.eric.ed.gov/PDFS/ED026786.pdf.

[8] This report is available at http://www.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf.

[9] This brief cites certain submissions compiled by the Task Force and submitted to Congress. These submissions (along with many others) were lodged (continued…)

For example, individuals with disabilities experienced extensive discrimination in voting, largely as a result of the physical inaccessibility of polling places. *See, e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989) (*Senate Report*). Inaccessible public buildings prevented individuals with disabilities from participating in public meetings, accessing government officials and proceedings, and otherwise fully exercising the right to petition for redress of grievances. *See, e.g.*, *Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 488 (1989) (*May 1989 Hearings*). As *Lane* documented, individuals with disabilities long have been shut out of inaccessible courthouses, depriving them of a number of fundamental rights attendant to judicial proceedings as well as access to other important public services housed in courthouses. *See, e.g.*, WY 1786 (wheelchair user unable to obtain marriage license because courthouse was inaccessible). Inaccessible public education facilities regularly denied individuals

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with the Supreme Court in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and many of them were catalogued in Appendix C to Justice Breyer's dissent in that case. Justice Breyer's dissent cites to the documents by State and Bates stamp number, *see id.* at 389-424, a practice we follow in this brief. The documents cited herein also are attached for this Court's convenience in an addendum to this brief.

with disabilities educational opportunities. *See, e.g., Senate Report* 7. Many individuals with disabilities could not access their local libraries, *see* ND 1192, social service agencies, *see* AZ 131; AR 145, or homeless shelters, *see* CA 216.

Of particular relevance to this case, the inaccessibility of public facilities denied individuals with disabilities access to a variety of public activities such as parks, museums, and sporting events. As one Task Force submission observed, individuals with disabilities often face particular difficulties accessing recreation facilities precisely because such facilities are "assumed to be not as important as many other areas in our work-oriented society." NC 1155. As the defendants' own brief illustrates, the ADA's legislative history is replete with discussion of the need to ensure that individuals with disabilities have the opportunity to participate in shared recreational pursuits such as public parks. *See* Defs.' Mot. 8-9.

For example, one Utah couple could not access a football field to watch their grandson play, an auditorium to watch their daughter perform, or the senior citizens' meals and functions held at a local school. UT 1613. A six-year-old girl with a hearing impairment was denied placement in a public swim class. WI 1751-1752. Lack of accessible facilities routinely shut individuals with disabilities out of public swimming pools. *See, e.g.*, CT 294-295; OK 1298; TX 1521. Public parks enforced "no dog" rules against even children with visual impairments who needed

guide dogs, *see May 1989 Hearings* 488, and parks had inaccessible bathrooms and other features. *See, e.g.*, AZ 111-112; HI 480; OH 1218; OK 1271. And individuals with disabilities regularly were excluded from watching sporting events that were central to their local communities. *See, e.g.*, MI 874 (Michigan State University was "neglectful of continuing requests received from handicappers for access, reasonable seating, both in number and quality, and accommodations" at football stadium); OH 1240 (wheelchair user unable to attend sporting events at state university with his wife and children even though he was a student there).

Instead, governments often shunted individuals with disabilities into separate, more limited recreation programs. *See, e.g.*, NC 1155 (person with visual impairment denied access to public parks and recreation program; "he was told that there were 'blind programs' and that he should go there"); KS 704-705 (wheelchair user unable to sit with his family, relegated to "handicapped accessible" suite at city-owned sports facility); *Americans with Disabilities Act of 1989: Hearing Before the House Subcomm. on Select Educ.*, 101st Cong., 1st Sess. 70 (1989) (*October 1989 Hearing*) (wheelchair user could not sit next to his family at sporting event). One paraplegic Vietnam veteran, told by his doctor that swimming would be his "best therapy," was relegated to a "kiddie pool" not deep enough for him to swim by a park commissioner who told him: "It's not my fault you went to

Vietnam and got crippled." *See Americans with Disabilities Act of 1989: Hearings Before the Comm. on the Judiciary and the Subcomm. on Civil & Constitutional Rights,* 101st Cong., 1st Sess. 51 (1989) (*House Judiciary Hearing*).

The systematic and unnecessary denial of access to public recreational opportunities both results from and perpetuates the state-sponsored isolation and segregation of individuals with disabilities that has plagued our country for so long. It makes it difficult to ensure "that families function as cohesive units," "that social relationships are initiated and cemented," and that individuals with disabilities otherwise are integrated fully into society. NC 1155. Being systematically shut out of facilities otherwise open to the public rendered individuals with disabilities second-class citizens in their own communities. *See Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (unnecessary exclusion of individuals with disabilities from community "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). The isolation and stigma thereby officially created was a harm of constitutional magnitude that Congress was entitled to remedy and prevent. *See Hibbs*, 538 U.S. at 737 (in enacting the Family Medical Leave Act, Congress properly "sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade

leave obligations simply by hiring men"; the statute "attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes").

2. This pervasive inaccessibility of public facilities frequently was due to irrational discrimination, such that it would fail even rational basis scrutiny. Although cost is the reason most often given for not constructing facilities in an accessible manner, evidence before Congress demonstrated that, in truth, it is not significantly more expensive to construct accessible facilities.

One report before Congress concluded that "the cost of barrier-free construction is negligible, accounting for only an estimated one-tenth to one-half of 1 percent of construction costs." *Spectrum* 81. Indeed, as the General Accounting Office found, incorporating accessibility features in new construction "may even result in cost savings" compared with inaccessible design. Comptroller General of the United States, *Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped* 87 (1975) (*GAO Report*); *see id.* at 87-91 (giving specific examples of cheap or even cost-saving accessible design).[10] Modifying

[10] This report is available at http://archive.gao.gov/f0402/096968.pdf. (continued…)

existing buildings is more expensive, costing an estimated "3 percent of a building's value" for "full accessibility," but still is a relative bargain in light of the economic value generated by providing independence to individuals with disabilities, who then require substantially less government assistance. *Spectrum* 81. The bottom line, Congress was told, was that "the cost of discrimination far exceeds the cost of eliminating it." *Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Before the House Subcomms. on Select Educ. & Emp't Opportunities*, 101st Cong., 1st Sess. 57 (Sept. 1989) (*Sept. 1989 Hearing*).[11]

Accordingly, the impediment to accessibility was "not so much real costs, but perceptions about costs." *See* Advisory Commission on Intergovernmental

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[11] Moreover, making facilities accessible often increases their usefulness for all individuals, not just those with disabilities. *See, e.g.*, *Sept. 1989 Hearing* 111 (widened doorways and enlarged elevators not only permitted wheelchair access, but also allowed easier moving of heavy equipment); *Americans with Disabilities Act of 1988: Joint Hearing Before the Senate Handicapped Subcomm. and House Select Educ. Subcomm.*, 100th Cong., 2d Sess. 65-66 (1988) (lowered drinking fountains can be used by children as well as wheelchair users); *Field Hearing on Americans with Disabilities Act: Before the House Subcomm. on Select Educ.*, 101st Cong., 1st Sess. 25 (1989) (making high school accessible to wheelchairs also would permit attendance by able-bodied students who sprained ankles or suffered other temporary injuries); *Sept. 1989 Hearing* 11 (elevators permit greater access not only to wheelchair users, but also to pregnant women and children).

Relations, *Disability Rights Mandates: Federal & State Compliance with Employment Protections & Architectural Barrier Removal* 87 (1989);[12] *see id.* at 88 (citing "fear of high costs"). Public officials failed to make buildings accessible after decision-making plagued by "ignorance about the lives and needs of persons with disabilities and the negative impact that barriers have on them." *Id.* at 87; *accord GAO Report* 92 ("Since the cost of eliminating barriers is not significant, limited progress in eliminating barriers may be due in part to a lack of commitment by Government officials.").

With respect to existing facilities, projected costs of making public services accessible often were "overestimated and contrary to common sense and practicality." *Spectrum* 70. For example, building managers complained of being required to "tear out their plumbing and install a new drinking fountain" to accommodate individuals with disabilities, when they can "install a five-dollar cup dispenser instead." *See* National Council on Disability, *The Americans with Disabilities Act: Ensuring Equal Access to the American Dream* 13 (1995).[13] As

[12] This report is available at http://www.library.unt.edu/gpo/acir/Reports/policy/a-111.pdf.

[13] This report is available at http://www.ncd.gov/publications/1995/01262005. For another telling of this anecdote, *see October 1989 Hearing* 145.

one witness observed, those who make a good-faith effort to accommodate generally find that their costs are minimal, but "[i]f they don't want them, the accommodations go right through the ceiling." *Sept. 1989 Hearing* 23.

Irrationality and blatant discrimination also were responsible for much of the pervasive inaccessibility of public facilities and other public services. In response to complaints that one city hall was inaccessible, a city manager said that he "runs this town" and "no one is going to tell him what to do." AK 73. One state transportation agency, in response to complaints about inaccessible bus service, said: "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Before the House Subcomm. on Select Educ.*, 100th Cong., 2d Sess. 57 (1988) (*October 1988 Hearing*). Town officials claimed to a newspaper that it would cost $500 more to build a curb with a ramp, prompting a rebuttal letter from a cement contractor. TX 1483. And the director of an architectural firm testified that most architects and builders would rather invest time and money seeking a variance from accessibility requirements than find out how to comply. *October 1988 Hearing* 99.

D. Title II Is A Congruent And Proportional Response To The Pattern Of Discrimination It Remedies

Title II's measured requirements are a congruent and proportional response to the pattern of irrational discrimination that Congress documented in this context. Title II is carefully tailored to (1) require that public entities make such physical modifications as are necessary for their public services to be accessible to individuals with disabilities, preventing the denial of many fundamental rights and facilitating the integration of individuals with disabilities into society; and (2) require that new facilities or alterations be made accessible to individuals with disabilities, a step that adds little to costs. It does not require public entities to take any unreasonably costly steps or fundamentally alter the programs and services they offer. In short, in this context as in others, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

As *Lane* concluded with respect to access to courts and judicial services, the "unequal treatment of disabled persons" with respect to physical access to public facilities has a "long history, and has persisted despite several legislative efforts to remedy the problem." *Lane*, 541 U.S. at 531. "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added

prophylactic measures in response.'" *Ibid.* (quoting *Hibbs*, 538 U.S. at 737). Animating Title II's accessibility requirements is the view that "[j]ust as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons." *House Judiciary Hearing* 163 n.4. That is, "[i]t is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." *Ibid.* Congress had extensive evidence demonstrating that complying with accessible architectural standards adds only minor costs to new construction and that existing facilities often require only minor renovations to make public services accessible. It also had an enormous record of public officials nonetheless refusing to take such steps, resulting in the denial of important rights and services to individuals with disabilities.

Nevertheless, "[t]he remedy Congress chose is * * * a limited one." *Lane*, 541 U.S. at 531. Title II requires public entities to make only "'reasonable modifications' that would not fundamentally alter the nature of the service provided." *Id.* at 532 (citation omitted). It does not require them "to compromise their essential eligibility criteria." *Ibid.* Nor does it require them to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Ibid.*

In particular, as *Lane* specifically noted, Title II and its implementing regulations require compliance with specific architectural standards only for public facilities built or altered after 1992. *See* 28 C.F.R. § 35.151; *Lane*, 541 U.S. at 532. By contrast, for "older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Lane*, 541 U.S. at 532 (citing 28 C.F.R. § 35.150(b)(1)). "Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes." *Ibid.* "And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service." *Ibid.* The bottom line is that public entities are not "unduly burdened by the statute's remedial requirements." *Mason*, 2012 WL 4815518, at *12.

Under such circumstances, Congress was entitled to ensure that public officials make rational and fair decisions about public facility construction and modification. The risk of unconstitutional treatment was sufficient to warrant Title II's prophylactic response. *See Hibbs*, 538 U.S. at 722-723, 735-737 (in light of many employers' reliance on gender-based stereotypes, Congress's requirement that

all employers provide family leave was congruent and proportional response). And Congress was entitled to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520.

Congress's response was well targeted to the problem it faced. Title II requires that public officials provide *real* justifications for failing to make newly constructed or altered facilities accessible – that is, justifications based on actual, not imagined, cost or administrative difficulties. It thus takes direct aim at the invidious, class-based stereotypes that otherwise are difficult to detect or prove. And by requiring that existing facilities be made accessible to the extent necessary to ensure access to public services, Congress directly protected a number of fundamental rights, including those at issue in *Lane*.

Congress was entitled to do more than simply ban overt discrimination in this context. Not only can such "subtle discrimination" be difficult to prove, *see Hibbs*, 538 U.S. at 736, but such a limited remedy would have frozen in place the effects of public officials' prior official exclusion and isolation of individuals with disabilities. "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 (1996) (internal quotation

marks and brackets omitted); *see Hibbs*, 538 U.S. at 736. The remedy for segregation is integration, not inertia.

Providing individuals with disabilities with long-denied access to public facilities not only is a legitimate aim of Fourteenth Amendment legislation on its own, it also is an essential piece of the ADA's larger purpose: ameliorating the enduring effects of this Nation's long and pervasive discrimination against individuals with disabilities. Such discrimination was not limited to a few discrete areas (such as access to public facilities), but rather constituted the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).[14] Those decades of officially compelled isolation, segregation, and discrimination rendered persons with disabilities invisible to government officials generally as well as to those who designed and built facilities for public and private entities alike. They also gave rise to, and continue to fuel, discrimination borne of stereotypes, fear, and negative attitudes towards those with disabilities.

[14] For example, from the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 18 n.5, 20; *accord Lane*, 541 U.S. at 535 (Souter, J., concurring); *see also Olmstead*, 527 U.S. at 608 (Kennedy, J., concurring) (observing that individuals with mental disabilities "have been subject to historic mistreatment, indifference, and hostility").

Title II's requirements with respect to public facilities are part of a broader remedy to a constitutional problem that is greater than the sum of its parts. The inaccessibility of public facilities has a direct and profound impact on the ability of people with disabilities to integrate into the community, literally excluding them from attending community events, voting, working, and many other activities. This exclusion, in turn, feeds the irrational stereotypes that lead to further discrimination by public and private entities alike. *Cf. Olmstead*, 527 U.S. at 600 (segregation of individuals with disabilities "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's requirements, as applied to public facilities, are a vital part of that comprehensive law. In particular, it would undercut the effectiveness of Title III, which requires private owners of public accommodations to provide access to individuals with disabilities, not to impose the same requirements on public entities. *See Mason*, 2012 WL 4815518, at *12. Collectively, Title II and Title III directly ameliorate past and present discrimination by ensuring that the needs of persons previously invisible to architects, contractors, and others responsible for such facilities are now considered. And the access to facilities provided by both Title II and Title III helps individuals with disabilities obtain sufficient integration into society to take advantage of the other rights ensured by the ADA.

The bottom line is that Title II's remedial scheme, in this context as in others, is not "out of proportion to a supposed remedial or preventive object." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 86 (2000) (citation omitted). Rather, it is "responsive to, or designed to prevent, unconstitutional behavior." *Ibid.* Accordingly, it is valid Section Five legislation.

III. THE REQUIREMENTS OF TITLE II AND SECTION 504 ARE ENFORCEABLE IN A SUIT FOR INJUNCTIVE RELIEF PURSUANT TO THE *EX PARTE YOUNG* DOCTRINE

Because Title II validly abrogates sovereign immunity here, and because the plaintiff has a viable Section 504 claim, there is no reason for this Court to reach the question of whether, if the State did maintain its sovereign immunity, the plaintiff nonetheless could obtain injunctive relief pursuant to the *Ex Parte Young* doctrine. But in any event, as every appellate court to consider the question has determined, such a suit for prospective relief is available under both Title II and Section 504.

Under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny, "individual state officers can be sued in their individual capacities for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law." *MCI Telecomm. Corp.* v. *Bell Atlantic-Pa.*, 271 F.3d 491, 506 (3d Cir. 2001); *accord Grizzle* v. *Kemp*, 634 F.3d 1314, 1319 (11th Cir. 2012); *MCI Telecomms. Corp.* v. *BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1272 (11th Cir. 2002). "In

determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted). Here, the amended complaint seeks prospective relief against a state official for alleged ongoing violations of federal law. Thus, the plaintiff's request for prospective relief falls squarely within the *Ex parte Young* exception to the Eleventh Amendment.

The defendants misapprehend the manner in which *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), impacts the *Ex Parte Young* doctrine. *Seminole Tribe* held that Congress did not validly abrogate sovereign immunity when it authorized a private suit against a State to enforce a provision of the Indian Gaming Regulatory Act that requires a State to negotiate compacts in good faith. *See id.* at 47. It then held that the same provision could not be enforced through an *Ex Parte Young* suit against a state official, because the provision's unusual remedial scheme – including a requirement that a mediator be appointed – was inconsistent with such a suit. *See id.* at 74-75; *see also id.* at 49-50 (describing the remedial scheme).

Thus, the holding of *Seminole Tribe* is not that *Ex Parte Young* suits are unavailable whenever Congress has created "a detailed remedial scheme for the enforcement against a State of a statutorily created right," Defs.' Mot. 24, but rather that such suits are unavailable when they would be inconsistent with the more limited enforcement scheme Congress intended. *Cf. MCI Telecomms.*, 298 F.3d at 1272 (*Ex Parte Young* suit is available to enforce Telecommunications Act requirements, because that statute "evidenced no congressional intent to foreclose jurisdiction under *Ex Parte Young*"). The State does not argue that an *Ex Parte Young* suit would be inconsistent with the enforcement schemes of Title II and Section 504, nor could such an argument succeed. Unlike the Indian Gaming Regulatory Act's unusually circumscribed private right of action, Title II's and Section 504's private rights of action expressly permit the full range of relief normally available in litigation under Title VI of the Civil Rights Act of 1964, including injunctive relief. *See* 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(1).

Unsurprisingly, the Eleventh Circuit has squarely held that plaintiffs may enforce the requirements of Title II through a suit against a state official under the *Ex Parte Young* doctrine. *See Miller* v. *King*, 384 F.3d 1248, 1264 & n.16 (11th Cir. 2004), *rev'd as to other holding sub nom. United States* v. *Georgia*, 546 U.S. 151

(2006).[15] In doing so, it joined every other circuit to consider the question to respect to Title II or Section 504. *See, e.g.*, *McCarthy* v. *Hawkins*, 381 F.3d 407, 414 n.8 (5th Cir. 2004) (*Seminole Tribe* is inapplicable because plaintiffs "do not seek under *Ex parte Young* any remedies that have been limited by the terms of Title II"); *see also Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 287-288 (2d Cir. 2003); *Wessel* v. *Glendening*, 306 F.3d 203, 207 n.4 (4th Cir. 2002); *Carten* v. *Kent State Univ.*, 282 F.3d 391, 395-397 (6th Cir. 2002); *Bruggeman* v. *Blagojevich*, 324 F.3d 906, 912-913 (7th Cir. 2003); *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997); *Roe No. 2* v. *Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001).

Moreover, the Eleventh Circuit has held that *Seminole Tribe* does not preclude an *Ex Parte Young* suit to enforce Title VI's requirements. *See Sandoval* v. *Hagan*, 197 F.3d 484, 500-501 (11th Cir. 1999), *rev'd on other grounds sub nom. Alexander* v. *Sandoval*, 532 U.S. 275 (2001). There is no reason, pursuant to *Seminole Tribe*, that Title II's and Section 504's identical private enforcement schemes should preclude an *Ex Parte Young* suit.

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[15] In the Supreme Court, the state defendants "correctly chose[] not to challenge the Eleventh Circuit's holding that Title II is constitutional insofar as it authorizes prospective injunctive relief against the State." *Georgia*, 546 U.S. at 160 (Stevens, J., concurring).

The State also errs in relying on a portion of Justice Kennedy's opinion in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), that was joined by only one other Justice. *See* Defs.' Mot. 23. As an initial matter, Justice Kennedy's opinion does not say that "the *Young* exception is only to be utilized in very narrow circumstances," *ibid.*, and the State does not further explain how the opinion aids its argument. But in any event, Justice Kennedy's opinion as to the scope of *Ex Parte Young* was rejected by a seven-Justice majority. *See Coeur d'Alene*, 521 U.S. at 291, 296 (O'Connor, J., concurring for three Justices); *id.* at 297-298 (Souter, J., dissenting for four Justices). Accordingly, it "cannot be read to establish the controlling standard for *Young*." *MCI Telecomm. Corp.*, 271 F.3d at 507. Any remaining confusion on this score was cleared up by *Verizon Maryland*, which cited to Justice O'Connor's and Justice Souter's opinions rather than Justice Kennedy's for the controlling standard. See 535 U.S. at 645. Under that standard, as described above, plaintiff has pleaded a claim for injunctive relief pursuant to *Ex Parte Young* regardless of whether the State has sovereign immunity barring any request for damages.

IV. REGULATIONS AUTHORITATIVELY CONSTRUING TITLE II AND SECTION 504 ARE ENFORCEABLE UNDER THOSE STATUTES' PRIVATE RIGHTS OF ACTION

The defendants also err in asserting that the plaintiff may not enforce compliance with certain regulations implementing Title II and Section 504. As the defendants concede, *see* Defs.' Mot. 14, Title II's and Section 504's broad anti-discrimination mandates are privately enforceable.[16] *See Barnes* v. *Gorman*, 536 U.S. 181, 184-185 (2002). And where, as here, regulations validly interpret and implement that mandate, requirements set forth in those regulations are as enforceable as the statutory language itself. *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001). Indeed, because such regulations "authoritatively construe" the statute, it is "meaningless to talk about a separate cause of action to enforce the regulations

[16] Notwithstanding this concession, the defendants go on to argue that, because the statutes' enforcement schemes require "notice and unsuccessful efforts to obtain compliance, intent to impose enforcement by private individuals cannot be imputed to Congress." *See* Defs.' Mot. 15 (citing *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). But neither Title II nor Section 504 requires an individual to give "actual notice to the entity" and attempt "informal resolution of compliance issues" before filing suit, as the defendants suggest. See *ibid.* The regulations defendants cite actually provide that, instead of filing suit, an individual may file an administrative complaint with the Justice Department or other relevant federal agencies, *see* 28 C.F.R. § 35.170, which then will seek to resolve the complaint with the public entity before suing, *see* 28 C.F.R. § 35.173. Nor does *Gebser*, which governs when an individual may recover damages for a third party's sex discrimination, pertain to whether the regulations at issue here are enforceable.

apart from the statute." *Ibid.* "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.*

Sandoval found that the regulation at issue in that case did *not* authoritatively construe the statute and so could not be enforced through the statute's private right of action. At issue in *Sandoval* were regulations adopted pursuant to Section 602 of the Civil Rights Act that banned disparate-impact discrimination. The regulations thus exceeded the prohibitions of Section 601 of the Civil Rights Act, which bans only intentional discrimination, rather than authoritatively construing them. Accordingly, it was irrelevant that Section 601's requirements are enforceable through a private right of action. 532 U.S. at 280-281. Instead, the disparate-impact regulations could be enforced only if Section 602, the separate statutory provision authorizing the promulgation of those regulations, similarly conferred a private right of action, and *Sandoval* held that it did not. *Id.* at 288-289.

Here, however, the regulations at issue are fully consistent with the statutory provision that is enforceable through a private right of action, and so *Sandoval* provides that the regulations are enforceable. The defendants miss the point in observing that "the regulations themselves do not suggest creation of a private cause of action," *see* Defs.' Mot. 15. *Sandoval* provides that the regulations cannot be the

source of such a cause of action, and here they do not purport to be; they merely construe a statutory obligation that the statute itself makes enforceable.

The defendants' argument that Title II's implementing regulations "exceed the statutory authority of the ADA," *see* Defs.' Mot. 15, is squarely foreclosed by Eleventh Circuit authority. *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003); *Shotz* v. *Cates*, 256 F.3d 1077, 1079-1081 (11th Cir. 2001). That argument is, in any event, incorrect.

Title II broadly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504, in almost identical language, provides in relevant part: "No otherwise qualified individual with a disability in the United States * * * 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. The regulations implementing both statutes, while more specific than that statutory language, are fully consistent with it. They also are consistent with other language in the ADA making clear that the statute's intended effects include remedying "the discriminatory effects of

architectural, transportation, and communication barriers" and the "failure to make modifications to existing facilities." 42 U.S.C. § 12101(a)(5).

The defendants can point to no implementing regulations at issue here that are not fully consistent with the broad anti-discrimination mandates of Title II and Section 504. Rather, as with their arguments regarding Title II's validity as Section Five legislation, the defendants primarily rely on overly broad interpretations of the regulations that not even they endorse. It is irrelevant whether the regulations, if incorrectly construed, would "create strict liability" where none exists under the statutes. *See* Defs.' Mot. 14. As the defendants concede, the regulations, when properly construed, do *not* create the unyielding requirement to comply with architectural guidelines that the defendants argue would make them overly broad. *See id.* at 15-16.

Moreover, as the Eleventh Circuit has observed, Congress specifically called for the Justice Department to promulgate the Title II regulations in question. *See City of Plantation*, 344 F.3d at 1179. Specifically, Congress instructed the Attorney General to implement Title II by promulgating regulations that set forth public entities' specific duties pursuant to Title II's broad mandate. 42 U.S.C. § 12134(a). It directed the Attorney General, in writing those regulations, to make them consistent with specific rules the Department of Justice and the Department of

Health, Education, and Welfare had adopted in earlier regulations to implement Section 504 of the Rehabilitation Act. *See* 42 U.S.C. § 12134(b). And it provided that the ADA shall not "be construed to apply a lesser standard than [Section 504's] or the regulations issued by Federal agencies pursuant to [Section 504]." 42 U.S.C. § 12201(a); *see Bragdon* v. *Abbott*, 524 U.S. 624, 632 (1999) (construing ADA consistent with Section 504's regulations after noting Congress's directive to do so).

Congress's mandate that the standards of the Section 504 regulations be promulgated, and that the ADA be interpreted consistent with those standards, gives those standards the force of law, just as if Congress had written them into the statutes. *Helen L.* v. *DiDario*, 46 F.3d 325, 332 (3d Cir. 1995); *accord City of Plantation*, 344 F.3d at 1179; cf. *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) ("Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility."). And even before Title II's passage, it was well established that Congress granted to the agencies implementing Section 504 "substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander* v. *Choate*, 469 U.S. 287, 304 n.24 (1985). The defendants thus miss the mark in arguing that Congress's decision not to put specific reasonable accommodation requirements in the text of Title II and

Section 504, as it did in the text of Titles I (employment) and III (public accommodations) of the ADA, indicates that Congress did not intend for Title II and Section 504 to have such requirements. *See* Defs.' Mot. 19. In fact, Congress not only intended, but specifically required, that reasonable accommodation requirements be promulgated as part of Title II's implementation. *See Mason*, 2012 WL 4815518, at *14 ("[D]efendant's failure to make reasonable modifications to eliminate or ameliorate structural barriers to equal access does directly harm plaintiffs in a manner anticipated by Title II.).

Because the substantive regulations construing Title II and Section 504 thus are valid interpretations of the statutory mandates, which themselves are enforceable in a private right of action, the regulations' requirements are enforceable through those rights of action. Accordingly, those appellate courts that have squarely decided the issue have held that a violation of these implementing regulations is enforceable through a suit under Title II. *See Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004); *Chaffin* v. *Kansas State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003); *see also Mason*, 2012 WL 4815518, at *14-15.

Contrary to the defendants' suggestion, *see* Defs.' Mot. 13 n.6, no appellate decision holds that any of Title II's or Section 504's substantive regulations cannot be enforced in a private right of action. Rather, some courts have held that certain

administrative rules – such as the requirement in 28 C.F.R. § 35.150(c)-(d) that public entities create transition plans for making required structural changes by a specified deadline (that has long since passed) – do not directly implement the non-discrimination mandates of Title II and Section 504 and therefore are unenforceable in a private suit. *See, e.g.*, *Lonberg* v. *City of Riverside*, 571 F.3d 846, 850-851 (9th Cir. 2009); *see also Abraham* v. *MTA Long Island Bus*, 644 F.3d 110, 119-120 (2d Cir. 2011) (reaching similar conclusion regarding 49 C.F.R. § 37.137(c), which requires "the participation of individuals with disabilities in the continued development and assessment of services to persons with disabilities").[17] Even those cases upon which the defendants rely distinguish between the substantive and administrative regulations and make clear that Title II's substantive requirements *are* privately enforceable. *See, e.g.*, *Ability Ctr.*, 385 F.3d at 910; *see also Lonberg*, 571 F.3d at 852 (observing that individual's proper remedy is not

[17] The Third Circuit found, for a somewhat different reason, that no private right of action lies to enforce regulations requiring public housing authorities to make a certain percentage of units accessible. *See Three Rivers Ctr. for Indep. Living Inc.* v. *Housing Auth. of the City of Pittsburgh*, 382 F.3d 412, 430 (3d Cir. 2004). *Three Rivers* found that compliance with this regulation did not benefit any particular individual; indeed, a housing authority could fail to comply while not denying accessible housing to anyone. *Ibid.* Accordingly, regardless of whether the regulation validly implemented Section 504's mandate – a question the court declined to reach – it was not enforceable in a suit brought by an individual. *Ibid.*

enforcement of the transition plan requirement, but rather "an injunction requiring the actual removal of barriers that prevent meaningful access").

The defendants also rely on dicta in an Eleventh Circuit decision that has been withdrawn and replaced. *See* Defs.' Mot 13 n.6 (citing *American Ass'n of People with Disabilities* v. *Harris*, 605 F.3d 1124 (11th Cir. 2010), *withdrawn and replaced*, 647 F.3d 1093 (11th Cir. 2011)). In *Harris*, the district court found that the defendants had violated only an implementing regulation and not Title II itself. *See id.* at 1131. On appeal, the Eleventh Circuit originally held that the district court erred by making "no mention of enforcing [the regulation] through the ADA; rather, it treated [the regulation] as creating a freestanding right to sue." *Id.* at 1135 n.24. Additionally, the Court held that, in any event, the defendants' conduct did not violate the regulation. *Id.* at 1136-1137.

The original decision in *Harris* did not explicitly decide whether a plaintiff may allege a violation of Title II as authoritatively construed by the implementing regulations, a situation not before it. But it contained dicta – issued without the benefit of briefing on the question from the parties – that could be read to suggest that 28 C.F.R. § 35.151(b), which requires that existing public facilities be made accessible when they are altered, may not be enforceable in an action brought under Title II. This dicta directly conflicted with *Sandoval*, the appellate courts that have

squarely considered the issue, and the Eleventh Circuit's own prior statement that the substantive regulations implementing Title II validly construe the statutory mandate. *See City of Plantation*, 344 F.3d at 1179; *Cates*, 256 F.3d at 1079-1081. Accordingly, the panel withdrew that decision and replaced it with one that does not in any way support the defendants' arguments here.

CONCLUSION

The defendants' motion to dismiss should be denied.

Respectfully submitted this the 13th day of November 2012,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with Local Rule 5.1(B) in 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 13, 2012, I electronically filed the foregoing UNITED STATES BRIEF AS INTERVENOR AND AMICUS CURIAE IN OPPOSITION TO MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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