No. 00-1875

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FRANK G. McALEESE,

Plaintiff-Appellant

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
MARTIN HORN, SECRETARY OF PA DOC; PA DOC CORRECTIONAL INDUSTRIES; LINDA MORRISON, DIRECTOR, PA DOC CORRECTIONAL INDUSTRIES; EDWARD BRENNAN, SUPERINTENDENT; HAROLD BENICH, SUPV., CORR. INDUSTRIES AT SCI ALBION; SANDRA SEAGREN, INMATE EMPLOYMENT COORDINATOR AT SCI ALBION,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS INTERVENOR

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Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984) 20, 21

Field Hearing on Americans with Diabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 101st Cong., 1st Sess. (1989) 12

Hearing on H.R. 2273, the Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opportunities and Select Educ. of the House Comm. on Educ. and Labor, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989) 12

Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong., 2d Sess. (1989) 12

22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986) 49

Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. (Comm. Print 1990) (Volumes 2 & 3) . . . . *passim*

H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):
- Pt. 2 . . . . *passim*
- Pt. 3 . . . . 28, 31, 72-73

S. Rep. No. 116, 101st Cong., 1st Sess. (1989) . . . . *passim*

S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 48

LEGISLATIVE HISTORY (continued): **PAGE**

110 Cong. Rec. 6544(1964) 54

131 Cong. Rec. 22,346 (1985) 48

132 Cong. Rec. 28,624 (1986) 49

132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) 29

134 Cong. Rec. E1311 (daily ed. Apr. 28, 1988) 18

136 Cong. Rec. H2480 (daily ed. May 17, 1990) 24

136 Cong. Rec. H2633 (daily ed. May 22, 1990) 27

136 Cong. Rec. 11,471 (1990) 73

MISCELLANEOUS:

Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (1989) 23

Calif. Att'y Gen., *Commission on Disability: Final Report* (1989) . . . . *passim*

Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983) . . . . *passim*

FEC, *Polling Place Accessibility in the 1988 General Election* (1989) 21

J. Shapiro, *No Pity* (1994) 26, 31

James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 Ariz. L. Rev. 651 (1999) 68

Louis Harris & Associates:
The ICD Survey II: Employing Disabled Americans (1987) 13-14

The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (1986) 13

National Council on the Handicapped:
On the Threshold of Independence (1988) 26

MISCELLANEOUS (continued): **PAGE**

Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 16

Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988) 13

Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (1990) 13, 14, 32, 41

T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991) 17

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1875

FRANK G. McALEESE,

Plaintiff-Appellant

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
MARTIN HORN, SECRETARY OF PA DOC; PA DOC CORRECTIONAL INDUSTRIES; LINDA MORRISON, DIRECTOR, PA DOC CORRECTIONAL INDUSTRIES; EDWARD BRENNAN, SUPERINTENDENT; HAROLD BENICH, SUPV., CORR. INDUSTRIES AT SCI ALBION; SANDRA SEAGREN, INMATE EMPLOYMENT COORDINATOR AT SCI ALBION,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF SUBJECT MATTER JURISDICTION

For the reasons discussed in this brief, the district court had jurisdiction over the action pursuant to 28 U.S.C. 1331.

STATEMENT OF APPELLATE JURISDICTION

The district court entered a final judgment for the defendants on June 2, 2000. A notice of appeal was filed on June 13, 2000. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether the statutory provision removing Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

3. Whether an individual may sue a state official in his official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277(1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation,

institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

2. Finding that Section 504 was not sufficient to bar discrimination against individuals with disabilities, Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5).

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair

and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

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

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

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" as authority for its passage of the ADA. 42 U.S.C. 12101(b)(4). The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

3. This case involves a suit filed under Title II and Section 504. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination

by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2). Title II does not normally require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new facilities must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151. Department of Justice regulations provide that, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o 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(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29

U.S.C. 794(b). As with Title II, protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid*. Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Strathie* v. *Department of Transp.*, 716 F.2d 227, 229 (3d Cir. 1983). Congress expressly removed the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act to remedy discrimination against persons with disabilities.

1. The Supreme Court in *University of Alabama* v. *Garrett*, 121 S. Ct. 955 (2001), reaffirmed that Congress had the power to abrogate States' Eleventh Amendment immunity to private damage actions under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the rights protected by Section 1 of the Fourteenth Amendment. *Garrett* held that Congress's abrogation for Title I of the ADA was not "appropriate" because Congress had only identified six examples of potentially

unconstitutional discrimination by States against people with disabilities in employment and there was no evidence that Congress had made a legislative judgment that such discrimination by States was pervasive. The record before Congress of constitutional violations in employment did not provide a sufficient basis for Congress to abrogate immunity for a statutory scheme that was designed to remedy and deter constitutional violations.

In contrast, the record before Congress supported Congress's decision to abrogate Eleventh Amendment immunity for Title II. Congress assembled a record of constitutional violations by States – violations not only of the Equal Protection Clause but also of the full spectrum of constitutional rights the Fourteenth Amendment incorporates – which Congress in its findings determined "persist[ed]" in areas controlled exclusively or predominantly by States, such as education, voting, institutionalization, and public services. These well-supported findings justify the tailored remedial scheme embodied in Title II. Congress formulated a statute that is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, Title II preserves the latitude and flexibility States legitimately require in the administration of their programs and services. Title II accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to "qualified individual[s]," who by definition

meet all of the States' legitimate and essential eligibility requirements. Title II simply requires "reasonable" modifications that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior irrational governmental segregation of persons with disabilities.

2. In addition, Congress validly removed States' immunity to private suits brought to enforce Section 504 of the Rehabilitation Act. Section 2000d-7 of Title 42 contains an express statutory provision removing Eleventh Amendment immunity for Section 504 suits. If this Court upholds the constitutionality of Title II's abrogation, then the validity of Section 2000d-7 follows as a matter of course. In any event, this provision is a valid exercise of Congress's power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put state agencies on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Section 504.

3. Regardless whether this Court finds a valid abrogation or waiver of immunity, this action may proceed against the named state officials in their official capacities for prospective relief. Under the doctrine of *Ex parte Young*, such suits are not barred by the Eleventh Amendment. Contrary to defendants' argument, there is no statutory bar to such suits. The text, structure, and legislative history of

Title II and Section 504 all demonstrate that Congress intended that the statutes could be enforced by suing state officials in their official (as opposed to individual) capacities. This Court's cases likewise confirm that official-capacity suits under Title II and Section 504 are appropriate. Thus, the Eleventh Amendment is no bar to plaintiff's claims for injunctive relief.

ARGUMENT

I

CONGRESS VALIDLY REMOVED STATES' ELEVENTH AMENDMENT IMMUNITY TO PRIVATE SUITS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

In *University of Alabama* v. *Garrett*, 121 S. Ct. 955, 962 (2001), the Supreme Court reaffirmed that Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the State's Eleventh Amendment immunity to private damage suits. In assessing the validity of "§ 5 legislation reaching beyond the scope of § 1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 121 S. Ct. at 963 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). This requires a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *id*. at 963; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *id*. at 964; finally, the Court must assess whether the "rights and remedies created" by the statute were "designed to guarantee meaningful

enforcement" of the constitutional rights that Congress determined the States were violating, *id*. at 966, 967.

Applying these "now familiar principles," *id*. at 963, the Court in *Garrett* held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the ADA. The Court concluded that Congress had identified only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as *employers* against people with disabilities), *id*. at 965, and had not made a specific finding that discrimination in public sector employment was pervasive, *id*. at 966. Thus, the Court held, Congress did not assemble a sufficient basis to justify Title I's abrogation of Eleventh Amendment immunity for its prophylactic statutory remedies. *Id*. at 967.

The Supreme Court specifically reserved the question currently before this Court, whether Title II's abrogation can be upheld as valid Section 5 legislation, noting that Title II "has somewhat different remedial provisions from Title I," *id*. at 960 n.1, and that the legislative record for those activities governed by Title II was more extensive, see *id*. at 966 n.7. Less than a week after deciding *Garrett*, the Supreme Court denied a petition for certiorari filed by California and let stand the Ninth Circuit's holding that Title II's abrogation was valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 121 S. Ct. 1187 (2001).

As the Court's disposition of *Dare* indicates, *Garrett* does not imply that Title II's abrogation exceeds Congress's power under Section 5. For Title II differs from Title I in four significant respects. First, Congress made express findings of persistent discrimination in "public services" generally, including services provided by States, as well as specific areas of traditional state concern, such as voting, education, and institutionalization. Second, Congress's findings were based on an extensive record of unconstitutional state conduct regarding people with disabilities in the areas covered by Title II, a record more extensive than existed for employment alone. Third, unlike Title I, which was intended simply to redress violations of the Equal Protection Clause as applied to a non-suspect class in an area (employment) not otherwise subject to heightened scrutiny, the range of constitutional violations implicated by Title II extends to areas where heightened judicial scrutiny is appropriate and where even policies subject to rational-basis review cannot always be justified by cost or administrative efficiency alone. Finally, the remedy enacted by Congress is more proportional and congruent to this record of violations than the record discussed in *Garrett*. We address each point in turn.[1]

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[1] It could be argued that this appeal falls within the holding of *Garrett* because it involves a claim of employment discrimination. But the complaint alleges that defendants have established the program in question to provide prisoners "rehabilitation, education and training," as well as income (App. 10). Moreover, we do not think that the prison-inmate relationship is fairly analogized to that of employer-employee. Cf. *Tourscher* v. *McCullough*, 184 F.3d 236, 243 (3d Cir.

(continued...)

A. Congress Identified Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Persons With Disabilities By States And Made Express Findings On The Subject

Congress engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to the consideration of the ADA.[2] In addition, a

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[1](...continued)
1999) (prisoners are not "employees" entitled to the minimum-wage protections of the Fair Labor Standards Act). Nor do defendants seek a declaration that Title II is invalid as applied to situations, such as this, that have elements of an employment relationship; rather, they argue (Br. 21-22, 23-24) that Title II is not valid Section 5 legislation *in toto*. We will likewise address this broader question.

[2] See *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transp. and Haz. Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecomm. Relay Servs., Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opps. and Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess.
(continued...)

congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities – often at the hands of state governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) (*Leg. Hist.*); Task Force Report 16. Congress also considered several reports and surveys. See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990); Task Force Report 16.[3]

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[2](...continued)
(1989); *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. (1990); *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (*May 1989 Hearings*); *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1989).

[3] These included the two reports of the National Council on the Handicapped; the Civil Rights Commission's *Accommodating the Spectrum of Individual Abilities* (1983) (*Spectrum*); two polls conducted by Louis Harris & Assoc., *The ICD Survey Of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans*
(continued...)

1. *Congressional Findings*: As the Supreme Court in *Garrett* acknowledged, 121 S. Ct. at 966 n.7, the record of adverse conduct by States toward people with disabilities was both broader and deeper than the six incidents Congress identified with regard to state employment. Equally important, after amassing the record we discuss below, Congress brought its legislative judgment to bear on the issue and expressly found that discrimination was pervasive in these areas. Unlike state employment, where Congress made a finding about private employment, but no analogous finding for public employment, *id*. at 966, in the text of statute itself Congress made express findings of persisting discrimination in "education, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). The first three areas are fields predominated by States and the last is, under the terms of the statute, the exclusive domain of state and local governments. See 104 Stat. 337 (title of Title II is "Public Services"); 42 U.S.C. 12131(1) (limiting term "public entity" to state and local governments and Amtrak). Similarly, the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point with regard to public services, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, *public services*,

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[3](...continued)
(1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

transportation, and telecommunications." H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (emphasis added); see also S. Rep. No. 116, *supra*, at 6 ("Discrimination still persists in such critical areas as employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." (emphasis added)). The judgment of a co-equal branch of government – embodied in the text of the statute and its committee reports – that a pattern of State discrimination persists and requires a federal remedy is entitled to "a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); see also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990). This judgment was supported by ample evidence.

2. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999). Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); see *id.* at 461 (Marshall, J., concurring in the judgment in part); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985)

("well-cataloged instances of invidious discrimination against the handicapped do exist").

That "lengthy and tragic history," *Cleburne*, 473 U.S. at 461 (Marshall, J.), of discrimination, segregation, and denial of basic civil and constitutional rights for persons with disabilities assumed an especially pernicious form in the early 1900s, when the eugenics movement and Social Darwinism labeled persons with mental and physical disabilities "a menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." *Id*. at 462 (Marshall, J.); see also Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 19 (1983) (*Spectrum*). Persons with disabilities were portrayed as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 20. "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J.). Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[4] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feeble-

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[4] See also *Cleburne*, 473 U.S. at 463 (Marshall, J.) (state laws deemed persons with mental disorders "unfit for citizenship"); Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

minded." *Spectrum* 20, 33-34. With the aim of halting reproduction and "nearly extinguish[ing] their race," *Cleburne*, 473 U.S. at 462 (Marshall, J.), almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage, see *id*. at 463; see also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding state compulsory sterilization law "in order to prevent our being swamped with incompetence"); 3 *Leg. Hist.* 2242 (James Ellis).

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *Cleburne*, 473 U.S. at 463 (Marshall, J.); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education").[5] Numerous States also restricted the rights of physically disabled people to enter into contracts. See *Spectrum* 40.

3. *The Enduring Legacy of Governmental Discrimination*: "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J.). "[O]ut-dated statutes are still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Id*. at 467

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[5] See also *State ex rel. Beattie* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991) .

(emphasis added).[6] Consequently, "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[7]

Moreover, as we detail below based on the testimony of hundreds of witnesses before Congress and at the Task Force's forums,[8] Congress found, as a

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[6] For example, as recently as 1983, 15 States continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15-year-old girl). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J.).

[7] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society – notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history."); 134 Cong. Rec. E1311 (daily ed. 1988) (Rep. Owens) ("The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.").

[8] The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325.

(continued...)

matter of present reality and historical fact, that discrimination pervaded state governmental operations and that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645; see 42 U.S.C. 12101(a)(2) and (a)(3).

In particular, Congress reasonably discerned a substantial risk that persons with disabilities will be subjected to unconstitutional discrimination by state governments in the form of "arbitrary or irrational" distinctions and exclusions, *Cleburne*, 473 U.S. at 446. In addition, the evidence before Congress established that States structure governmental programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights (such as the rights to vote, to petition government officials, to contract, to adequate custodial treatment, and to equal access to the courts and public education) in violation of the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Nonetheless, by

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[8](...continued)
Those documents – mostly handwritten letters and commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. See *id*. at 1336, 1389. Both the majority and dissent in *Garrett* relied on these documents, see 121 S. Ct. at 965, with the dissent citing to them by State and Bates stamp number, *id*. at 976-993 (Breyer, J., dissenting), a practice we follow.

necessity, we have divided the evidence into sections touching on various areas of constitutional import.

(a) *Voting, Petitioning and Access to Courts*: Voting is the right that is "preservative of all rights," *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966), and the Equal Protection Clause subjects voting classifications to strict scrutiny to guarantee "the opportunity for equal participation by all voters" in elections, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

Congress heard that "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature." The clerk then arbitrarily invented a reason to reject the registration. *Id.* at 1219. Congress was also aware that a deaf voter was told that "you have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Access to Voting Hearings*). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[9]

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[9] "A blind woman, a new resident of Alabama, went to vote and was refused

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The denial of access to political officials and vital governmental services also featured prominently in the testimony. For example, "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came

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[9](...continued)
instructions on the operation of the voting machine." Ala. 16. Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Access to Voting Hearings* 45. The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places were frequently inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid*.; see also *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (similar). And even when persons with disabilities have voted absentee, they have been treated differently from other absentee voters. See 2 *Leg. Hist.* 1745 (Nanette Bowling) ("[S]ome jurisdictions merely encouraged persons with disabilities to vote by absentee ballot * * * [which] deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day."); *Equal Access to Voting Hearings* 17, 461 (criticizing States' imposition of special certification requirements on persons with disabilities for absentee voting); see generally FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

> back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1071 (Emeka Nwojke).

Numerous other witnesses explained that access to the courts[10] and other important government buildings and officials[11] depended upon their willingness to

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[10] See, *e.g.*, Ala. 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); W. Va. 1745 (witness in court case had to be carried up two flights of stairs because the sheriff would not let him use the elevator).

[11] See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 40 (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 488, 491 (Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them"); *id.* at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have an elevator."); *id.* at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call my husband to drive in and help me because the newly renovated State House" lacked accessible bathrooms); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped." City

(continued...)

crawl or be carried. And Congress was told that state officials *themselves* had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Commission on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989).

The physical exclusion of people with disabilities from public buildings has special constitutional import when court proceedings are taking place inside. For criminal defendants, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). The Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the

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[11](...continued)
Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); Calif. Att'y Gen., *Commission on Disability: Final Report* 70 (Dec. 1989) ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id.* at 819. Parties in civil litigation have an analogous Due Process right to be present in the courtroom unless their exclusion furthers important government interests. See, *e.g.*, *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985).

(b) *Education:* "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State undertakes to provide a public education, that right "must be made available to all on equal terms." *Ibid.* But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. For example, California reported that in its school districts (which are covered by the Eleventh Amendment, see n.30, *infra)*, "[a] bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability" and that in one California town, all disabled children are grouped into a single classroom regardless of individual ability. Calif. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Calif. Report*). "When I was 5," a witness testified to Congress, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal

ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[12]

State institutions of higher education also demonstrated prejudices and stereotypical thinking. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions

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[12] See also 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect others" but because "some parents were afraid he would"); 2 *Leg. Hist.* 989 (Mary Ella Linden) ("I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today."); Alaska 38 (school district labeled child with cerebral palsy who subsequently obtained a Masters Degree as mentally retarded); Neb. 1031 (school district labeled as mentally retarded a blind child); Or. 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); Vt. 1635 (quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material"); *Spectrum* 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); see also *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess. 384 (1973) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *id.* at 793 (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.* at 400 (Mrs. Richard Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise").

committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[13] This evidence is consistent with the finding of the Commission on Civil Rights, also before Congress, that the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (29% of disabled persons had attended college, compared to 48% of the non-disabled population). Although such a finding does not indicate what percentage of the population have conditions such as mental retardation that might affect skills required for higher education, "they nonetheless are evidence of a substantial disparity." *Spectrum* 28. Such gross statistical disparities can be sufficient to show unconstitutional conduct. See *Garrett*, 121 S. Ct. at 967 (discussing with

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[13] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "What are you doing in this program if you can't see"; student was forced to drop class); *id*. at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); Wis. 1757 (a doctoral program would not accept a person with a disability because "it never worked out well"); S.D. 1476 (University of South Dakota dean and his successor were convinced that blind people could not teach in the public schools); *Calif. Report* 138; J. Shapiro, *No Pity* 45 (1994) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work").

approval reliance on "50-percentage point gap" between white and black registration rates in finding discrimination by States in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966)).

(c) *Law Enforcement*: Persons with disabilities have also been victimized in their dealings with law enforcement. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification, ignoring the possibility of alternative means of identifying the perpetrator. N.M. 1081. A person in a wheelchair was given a ticket and six-months probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. Va. 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331.[14] The

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[14] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id*. at 1196 (Cindy Miller) (police "do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims"); *id*. at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Tex. 1541 (police refused to take an assault complaint from a person with a disability); *Calif. Report* 101-104 (additional examples). In addition, persons with disabilities, such as epilepsy, are "frequently inappropriately

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discrimination continues in correctional institutions. "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller).[15] These problems implicate the entire array of constitutional protections for those in state custody for alleged or proven criminal behavior (including the Fourth Amendment right to be free from unreasonable seizures, the substantive due process rights of pre-trial detainees, the procedural due process and Sixth Amendment rights to fair and open criminal proceedings, and the Eighth Amendment right to be free from cruel and unusual punishment upon conviction).

(d) *Institutionalization*: Unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were also catalogued. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state

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[14](...continued)
arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. H2633 (daily ed. May 22, 1990) (Rep. Levine); Wyo. 1777; Idaho 517.

[15] See also *Spectrum* 168 (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Calif. Report* 103 ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation.").

hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id*. at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[16] Unnecessary institutionalization and

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[16] See also *Calif. Report* 114. Congress also brought to bear the knowledge it had acquired of this problem in enacting the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. 1997 *et seq.*, and the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.* See, *e.g.*, 132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) (Sen. Kerry) (findings of investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos) (characterizing institutions for persons with mental retardation throughout the nation as "dehumanizing," "unsanitary and hazardous conditions," "replete with conditions which foster regression and deterioration," "characterized by self-containment and isolation, confinement, separation from the mainstream of society"); *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement.").

mistreatment within state-run facilities may violate substantive due process. See *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (impermissible confinement); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479 U.S. 962 (1986) .

(e) *Other Public Services*: Congress heard evidence that irrational discrimination permeated the entire range of services offered by governments. Programs as varied as zoning[17]; the operation of zoos,[18] public libraries,[19] public

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[17] Congress knew that *Cleburne* was not an isolated incident. See 2 *Leg. Hist.* 1230 (Larry Urban); Wyo. 1781 (zoning board declined to authorize group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school"); Nev. 1050 (Las Vegas has passed an ordinance that disallows the mentally ill from living in residential areas); N.J. 1068 (group home for those with head injuries barred because public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam'"; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles.").

[18] A zoo keeper refused to admit children with Down Syndrome "because he feared they would upset the chimpanzees." S. Rep. No. 116, *supra*, at 7; H.R. Rep. No. 485, *supra*, Pt. 2, at 30.

[19] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); Pa.

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swimming pools and park programs[20]; and child custody proceedings[21] exposed the discriminatory actions and attitudes of officials.[22]

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[19](...continued)
1391 (public library will not issue library cards to residents of group homes without the countersignature of a staff member – this rule applies to "those having physical as well as mental disabilities").

[20] A paraplegic Vietnam veteran was forbidden to use a public pool in New York; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id*. at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule").

[21] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory policies and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id*., Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk – it has meant being excluded from public schools * * * and being deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); Mass. 829 (government refuses to authorize couple's adoption solely because woman had muscular dystrophy); *Spectrum* 40; *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *Carney* v. *Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped").

[22] See also H.R. Rep. No. 485, *supra*, Pt. 2, at 46 ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?"); 2 *Leg. Hist.* 1061 (Eric Griffin) ("I come to you as one of those * * * who was denied a public education until age 18, one who has been put through the back door, and kept out of the front door and segregated even if you could

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B. *The Actions Covered By Title II Implicate Both Equal Protection And Other Substantive Constitutional Rights*

Garrett instructs that in assessing the validity of Congress's Section 5 legislation, it is important to identify the constitutional rights at stake. See 121 S. Ct. at 963. Since there is no constitutional right to state employment, the Court looked to the Equal Protection Clause as the sole constitutional provision that Congress sought to enforce. *Ibid.* And because classifications based on disability are not subject to heightened scrutiny, the Court faulted Congress for failing to identify incidents when state action did not satisfy the "minimum 'rational-basis' review applicable to general social and economic legislation." *Ibid.*

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[22](...continued)
get in."); *id*. at 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id*. at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where busdrivers start moving before I have my balance or State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); *id*. at 1017 (Judith Heumann) ("Some of these people are in very high places. In fact, one of our categories of great opposition is local administrators, local elected officials."); 3 *Leg. Hist.* 2241 (James Ellis) ("Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote, the right to attend public school, and the right to live in their own community, with their own families and friends."); 2 *Leg. Hist.* 1768 (Rick Edwards) ("Why are the new drinking fountains in our State House erected out of reach of persons in wheelchairs? And why were curb cuts at the Indianapolis Airport filled in with concrete?"); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

By contrast, Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. To the extent that Title II enforces the Fourteenth Amendment by remedying and preventing government conduct that burdens these constitutional provisions and discriminates against persons with disabilities in their exercise of these rights, Congress did not need to identify *irrational* government action in order to identify and address *unconstitutional* government action. As mentioned earlier, those rights include the right to vote, to access the courts, to petition officials for redress of grievances, to due process by law enforcement officials, and to humane conditions of confinement.

Moreover, in evaluating generally-available public services that do not implicate fundamental rights, the same justifications that would be sufficient in an employment setting often will not suffice when the classification involves the exclusion from generally available government services. This is because when a government interacts with its citizens as employer, rather than sovereign, the core purpose of the Constitution in protecting its citizens *qua* citizens is not directly implicated. Thus, as the Supreme Court has explained in the First Amendment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Board of County*

Comm'rs v. *Umbehr*, 518 U.S. 668, 676 (1996); cf. *O'Connor* v. *Ortega*, 480 U.S. 709, 724 (1987) (holding that Fourth Amendment protects government employees, but declining to impose "probable cause" requirement on searches because of special needs of government as employer). Conversely, then, interests that are sufficient to justify government employment policies may not be sufficient when the government is acting in its sovereign capacity.

Therefore, the Court's statement in *Garrett* that the Equal Protection Clause does not require States to accommodate people with disabilities if it involves additional expenditures of funds, see 121 S. Ct. at 966, is best understood as limited to government actions in its capacity as an employer. That statement certainly would not permit States to deny persons with disabilities their right to vote on the ground that providing access to the polling place is costly. Even outside the arena of fundamental rights, the Supreme Court has made clear that a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. Under this standard, reducing costs or increasing administrative efficiency will not always suffice as justification outside the employment context. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636-637 (1974). Indeed, the Supreme Court has held that in order to comply with the Equal Protection Clause a State may be required to provide costly services free of charge where necessary to provide a class of persons meaningful access to important

services offered to the public at-large. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110, 127 n.16 (1996).

In addition, courts have found unconstitutional treatment of persons with disabilities in a wide variety of public services, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment.[23] These cases provide the "confirming judicial documentation," *Garrett*, 121 S. Ct. at 968 (Kennedy, J.,

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[23] See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563, 567-575 (1975) (impermissible confinement); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (doctor with multiple sclerosis denied residency out of concern about patients' reactions); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *Flakes* v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981)*; New York State Ass'n for Retarded Children* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979); *Lora* v. *Board of Educ.*, 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Frederick L.* v. *Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976); *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Aden* v. *Younger*, 129 Cal. Rptr. 535 (Ct. App. 1976); *In re Downey*, 340 N.Y.S. 2d 687 (Fam. Ct. 1973); *Fialkowski* v. *Shapp*, 405 F. Supp. 946, 958-959 (E.D. Pa. 1975); *In re G.H.*, 218 N.W. 2d 441, 447 (N.D. 1974); *Stoner* v. *Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974); *Vecchione* v. *Wohlgemuth*, 377 F. Supp. 1361, 1368 (E.D. Pa. 1974), aff'd, 558 F.2d 150 (3rd Cir.), cert. denied, 434 U.S. 943 (1977); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), aff'd in part, 550 F.2d 1122 (8th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd in part, 503 F.2d 1305 (5th Cir. 1974).

concurring), of unconstitutional disability discrimination by States that the Court found lacking in the employment context.

C. Title II Is Reasonably Tailored To Remedying And Preventing Unconstitutional Discrimination Against Persons With Disabilities

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, 527 U.S. at 639. Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980) (Powell, J., concurring). Accordingly, in exercising its power, "Congress is not limited to mere legislative repetition of [the] Court's constitutional jurisprudence." *Garrett*, 121 S. Ct. at 963. Rather, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999). The operative question thus is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 121 S. Ct. at 963, than would the courts, but whether in response to the historic and enduring legacy of discrimination, segregation, and isolation faced by persons with disabilities at the hands of States, Title II was "designed to guarantee meaningful enforcement" of their constitutional rights, *id*. at 967.

Title II fits this description. Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all.[24] Title II also permits exclusion if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that she can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. Title II thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 120 S. Ct. 1044, 1057 (2000).

Title II thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. That margin of statutory protection does not redefine the constitutional right at issue. Instead, the statutory protection is

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[24] The types of disabilities covered by the Act, moreover, are generally confined to those substantially limiting conditions that have given rise to discriminatory treatment in the past. See *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy* v. *United Parcel Serv.*, 527 U.S. 516 (1999); *Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).

necessary to enforce the courts' constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court, remedying the continuing effects of prior unconstitutional discrimination, and deterring future constitutional violations. "While the 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," *Flores*, 521 U.S. at 519, Title II is on the remedial and prophylactic side of that line.

As defendants note (Br. 24), Title II requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). That requirement, however is carefully tailored to the unique features of disability discrimination that Congress found persisted in public services in two ways. First, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on discrimination would be insufficient to erase the stain of discrimination. Cf. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968) (after unconstitutional segregation, government is "charged with the affirmative duty to take whatever steps might be necessary" to eliminate discrimination "root and branch"). Therefore, Title II affirmatively promotes the integration of individuals with disabilities – both in order to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably conclude that the demonstrated failure of state governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations,

would freeze in place the effects of their prior exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. Congress also correctly concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, to the extent that the accommodation requirement necessitates alterations in some governmental policies and practices, it is an appropriate enforcement mechanism for many of the same reasons that a prohibition on disparate impact is.[25] Like practices with a disparate impact and literacy tests for

[25] Legislation prohibiting or requiring modifications of rules, policies, and practices that have a discriminatory impact is a traditional and appropriate exercise of the Section 5 power to combat a history of invidious discrimination. See *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J., concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome* v. *United States*, 446 U.S. 156, 176-177 (1980) (under its Civil War Amendment powers, Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina* v. *Katzenbach*, 383 U.S. at 325-333; see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another").

voting,[26] governmental refusals to make even reasonable accommodations for persons with disabilities often perpetuate the consequences of prior unconstitutional discrimination, and thus fall within Congress's Section 5 power.[27]

Moreover, failure to accommodate the needs of qualified persons with disabilities may often result directly from hidden unconstitutional animus and false stereotypes. Title II simply makes certain that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, rather than on nothing but the discomfort with the disability or unfounded concern about the costs of accommodation. Such a prophylactic response is commensurate with the problem of irrational state discrimination that denies access to benefits and services for which the State has otherwise determined individuals with disabilities to be qualified or which the State provides to all its citizens (such as education, police protection, and civil courts). It makes particular sense in the context of public services, where a *post hoc* judicial remedy may be of limited utility to an individual given the difficulty in remedying

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[26] See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests even though they are not unconstitutional per se); *Gaston County* v. *United States*, 395 U.S. 285, 293, 296-297 (1969) (Congress can proscribe constitutional action, such as literacy test, to combat ripple effects of earlier discrimination in other governmental activities); *South Carolina* v. *Katzenbach*, 383 U.S. at 333-334.

[27] Of course, the obligation to accommodate is less intrusive than the traditional disparate impact remedy because the government is not required to abandon the practice *in toto*, but may simply modify it to accommodate those otherwise qualified individuals with disabilities who are excluded by the practice's effect.

unconstitutional denials of intangible but important rights, such as the right to vote, to a fair trial, or to educational opportunity. By establishing prophylactic requirements, Congress provided additional mechanisms for individuals to avoid irreparable injuries and to ensure that constitutional rights were fully vindicated.

Further, Congress tailored the modification requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the position. 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16. And Congress determined, based on the consistent testimony of witnesses and expert studies, that contrary to the misconceptions of many, the vast majority of accommodations entail little or no cost.[28] And any costs are further diminished when measured against the financial and human costs of denying persons with disabilities an education or excluding them from needed government services or the

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[28] See S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id*. at 1077 (John Nelson); *id*. at 1388-1389 (Justin Dart); *id*. at 1456-1457; *id*. at 1560 (Jay Rochlin); 3 *Leg. Hist.* 2190-2191 (Robert Burgdorf); Task Force Report 27; *Spectrum* 2, 30, 70. The federal government, moreover, provides substantial funding to cover many of those costs.

equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyler*, 457 U.S. at 223-224, 227.

In short, "[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). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id*. at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access). The remedy for segregation is integration, not inertia.

Defendants contend (Br. 23) that, as in *Garrett*, Title II imposes on States a burden of justifying disability discrimination under the statute that is greater than what a court would require under Section 1 of the Fourteenth Amendment. But an elevated burden of justification is not necessarily an impermissible effort to redefine constitutional rights; it can be, as it is here and under Title VII, an appropriate means of rooting out hidden animus and remedying and preventing pervasive discrimination that is unconstitutional under judicially defined standards.

D. *In Light Of The Legislative Record And Findings And The Tailored Statutory Scheme, Title II And Its Abrogation Are Appropriate Section 5 Legislation*

The record Congress compiled and the findings it made suffice to support Title II's substantive standard as appropriate Fourteenth Amendment legislation

applicable to States and localities.[29] As such, it is one in a line of civil rights statutes, authorized by Civil War Amendments, that apply to States *and* local governments. See, *e.g.*, Titles III, IV, VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000b-2000e *et seq.*; Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*; Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq*.

Aside from the substantive provisions of Title II, *Garrett* held that to sustain an *abrogation* of Eleventh Amendment immunity as appropriate Section 5 legislation, only constitutional misconduct committed by those who are "beneficiaries" of the Eleventh Amendment can be relied upon. 121 S. Ct. at 965. The line between those government entities entitled to Eleventh Amendment immunity and those which are not is not always easy to identify. For example, while school districts are generally found not to be "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd.* v. *Doyle*, 429 U.S. 274, 280–281 (1977), there are some significant exceptions to this rule.[30] Similar

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[29] The Interstate Commerce Clause is also the basis for these substantive obligations. See *Walker* v. *Snyder*, 213 F.3d 344, 346 (7th Cir. 2000), cert. denied *sub nom. United States* v. *Snyder*, 121 S. Ct. 1188 (2001).

[30] See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) (California school districts protected by Eleventh Amendment); *Rosenfeld* v. *Montgomery County Pub. Schs.*, 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts protected by Eleventh Amendment). The law in other States remains in flux. Cf. *Martinez* v. *Board of Educ. of Taos Mun.*

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state-by-state inquiries are required in the law enforcement arena. See *McMillian* v. *Monroe County*, 520 U.S. 781, 795 (1997) (holding that county sheriff in Alabama is state official and noting "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another"). In other situations, such as voting, local officials are simply administering state policies and programs. While nominally the action of a local government, the discrimination individuals with disabilities endure is directly attributable to the State. Cf. *Railroad Co.* v. *County of Otoe*, 83 U.S. 667, 676 (1872) ("Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly."). Thus, as *Garrett* makes clear, actions of such local officials can be attributed to the States for purposes of the "congruence and proportionality" inquiry. See 121 S. Ct. at 967 (attributing to "States" and "State officials" conduct regarding voting that was done by county "registrar[s]" and "voting officials" in *South Carolina* v. *Katzenbach*, 383 U.S. at 312).

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[30](...continued)
Sch. Dist., 748 F.2d 1393 (10th Cir. 1984) (New Mexico school districts protected by Eleventh Amendment), overruled, *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973) (Utah school districts protected by Eleventh Amendment), overruled, *Ambus* v. *Granite Bd. of Educ.*, 995 F.3d 992 (10th Cir. 1992) (en banc).

Given the fact that some school districts and law enforcement officials are "beneficiaries of the Eleventh Amendment," *Garrett*, 121 S. Ct. at 965, and that some local practices are done at the States' behest, the evidence before Congress regarding the treatment of people with disabilities by education, law enforcement, voting and other officials is relevant in assessing Congress's legislative record about State violations. Because the demarcation is unclear at the margins, we have in this brief provided the evidence before Congress concerning both state and local governments. But even limited to the evidence concerning States acting through their own agencies, there was a sufficient basis to sustain Congress's determination that States engaged in a pattern of unconstitutional conduct.

Defendants note (Br. 24) that Title II's broad coverage contrasts with that of Section 5 of the Voting Rights Act of 1965, which the Court noted approvingly in *Garrett*, 121 S. Ct. at 967. The operative question, however, is not whether Title II is broad, but whether it is broader than necessary. It is not. The history of unconstitutional treatment and the risk of future discrimination found by Congress pertained to all aspects of governmental operations. Only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if persons with disabilities were relegated to institutions or trapped in their homes by lack of transportation or inaccessible sidewalks. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries,

museums, parks, and recreation services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem; to do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13. "Difficult and intractable problems often require powerful remedies * * * ." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). It is in such cases that Congress is empowered by Section 5 to enact "reasonably prophylactic legislation." *Ibid*. Title II is just such a powerful remedy for a problem which Congress found to be intractable.

II

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964."

Because of the close identity between the substantive obligations of Title II and Section 504, whether Section 2000d-7 is valid Section 5 legislation for Section 504 claims is governed by this Court's determination regarding Title II's abrogation. But even if this Court holds that Section 2000d-7 is not valid Section 5 legislation, Section 2000d-7 may be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance. For States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (1999). And "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * acceptance of the funds entails an agreement to the actions." *Id.* at 686. Thus, Congress may, and has, conditioned the receipt of federal funds on defendants' waiver of Eleventh Amendment immunity to Section 504 claims.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under Section 504*

Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear

intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247.

Section 2000d-7 makes unambiguously clear that Congress intended States to be amenable to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance) if they accepted federal funds.[31] Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it could be sued in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.[32]

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[31] Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

[32] The Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on

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Thus, the Supreme Court, in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. The Fourth Circuit, after an extensive analysis of the text and structure of the Act, held in *Litman* v. *George Mason University*, 186 F.3d 544, 554 (1999), cert. denied, 120 S. Ct. 1220 (2000), that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." Every court to address this issue has agreed with *Litman* that the Section 2000d-7 l anguage clearly manifests an intent to condition receipt of federal financial assistance on consent to waive Eleventh Amendment immunity. See *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), petition for cert. filed, No. 00-1488; *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 2001 WL 408983

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[32](...continued)
congressional spending powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

(Apr. 24, 2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); see also *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (addressing same language in 20 U.S.C. 1403), cert. denied, 121 S. Ct. 70 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same). The text and structure of the statutes make clear that federal financial assistance is conditioned on both the nondiscrimination obligation and removal of Eleventh Amendment immunity.

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity*

Congress may condition its spending on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank*, the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that unlike Congress's power under the

Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id*. at 687. Cf. *Delaware Dep't of Health & Social Servs.* v. *Department of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity).

C. *Section 504 Is A Valid Exercise Of The Spending Power*

Although defendants have not, up to this point, argued that Section 504 is not valid Spending Clause legislation, we briefly discuss the issue for the convenience of the Court. The Supreme Court in *Dole* identified four limitations on Congress' Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress conditions the States' receipt of federal funds, it "'must do so unambiguously * * *, enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation.'" *Ibid*. (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid*. And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions.

Id. at 208. Section 504 meets all four of the *Dole* criteria.[33]

1. First, the general welfare is served by prohibiting discrimination against persons with disabilities. See *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval). Indeed, *Dole* noted that the judicial deference to Congress is so substantial that there is some question "whether 'general welfare' is a judicially enforceable restriction at all." 483 U.S. at 207 n.2.

2. The language of Section 504 alone makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance. Thus, the second *Dole* requirement is met. See *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst*). Moreover, Department of Justice implementing regulations require that each application for financial assistance include an "assurance that the program will be conducted in compliance with the requirements of section 504 and this subpart." 28 C.F.R. 42.504(a).

3. Section 504 meets the third *Dole* requirement as well. Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons.

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[33] There does not appear to be any dispute that defendants received federal financial assistance as alleged in the complaint (App. 9-10).

Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by “programs” that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *Arline*, 480 U.S. at 278 n.2. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI, which the Court interpreted to prohibit a school district from ignoring the disparate impact its policies had on limited-English proficiency students, was a valid exercise of the Spending Power. “The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here.” *Id*. at 569 (citations omitted). The Court made a similar holding in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from discriminating on the basis of sex, infringed on the college’s First Amendment rights. The Court rejected that claim, holding that “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.” *Id*. at 575.

These cases stand for the proposition that Congress has an interest in preventing the use of its funds to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services to qualified persons because of race, gender, and disability. Thus, compliance with Section 504 is a valid condition on the receipt of all federal financial assistance.

Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance. The purposes articulated by Congress in enacting Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); *id*. at 7061-7062 (Sen. Pastore); *id*. at 2468 (Rep. Celler); *id*. at 2465 (Rep. Powell). Certainly, there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.[34] Thus, a challenge to such a cross-cutting non-discrimination statute fails under current Spending Clause law.

4. Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. Neither providing meaningful access to people with disabilities nor waiving sovereign immunity

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[34] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending program, see *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds).

violates anyone's constitutional rights. Defendants might argue that operating prisons is a "core state function" that precludes federal intrusion under principles of federalism. But the Court has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." *Ibid*. This is because the federal government has not intruded into defendants' prisons. The Department of Corrections incurs these obligations only because it applies for and receives federal funds. "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

5. Defendants may contend that Section 2000d-7's condition that state agencies waive their immunity is invalid because it is "coercive." The Tenth Circuit recently observed that "the coercion theory is unclear, suspect, and has little precedent to support its application." *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.), cert. denied, 121 S. Ct. 623 (2000). The Court pointed out in *Dole*, that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the only case the Court cited was *Steward Machine*, a decision that expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a

concept can ever be applied with fitness to the relations between state and nation"). For every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.*[35] The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Even accepting that "coercion" is an independent and justiciable concept, any argument that Section 504 is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to "difficult" or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive."

In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal

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35 Other courts have recognized the inherent difficulties in determining whether a State has been "coerced" into accepting a funding condition. See *California* v. *United States*, 104 F.3d 1086, 1091-1092 (9th Cir.) (questioning whether there is "any viability" left in the coercion theory), cert. denied, 522 U.S. 806 (1997); *Nevada* v. *Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (recognizing "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities"), cert. denied, 493 U.S. 1070 (1990); *Oklahoma* v. *Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice.").

financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id.* at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id.* at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[36]

Similarly, in *FERC* v. *Mississippi*, 456 U.S. 742 (1982), the Court upheld a statute that required States to choose between regulating in light of federal

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[36] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976).

standards or having the field preempted so that they could not regulate at all. The Court acknowledged that "the choice put to the States–that of either abandoning regulation of the field altogether or considering the federal standards–*may be a difficult one*." *Id*. at 766 (emphasis added). The Court agreed that "it may be unlikely that the States will or easily can abandon regulation of public utilities to avoid [the statute's] requirements. But this does not change the constitutional analysis." *Id*. at 767.

Finally, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[37]

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[37] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400

(continued...)

These cases demonstrate that the federal government can demand that States comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (*North Carolina*), losing all federal funds (*Mergens*), or even losing the ability to regulate certain areas (*FERC*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal largesse, each department or agency of the State, under the control of state officials, is free to decide whether they will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City Coll.*, 465 U.S. at 575; *Kansas*, 214 F.3d at 1203-1204 ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it

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[37](...continued)
U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude the recipient from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally require that the entity that receives federal funds to provide services on behalf of the government not engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

is ultimately free to reject both the conditions and the funding, no matter how hard 3that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars." (citation omitted)).[38]

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 527 U.S. at 750, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency can be sued in federal court, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendants have accepted federal financial assistance, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). For all these reasons, Section 2000d-7 can be upheld under the Spending Clause.

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[38] Although it is not clear how far the analogy between Spending Clause legislation and contracts extends, we note that when one party is seeking to void a contract on the grounds "economic duress," "[i]t is well settled that merely because one enters into an agreement which he would not enter if he did not need the money there is not such duress as will void the contract." *Lawlor* v. *National Screen Serv. Corp.*, 211 F.2d 934, 937 (3d Cir. 1954), rev'd on other grounds, 349 U.S. 322 (1955); accord *United States* v. *Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994).

III

TITLE II AND SECTION 504 MAY BE ENFORCED AGAINST STATE OFFICIALS IN THEIR OFFICIAL CAPACITIES FOR PROSPECTIVE RELIEF EVEN IF CONGRESS DID NOT VALIDLY REMOVE THE STATES' IMMUNITY

The Eleventh Amendment bars private suits against a State sued in its own name, absent a valid abrogation by Congress or waiver by the State. See *Alden*, 527 U.S. at 755-756. However, even without a valid abrogation or waiver, it does not follow that States no longer need to comply with the ADA or Section 504 or that private parties cannot seek relief in federal court. The Supreme Court reaffirmed in *Garrett* that the Eleventh Amendment immunity does not authorize States to violate federal law. For a holding that "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages * * * does not mean that persons with disabilities have no federal recourse against discrimination." 121 S. Ct. at 968 n.9; see also *Alden*, 527 U.S. at 754-755 ("The constitutional privilege of a State to assert its sovereign immunity * * * does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.").

It was to reconcile these very principles — that States have Eleventh Amendment immunity from private suits, but that they are still bound by federal law — that the Supreme Court adopted the rule of *Ex parte Young*. See *Alden*, 527

U.S. at 756.[39] *Ex parte Young*, 209 U.S. 123 (1908), held that when a state official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is acting *ultra vires* and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective relief. See *Edelman* v. *Jordan*, 415 U.S. 651, 664, 667-668 (1974). By limiting relief to prospective injunctions of officials, the Court avoided a judgment directly against the State but, at the same time, prevented the State (through its officials) from continuing illegal action.

The *Ex parte Young* doctrine has been described as a legal fiction, but it was adopted by the Supreme Court almost a century ago to serve a critical function in permitting federal courts to bring state policies and practices into compliance with federal law. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); see also *Alden*, 527 U.S. at 757 ("Established rules provide ample means to correct

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[39] The Eleventh Amendment is also no bar to the United States suing the State. See *Garrett*, 121 S. Ct. at 968 n.9 (noting that United States could sue a State to recover damages under the ADA); *Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.").

ongoing violations of law and to vindicate the interests which animate the Supremacy Clause.").

This Court recognized the applicability of *Ex parte Young* in *Balgowan* v. *New Jersey*, 115 F.3d 214 (1997). In that case, even after holding that the Fair Labor Standards Act did not validly abrogate the States' Eleventh Amendment immunity, this Court held that "we may retain jurisdiction [against the state official] under the doctrine of *Ex Parte Young*," which it described as "carv[ing] out an exception to Eleventh Amendment immunity by permitting citizens to sue state officials when the litigation seeks only prospective injunctive relief in order to end continuing violations of federal law." *Id*. at 217. In *Garrett*, the Supreme Court similarly noted that Title I's "standards can be enforced * * * by private individuals in actions for injunctive relief under *Ex parte Young*." 121 S. Ct. at 968 n.9. Thus, the Eleventh Amendment is no bar to a suit proceeding against a state official for prospective injunctive relief.

Defendants concede (Br. 31) that a suit against a state official in his or her official capacity for prospective relief is permitted by the Eleventh Amendment but contend (Br. 31-33) that a suit against a state official for injunctive relief to cure a continuing violation of federal law is not available under Title II and Section 504 because Congress only intended States, and not their officials, to be named as defendants. This is a question of statutory construction, which this Court reviews *de novo*.

1. Defendants rely on the secondary holding of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), in which the Court held that "Congress did not intend" to "authorize federal jurisdiction under *Ex parte Young*" to enforce the Indian Gaming Regulatory Act (IGRA). *Id*. at 75 n.17. IGRA provided that certain forms of gaming were permissible on Indian lands only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. 2710(d)(1). IGRA provided that upon receiving a request from an Indian tribe to enter into negotiations for such a compact, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

The Tribe could sue the State to enforce the State's obligation to "negotiate in good faith" only after 180-days had elapsed from the Tribe's request. 25 U.S.C. 2710(d)(7)(A)(i) & (B)(i). In such a suit, the district court's authority was strictly limited. If the district court concluded that the State had failed to negotiate in good faith, it could "order the State and the Indian Tribe to conclude such a compact within a 60-day period," 25 U.S.C. 2710(d)(7)(B)(iii), but failure to comply was not subject to contempt sanctions, see 517 U.S. at 74. Instead, IGRA required the court to appoint a mediator to which the parties submitted their "last best offer for a compact." 25 U.S.C. 2710(d)(7)(B)(iv). If the mediator was unsuccessful in achieving agreement between the parties, the mediator informed the Secretary of Interior, who was empowered to authorize gaming even in the absence of a compact. 25 U.S.C. 2710(d)(7)(B)(vii).

The Court in *Seminole Tribe* stressed that the Eleventh Amendment did not bar an action against a state official to enforce IGRA. See 517 U.S. at 75. It held, instead, that as a matter of statutory construction, "Congress did not intend" to permit suits against state officials under IGRA. *Id*. at 75 n.17. The Court relied on three factors in determining that Congress did not intend to permit a suit against a state official in his official capacity: (1) the duty imposed by IGRA "repeatedly refer[s] exclusively to 'the State'" (*ibid*.); (2) the duty imposed by IGRA — to negotiate to enter into a "a compact with another sovereign — stands distinct in that it is not of the sort likely to be performed by an individual state executive officer or even a group of officers" (*ibid*.); and (3) the "carefully crafted and intricate remedial scheme" Congress enacted in IGRA limited the remedies to a particular "modest set of sanctions" that would have been made "superfluous" if recourse to *Ex parte Young* were available (*id*. at 73-75).

Unlike IGRA, Congress did not manifest an intent to bar a suit against state officials in their official capacities for injunctive relief in either Section 504 or Title II. In arguing to the contrary, defendants misapprehend these statutes' duties and remedies.

We start with the plain language of Title II. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. While it is true that the text prohibits "public entit[ies]" from

discriminating, that duty extends to the officials who are acting for the entity, for a public entity can only act through its officials. For example, if a State is obliged under Title II to permit a person who is blind to enter a public building with her guide dog, then it would be unlawful for a state official to promulgate a rule to the contrary, or for a state employee to enforce that rule. For both "[t]he States *and their officers* are bound by obligations imposed * * * by federal statutes that comport with the constitutional design." *Alden*, 527 U.S. at 755 (emphasis added).

If a lawsuit were brought to enjoin that state policy or practice, it would be immaterial for purposes of injunctive relief whether the individual sued the State itself or the official or employee in their official capacities. Under rules of equity, if the State was sued and enjoined, all its officers and agents would be automatically covered by the injunction. See Fed. R. Civ. P. 65(d) (every injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys"). If an official sued in his official capacity was the defendant, an injunction entered against him likewise binds other government officials as if the suit had been brought against the State. See *ACLU* v. *Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Hendrickson* v. *Griggs*, 672 F. Supp. 1126, 1142 n.26 (N.D. Iowa 1987).

The longstanding rule that a suit against an official in his or her official capacity is the same as a suit against the State (except for purposes of sovereign immunity) is based on this very understanding. "Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of

which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see also *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991). Thus, by definition, officials in their official capacities are no more free to violate Title II than the entity itself.[40]

2. The Court in *Seminole Tribe* relied on the unique nature of the duty required by IGRA — to negotiate and enter into a treaty — in concluding that Congress intended the State — and only the State — to be bound by IGRA. Title II and Section 504 do not deal with affirmative steps involving formal relations

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[40] Title II's definition of "public entity" supports this view. Title II defines a "public entity" to include a State or local government and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(B). The terms "agency" and "instrumentality" are not defined. A suit against a state official in his official capacity can fairly be described as one in which the official is "being sued not as a person, but as an instrumentality of state government." *United States* v. *Ferrara*, 54 F.3d 825, 832 (D.C. Cir. 1995) (Silberman, J., concurring). Indeed, under the Foreign Sovereign Immunity Act, courts have held that the term "agency or instrumentality of a foreign state" includes a government official sued in his official capacity. See *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101-1102 (9th Cir. 1990); *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *Byrd* v. *Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999). The Ninth Circuit reasoned that "[t]he terms 'agency,' 'instrumentality,' * * * 'entity,' * * * while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals." 912 F.2d at 1101.

between sovereigns. See James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 Ariz. L. Rev. 651, 715-716 n.541 (1999) ("[T]he ADA is fundamentally different from IGRA. Enforcement of ADA provisions can normally be accomplished by ordering a single public official, or no more than a few, to perform a statutory duty, such as not applying a discriminatory policy. Such simple actions are quite different from the relatively complicated tasks of negotiating agreements with Indian tribes that were at issue in *Seminole Tribe*. Hence there is no reason to assume that Congress would not have intended for injunctive relief to run against individual officers.").

3. In contrast to IGRA, the remedial scheme of Title II does not identify a "State" as the only defendant in a lawsuit. To the contrary, Title II does not identify who the defendants should be. Instead, it provides that the "remedies, procedures, and rights set forth in section 794a of Title 29 [Section 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [Title II]." 42 U.S.C. 12133. Section 794a, in turn, provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*., shall be available to any person aggrieved by any act or failure to act." 29 U.S.C. 794a(a)(2).

Title VI does not contain an express private cause of action that identifies potential defendants; instead, the courts have implied one. See *Cheyney State Coll. Faculty* v. *Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697, 699-701 (1979). In cases decided prior to the enactment of the ADA, courts permitted suits under Title VI to be brought against government officials in their official capacities. For example, in *United States* v. *Alabama*, 791 F.2d 1450, 1457 (11th Cir. 1986), the court held "that injunctive relief against the Board itself [under Title VI] is so barred [by the Eleventh Amendment], but that such relief against Board members in their official capacities is permitted."[41]

The same was true under Section 504. In addition to a number of Supreme Court cases in which Section 504 actions were brought against government officials in their official capacities,[42] courts of appeals held, prior to the enactment of the ADA, that the implied private right of action under Section 504 could be enforced against state officials in their official capacities, noting that they were relying on the

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[41] See also, *e.g.*, *Bazemore* v. *Friday*, 478 U.S. 385 (1986); *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1039 (7th Cir. 1987) ("It would appear initially that the Superintendent might be held accountable for the appropriate declaratory and injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny.").

[42] See *Alexander* v. *Choate*, 469 U.S. 287 (1985); *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148 (1985); *Smith* v. *Robinson*, 468 U.S. 992 (1984); *Campell* v. *Kruse*, 434 U.S. 808 (1977).

doctrine of *Ex parte Young* to avoid States' Eleventh Amendment immunity.[43] Congress, of course, is assumed to know the law and is generally deemed to have incorporated existing judicial interpretations when it adopts a preexisting remedial scheme. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). By incorporating the "remedies, procedures, and rights" of Title VI, Congress incorporated the right to sue government officials in their official capacities into Section 504 and Title II.

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[43] See, *e.g.*, *Lussier* v. *Dugger*, 904 F.2d 661, 670 n.10 (11th Cir. 1990) ("of course, the Eleventh Amendment does not bar Lussier's claims for equitable relief under § 794 against defendants named in this case in their official capacities" (citing *Ex parte Young*)); *Brennan* v. *Stewart*, 834 F.2d 1248, 1255, 1260 (5th Cir. 1988) (discussing *Ex parte Young* at length); *Miener* v. *Missouri*, 673 F.2d 969, 982 (8th Cir. 1982) (finding *Ex parte Young* inapplicable because relief sought was not prospective); *Helms* v. *McDaniel*, 657 F.2d 800, 806 n.10 (5th Cir. 1981) (citing *Ex parte Young*), cert. denied, 455 U.S. 946 (1982). Other cases, while not making an express holding, routinely adjudicated Section 504 suits brought against government officials in their official capacities. See, *e.g*, *Bonner* v. *Lewis*, 857 F.2d 559 (9th Cir. 1988); *Disabled In Action* v. *Sykes*, 833 F.2d 1113 (3d Cir. 1987), cert. denied, 485 U.S. 989 (1988); *Greater L.A. Council on Deafness, Inc.* v. *Zolin*, 812 F.2d 1103 (9th Cir. 1987); *Parks* v. *Pavkovic*, 753 F.2d 1397 (7th Cir.), cert. denied, 473 U.S. 906 (1985); *Garrity* v. *Sununu*, 752 F.2d 727 (1st Cir. 1984); *Hurry* v. *Jones*, 734 F.2d 879 (1st Cir. 1984); *Plummer* v. *Branstad*, 731 F.2d 574 (8th Cir. 1984); *Larry P.* v. *Riles*, 793 F.2d 969 (9th Cir. 1984); *Phillips* v. *Thompson*, 715 F.2d 365 (7th Cir. 1983); *Joyner* v. *Dumpson*, 712 F.2d 770 (2d Cir. 1983); *Kentucky Ass'n for Retarded Citizens, Inc.* v. *Conn*, 674 F.2d 582 (6th Cir.), cert. denied, 459 U.S. 1041 (1982); *S-1* v. *Turlington*, 635 F.2d 342 (5th Cir.), cert. denied, 454 U.S. 1030 (1981); *Baker* v. *Bell*, 630 F.2d 1046 (5th Cir. 1980); *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977).

4. One of the critical factors in the Supreme Court's decision in *Seminole Tribe* not to permit the action to proceed under *Ex parte Young* was that Congress had made clear that it did not want district court's to exercise its normal equitable authority to remedy violations of statutory rights. See *Marie O.* v. *Edgar*, 131 F.3d 610, 615-616 (7th Cir. 1997) (describing the existence of limited remedial measures as "one of the main reasons that the Court refused to allow an *Ex parte Young* action"); *Santee Sioux Tribe* v. *Nebraska*, 121 F.3d 427, 432 (8th Cir. 1997) ("Congress had prescribed a detailed remedial scheme for enforcing [IGRA], with significantly fewer remedies than those available under *Ex parte Young*, thus signaling Congress's intent to limit relief to that available under the statute."); *Sandoval* v. *Hagan*, 197 F.3d 484, 501 (11th Cir. 1999) (permitting *Ex parte Young* suit to proceed because "Title VI also contains no express limitations on the remedial powers of federal courts, unlike the IGRA"), rev'd on other grounds, 2001 WL 408983 (Apr. 24, 2001); cf. *Balgowan*, 115 F.3d at 217 (action against state officials for declaratory relief could be brought under *Ex parte Young* even when underlying statute barred individuals from seeking injunction).

In enacting Section 504 and Title II, Congress did not limit the availability of equitable remedies. To the contrary, Congress expressly incorporated the remedies of Title VI. See 42 U.S.C. 12133; 29 U.S.C. 794; *Doe* v. *County of Centre*, 242 F.3d 437, 457 (3d Cir. 2001). In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that the remedies available under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which also incorporates the

remedies of Title VI, were governed by the "general rule" under which "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id*. at 70-71. This Court has held that the holding of *Franklin* applies to Section 504 and Title II as well. See *Doe*, 242 F.3d at 456; *W.B.* v. *Matula*, 67 F.3d 484, 494 (3d Cir. 1995).

While there was extensive dispute in the courts prior to *Franklin* about the availability of compensatory damages under these statutes, it was never disputed that a prospective injunction was an appropriate remedy for the implied right of action. Cf. *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). This is consistent with Title II's legislative history, which states that Congress intended the "full panoply of remedies" to be available. H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 98 (1990); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 52 (1990). Indeed, the House Judiciary Committee Report cited as an example of the remedies available under Title II the Eighth Circuit's decision in *Miener* v. *Missouri*, 673 F.2d 969 (1982), which held that an implied private right of action was available under Section 504 where officials were sued in their official capacities. See H.R.

Rep. No. 485, *supra*, Pt. 3, at 52 n.62; see also 136 Cong. Rec. 11,471 (1990) (Rep. Hoyer) (same). Thus, there is no evidence that Congress intended to preclude the availability of injunctive relief.

5. Defendants rely (Br. 32) on three cases, all from outside this circuit, which they claim support their argument that officials in their official capacity cannot be sued under Title II or Section 504. Two of the cases are not relevant because they address the distinct question whether the statutes permit officials to be sued in their *individual* capacities for damages. Thus the Fifth Circuit in *Lollar* v. *Baker*, 196 F.3d 603 (1999), held that a government official could not be sued "individually" under Section 504, but specifically noted that it was not retreating from its opinion in *Brennan* v. *Stewart*, 834 F.2d 1248 (5th Cir. 1988), which held that a Section 504 suit could proceed against a state official in his official capacity under *Ex parte Young*. See 196 F.2d at 609 n.6; see also *Helms* v. *McDaniel*, 657 F.2d 800, 806 n.10 (5th Cir. 1981) (permitting Section 504 suit to proceed under *Ex parte Young*), cert. denied, 455 U.S. 946 (1982). Similarly, the Eighth Circuit in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999) (en banc), held that "the commissioners may not be sued in their *individual capacities* directly under the provisions of Title II." *Id*. at 1005 n.8 (emphasis added). It did not address the question of official capacity suits and *Ex parte Young* because the claims for injunctive relief were moot. *Id*. at 1003. Compare *Layton* v. *Elder*, 143 F.3d 469, 470 n.3 (8th Cir. 1998) (permitting suit under Title II against government official in official capacity); *Gorman* v. *Bartch*, 152 F.3d 907, 913-914, 916 (8th Cir. 1998)

(dismissing claims against government officials in individual capacities but remanding for trial claims against officials in official capacities).

It is true that the Seventh Circuit in *Walker* v. *Snyder*, 213 F.3d 344 (2000), cert. denied *sub nom. United States* v. *Snyder*, 121 S. Ct. 1188 (2001), did ultimately hold that official-capacity suits were not available under Title II. But the opinion is internally inconsistent and appears at a critical moment to conflate individual and official capacity suits. *Walker* holds, first, that because Title II applies to "public entit[ies]," its duties do not extend to the "employees or managers of these organizations" individually and thus there was no "personal liability." *Id.* at 346. But *Walker* correctly notes that a state official sued in his official, as opposed to individual, capacity "stands in for the agency he manages" and thus officials in their official capacities are simply "proxies for the state." *Ibid.* As such, the Court holds that the officials "have been sued and could be liable only in their official capacities." *Ibid.* But at the very end of the opinion, with no analysis, the Court incorrectly summarizes its discussion as holding that "the only proper defendant in a [sic] action under the provisions of the ADA at issue here is the public body as an entity" and thus *Ex parte Young* was not available. *Id.* at 347. In doing so, it ignores not only its own reasoning, but the text, structure, legislative history, and case law we recount above. Subsequently, the Seventh Circuit has described *Walker* as holding that suits under Title II may "proceed against the public entity – either in its own name, or through suits against its officers in their official capacities." *Stanley* v. *Litscher*, 213 F.3d 340, 343 (7th Cir. 2000).

The rationale of *Walker* is not persuasive. Instead, this Court should follow the majority of the courts of appeals that have held after *Seminole Tribe* that individuals could rely on *Ex parte Young* to enforce Title II and Section 504, as well as Title VI, against state officials. See *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) (Title II and Section 504); *Nelson* v. *Miller*, 170 F.3d 641, 646-647 (6th Cir. 1999) (same); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997) (same), cert. denied, 524 U.S. 937 (1998); *Sandoval*, 197 F.3d at 500-501 (Title VI).

While this Court has not addressed the precise argument raised by defendants, previous opinions have accepted that government officials in their official capacities are appropriate defendants under Section 504 and Title II. Indeed, in *W.B.*, 67 F.3d at 499 & n.8, this Court held in a case under Section 504 that "claims against defendants in their official capacities are equivalent to claims against the government entity" and thus the failure to name the entity as a defendant "does not prevent plaintiffs from maintaining the current damage action against the remaining defendants in their official capacities." And this Court entered judgment for plaintiff in a Title II suit, even while noting that "[a]lthough Karen F. Snider is the named defendant in this lawsuit, she was sued in her capacity as the Secretary of the Pennsylvania Department of Public Welfare" and thus the action could be treated as a suit against the department. *Helen L.* v. *Didario*, 46 F.3d 325, 327 n.2 (3d Cir.), cert. denied *sub nom. Pennsylvania Sec'y of Pub. Welfare* v. *Idell S.*, 516 U.S. 813 (1995); see also *Juvelis* v. *Snider*, 68 F.3d 648 (3d Cir. 1995) (affirming

injunctive relief under Section 504 against Director of Public Welfare); *Kinney* v. *Yerusalim*, 9 F.3d 1067 (3d Cir. 1993) (affirming injunctive relief under Title II against city officials in their official capacities), cert. denied, 511 U.S. 1033 (1994); *Olmstead* v. *L.C.*, 527 U.S. 581, 589-590 (1999) (adjudicating on the merits Title II suit against state official in official capacity for injunctive relief).

The Supreme Court has "frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." *Idaho* v. *Coeur d 'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (O'Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in judgment). As there is no evidence that Congress intended to preclude Section 504 and Title II suits proceeding against state official in their official capacity, the district court erred in dismissing the injunctive claims in this suit on the grounds of Eleventh Amendment immunity.[44]

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[44] Defendants also rely on the holdings of other courts of appeals to argue (Br. 35-36) that plaintiff may not enforce Section 504 and Title II against state officials through 42 U.S.C. 1983. In doing so, defendants ignore this Court's holding in *W.B.* that officials may sued "directly under § 504, as well as the § 1983 claim predicated on § 504." 67 F.3d at 494; see also *Powell* v. *Ridge*, 189 F.3d 387, 401-403 (3d Cir.) (holding that Title VI could be enforced through Section 1983 because it did not have a comprehensive remedial scheme), cert. denied, 528 U.S. 1046 (1999).

CONCLUSION

The Eleventh Amendment was no bar to the district court's jurisdiction over this action.

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