No. 03-50608

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTY McCARTHY, by and through her next friend
JAMIE TRAVIS*, et al.*,

Plaintiffs-Appellees

v.

KAREN F. HALE, in her official capacity as Commissioner of the Texas Department of Mental Health & Retardation, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument will assist the Court in reaching its decision in this case.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50452

CHRISTY McCARTHY, by and through her next friend
JAMIE TRAVIS, *et al.*,

Plaintiffs-Appellees

v.

KAREN F. HALE, in her official capacity as Commissioner of the Texas Department of Mental Health & Retardation, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF FOR THE UNITED STATES AS INTERVENOR

JURISDICTIONAL STATEMENT

Plaintiffs filed this case alleging violations of, among other statutes, Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The district court had jurisdiction pursuant to 28 U.S.C. 1331, 1343. On May 23, 2003, the district court denied Defendants' motion to dismiss the complaint as barred by the State's Eleventh Amendment immunity. Defendants then filed a timely notice of appeal on May 29, 2003. This Court has jurisdiction to review the correctness of the district court's denial of the State's claim of sovereign immunity pursuant to 28

U.S.C. 1291. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-145 (1993).

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether an individual may sue state officials in their official capacities to enjoin continuing violations of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).

2. Whether this Court should review the State's challenge to the constitutionality of Title II and Section 504 in this interlocutory appeal from a denial of Eleventh Amendment immunity.

3. Whether the substantive requirements of Title II of the ADA are a valid exercise of Congress's powers under either the Fourteenth Amendment or the Commerce Clause.

4. Whether the substantive requirements of Title II of the ADA violate the Tenth Amendment.

5. Whether Section 504 is valid Spending Clause legislation.

STATEMENT OF THE CASE

This case involves the application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, to Texas's administration of programs for individuals with mental retardation and other developmental disabilities.

1. Congress enacted the Americans with Disabilities Act of 1990, 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). "[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, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. 12101(a)(9).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce" and enacted the ADA. 42 U.S.C. 12101(b)(4). The ADA targets three 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.

In enacting the ADA, Congress instructed the Attorney General to promulgate regulations to interpret and implement Title II of the Act. See 42 U.S.C 12134. The Title II regulations require, among other things, that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), the Supreme Court interpreted Title II in light of the integration regulation and held that "[u]njustified isolation" of individuals with disabilities in institutions "is properly regarded as discrimination based on disability," in violation of the ADA. *Id*. at 597. At the same time, the plurality recognized that the State's responsibility under the Act "is not boundless." *Id*. at 603 (plurality); see also *id*. at 607 (Stevens, J., concurring) (same). States need only make "reasonable modifications," to avoid discrimination, which does not include changes that would "fundamentally alter the nature of the service, program, or activity." *Id*. at 603 (plurality); *id*. at 607 (Stevens, J., concurring); 28 C.F.R. 35.130(b)(7).

2. Section 504 of the Rehabilitation Act of 1973 was the predecessor to the ADA and 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). The provision applies to a "program or activity," a term 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). Section 504 may be enforced through private suits against States or state agencies providing programs or activities receiving federal funds. See 42 U.S.C. 2000d-7; *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

3. Plaintiffs are 21 individuals with mental retardation or developmental disabilities, seeking to represent a class of similarly situated individuals, and a nonprofit group that provides services to the class (see Order, R-6-1097).[1] They allege, among other things, that "the defendants violated Title II by failing to provide them 'community mental retardation or developmental disability habilitation and support services in the most integrated setting appropriate' and failing to provide * * * services to individuals in [intermediate care facilities for the mentally retarded] that would allow them to avoid institutionalization" (*id*. at 1115-1116).[2] Plaintiffs sued the heads of the relevant Texas state agencies in their

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[1] "R-__-__-__" refers to the volume and page, or page range, of the record on appeal.

[2] Plaintiffs also allege (R-2-266-271) that the State is in violation of a number of provisions of Title XIX of the Social Security Act (Medicaid Act), 42 U.S.C. 1396 *et seq.*, and the Fourteenth Amendment.

official capacities, seeking prospective injunctive and declaratory relief (see *id*. at 236, 272).

On May 23, 2003, the district court denied the State's motion to dismiss Plaintiffs' Title II and Section 504 claims, while granting the motion in substantial part with respect to Plaintiffs' claims under the Medicaid Act and the Fourteenth Amendment (see R-6-1104-1123). Plaintiffs' ADA and Section 504 claims for prospective relief against the state officials in their official capacities were not barred by the Eleventh Amendment, the court concluded (*id*. at 1116-1118, 1120), because they fell within the exception to sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908). The State nonetheless argued that it was "immune from suit under Title II of the ADA because the statute exceeds Congress's Commerce Clause power and regulates the states in violation of the Tenth Amendment" (R-6-1118). However, the district court found (*ibid*.) that because Plaintiffs "validly invoked the *Ex parte Young* exception, it need not address the defendants' sovereign immunity arguments." "[I]t is axiomatic that the Eleventh Amendment is not implicated when state officials are properly sued under the *Ex parte Young* exception and the state or its agency is not a defendant" (*ibid*.). Finally, the district court held (*id*. at 1120-1123) that Plaintiffs stated a claim under Section 504 and Title II, as interpreted by *Olmstead*.

The State subsequently took this interlocutory appeal, asserting (Br. 2) jurisdiction pursuant to the collateral order doctrine to challenge the district court's denial of its Eleventh Amendment immunity claim.

SUMMARY OF ARGUMENT

The scope of this appeal is necessarily limited by its interlocutory posture. The only question within this Court's jurisdiction is whether an individual may sue state officials in their official capacities to enjoin continuing violations of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504). The Supreme Court has repeatedly held that suits against state officials in their official capacities to enjoin an ongoing violation of federal law are not barred by the Eleventh Amendment under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). See, *e.g.*, *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002). This is true even in cases, such as this one and *Ex parte Young* itself, in which the plaintiff seeks to enforce a legal obligation that is imposed on a State or state agency rather than specifically on a state official.

This Court should resist the State's invitation to go further and decide whether Title II is a constitutional exercise of Congress's Fourteenth Amendment authority or Commerce Clause power, and whether Section 504 is valid Spending Clause legislation. These constitutional questions will only require an answer if Plaintiffs prevail upon remand. Moreover, the Supreme Court is currently considering related questions in a case that will be decided this Term. Finally, the State's constitutional challenges raise novel issues of first impression and enormous import that were never ruled upon by the district court.

If this Court reaches the State's challenges to the validity of Title II and Section 504, it should reject them. As held open by this Court in *Reickenbacker* v.

Foster, 274 F.3d 974 (5th Cir. 2001), the substantive requirements of Title II are a valid exercise of Congress's power to enforce the Fourteenth Amendment, even if the statute does not validly abrogate the State's immunity to claims for damages. In reviewing the substantive requirements, this Court must consider the entire record of unconstitutional conduct by state actors, including the actions of local government officials. That record is particularly strong in the context of the institutionalization of the mentally retarded. Moreover, the Court must also take into account that suits against States, or against state officials for money damages, are no longer available to enforce the substantive requirements of Title II. In light of these factors, Title II's prohibition against disability discrimination by public entities is a valid means of enforcing the Fourteenth Amendment.

Title II is also a valid exercise of Congress's power under the Commerce Clause. In prohibiting discrimination in the State's residential treatment services for individuals with mental retardation, Congress regulates a service that is economic in nature and which substantially affects interstate commerce. Such services are part of a national market in which both private and public entities participate. The Supreme Court has recognized in certain situations that when similar economic activities are undertaken by nonprofit entities or state hospitals, they fall within Congress's Commerce Clause authority.

More generally, Congress is entitled to prohibit disability discrimination in public programs as part of its broader economic regulation of employment and public accommodations. Congress understood that discrimination in public

services substantially impedes the economic efficacy of removing barriers to participation in the labor and consumer markets. This case illustrates the point – people unjustifiably institutionalized by the State are severely limited in their ability to have jobs or patronize public accommodations in their communities.

Furthermore, the ADA does not commandeer state legislators or executive officials in violation of the Tenth Amendment and applies substantially identical non-discrimination requirements on public and private entities alike, consistent with the Tenth Amendment.

Finally, as the United States has argued in numerous other cases currently pending before this Court, the requirements of Section 504 are a valid exercise of Congress's power under the Spending Clause.

ARGUMENT

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

The Eleventh Amendment bars private suits against a State sued in its own name absent a valid abrogation of sovereign immunity by Congress or waiver of immunity by the State. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999). The Eleventh Amendment also bars suits against officials in their official capacities, subject to the established exception articulated in *Ex parte Young*, 209 U.S. 123 (1908). See, *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). *Ex Parte Young* held that the Eleventh Amendment posed no bar to suits against state officials in their official capacities for prospective relief to end ongoing violations of federal

law. See *ibid*. While the Court in *Ex parte Young* explained its results in terms that have since been called a "fiction" (that a state official violating federal law is not acting on behalf of "the State"), courts have long recognized that the legitimacy and longevity of the doctrine is grounded in a practical construction of the Constitution's dual commands of state sovereignty and the supremacy of federal law. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984); see also *Prout* v. *Starr*, 188 U.S. 537, 542-543 (1903).

Relying on the Seventh Circuit's overruled decision in *Walker* v. *Snyder*, 213 F.3d 344, 346-347 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001),[3] the State asserts (Br. 20) that Congress precluded use of *Ex parte Young* suits to enforce Title II when it imposed the obligations of that Title on "public entities," rather than on public officials. In fact, the State asserts (Br. 20) that, as a general rule, "when a statute is directed at 'the State,' rather than a 'state official,' Congress did not intend to permit a *Young* suit to enforce that statute." The State proposes a limitation on *Ex parte Young* that has no basis in the precedents of this Court or the Supreme Court, one that would ignore the Court's on-point instruction in *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001),[4] and

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[3] See *Bruggeman* v. *Blagojevich*, 324 F.3d 906, 912-913 (7th Cir. 2003).

[4] See *Garrett*, 531 U.S. at 374 n.9 (noting that *Ex parte Young* is available to enforce Title I's obligations with respect to a state employer); see also *Perez* v. *Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 n.7 (5th Cir. 2002) (same for Title II's obligation for a "public entity"); *Reickenbacker* v. *Foster*, 274 F.3d 974, 976

(continued...)

overrule scores of cases, including *Ex parte Young* itself.[5]

As the Sixth Circuit recently explained in rejecting the same argument the State makes here, the

> problem with this argument is that it misrepresents *Ex parte Young*, insofar as it fails to recognize the nuances [of the doctrine]. The Court in [*Ex parte Young*] was not saying that the official was stripped of his official capacity for all purposes, but only for purposes of the Eleventh Amendment. This is evident in *Ex parte Young* itself: though the official was not "the state" for purposes of the Eleventh Amendment, he nevertheless was held responsible in his official capacity for enforcing a state law that violated the Fourteenth Amendment, which by its terms applies only to "states." * * * And in rejecting the defendants' *Ex parte Young* argument, we make a similar distinction: an official who violates Title II of the ADA does not represent "the state" for purposes of the Eleventh Amendment, yet he or she nevertheless may be held responsible in an official capacity for violating Title II, which by its terms applies only to "public entit[ies]."

Carten v. *Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002) (citations omitted). Thus, a suit against a public official in his official capacity *is* a suit against the state agency for every purpose except Eleventh Amendment immunity. "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

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[4](...continued)
(5th Cir. 2001) (same).

[5] See 209 U.S. at 130-132 (enforcing Fourteenth Amendment requirements imposed upon a "State").

official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky* v. *Graham*, 473 U.S. 159, 165-166 (1985) (citations omitted); see also *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991). Accordingly, an *Ex parte Young* suit against a public official in his official capacity to enjoin violations of Title II is quite properly considered to be a suit against the relevant "public entity" for purposes of the ADA. See *Carten*, 282 F.3d at 396.

Because an *Ex parte Young* suit is essentially a suit against the State, but one permitted by the Eleventh Amendment, the Supreme Court and the courts of appeals have consistently permitted *Ex parte Young* suits to enforce federal requirements that are, by their terms, directed at States rather than at public officials. Most recently, the Supreme Court in *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002), approved the use of *Ex parte Young* to enforce provisions of the Telecommunications Act of 1996, which imposed obligations on a "State commission." See 47 U.S.C. 252(b)(4), (e). That the statute addressed a state entity rather than state officials did not preclude a suit under *Ex parte Young*. "The mere fact that Congress has authorized federal courts to review whether the Commission's action" complies with federal law does not, the Court observed, indicate "whom the suit is to be brought against -- the state commission, the individual commissioners, or the carriers benefitting from the state commission's order." *Verizon*, 535 U.S. at 647. See also, *e.g.*, *AT&T Communications* v. *BellSouth Telecomm., Inc.*, 238 F.3d 636, 647-649 (5th Cir. 2001) (imposing duties on a "state Commission"); *Randolph* v. *Rodgers*, 253 F.3d 342, 348 (8th

Cir. 2001); *Telespectrum, Inc.* v. *Public Serv. Comm'n*, 227 F.3d 414, 420 (6th Cir. 2000); *Armstrong* v. *Davis*, 275 F.3d 849, 879 (9th Cir. 2001); *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *Duffy* v. *Riveland*, 98 F.3d 447, 452 n.4 (9th Cir. 1996).

The State can point to nothing in the ADA to show that Congress intended a different rule to apply in cases enforcing Title II. In *Verizon*, the Court explained that the doctrine of *Ex parte Young* is presumed to apply unless Congress displays an "intent to foreclose jurisdiction under *Ex parte Young*." 535 U.S. at 647. Like the Telecommunications Act of 1996, Title II imposes obligations upon public entities but does not identify who the defendants in a suit for injunctive relief should be. Instead, Title II incorporates the "remedies, procedures, and rights" of Section 504, which adopts the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." See 42 U.S.C. 12133 (ADA); 29 U.S.C. 794a(a)(2) (Section 504). By the time Congress enacted Title II, courts had long entertained suits for injunctive relief against public officials in their official capacities to enforce Title VI[6] and Section 504.[7] By incorporating the "remedies,

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[6] 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." See also, *e.g.*, *Bazemore* v. *Friday*, 478 U.S. 385 (1986); *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Gomez* v.

(continued...)

procedures, and rights" of Section 504 and Title VI, Congress therefore incorporated the right to sue government officials in their official capacities under Title II. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (Congress is presumed to incorporate existing judicial interpretations when it adopts a preexisting remedial scheme); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (same).

The State responds (Br. 20) that there is an "irreconcilable conflict between the *Young* fiction and Title II's requirement that suits be brought against a public

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[6](...continued)
Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987) ("It would appear initially that the Superintendent might be held accountable for the appropriate declaratory and injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny.").

[7] There had been a number of Supreme Court cases against state officials in their official capacities under Section 504. See *Alexander* v. *Choate*, 469 U.S. 287 (1985); *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148 (1985); *Smith* v. *Robinson*, 468 U.S. 992 (1984); *Campbell* v. *Kruse*, 434 U.S. 808 (1977). Courts of appeals had also held that *Ex parte Young* suits were available to enforce Section 504. See, *e.g.*, *Lussier* v. *Dugger*, 904 F.2d 661, 670 n.10 (11th Cir. 1990) ("[O]f 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*, *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).

entity." But the Supreme Court has long acknowledged that the *Ex parte Young* doctrine is based on a legal fiction that creates this formal contradiction, even while insisting that the fiction must be observed. See, *e.g.*, *Pennhurst*, 465 U.S. at 105-106 (acknowledging that *Ex parte Young* "created the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. Nonetheless, the *Ex parte Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'") (citations omitted); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 293 (1997) (plurality opinion); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Brennan* v. *Stewart*, 834 F.2d 1248, 1252-1253 (5th Cir. 1988).

Because Plaintiffs have properly invoked the doctrine of *Ex parte Young*, the Eleventh Amendment does not bar Plaintiff's suit. Accordingly, this Court should affirm the district court's holding and remand the case for further proceedings on the merits.

II. THE CONSTITUTIONALITY OF TITLE II AND SECTION 504 AFFECTS THE MERITS OF PLAINTIFFS' CLAIMS, NOT THE COURT'S JURISDICTION UNDER *EX PARTE YOUNG* TO ADJUDICATE THE CLAIMS

The bulk of the State's brief asks this Court to decide whether Plaintiffs have stated a claim on the merits, attempting to portray this as part of the Eleventh Amendment inquiry over which this Court has interlocutory jurisdiction. In particular, the State seeks immediate review of whether the substantive requirements of Title II and Section 504 are valid exercises of Congress's enumerated powers. This invitation must be rejected because the constitutionality of Title II and Section 504 affects the merits of Plaintiffs' claims, not the court's jurisdiction under *Ex parte Young* to adjudicate the claims.

A. The Constitutionality Of A Federal Statute Is A Question On The Merits That Does Not Affect The Eleventh Amendment Analysis Under Ex parte Young

The State asserts (Br. 13) that "a prerequisite to bringing a *Young* suit" is "a valid federal statute that is enforceable against a State." Yet the State can cite no decision from this Court, or any other, holding that a court must examine the constitutionality of a federal statute to establish jurisdiction under *Ex parte Young*.[8]

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[8] The State does cite (Br. 13) to a passage of *Ex parte Young* itself, but that passage says nothing about jurisdictional prerequisites. Instead, the Court explained that issuing an injunction to end an ongoing violation of federal law did not violate principles of sovereign immunity because such violations should not be considered acts of the State for purposes of the Eleventh Amendment. See *Ex*

(continued...)

Although the State is surely right that a valid federal law or regulation is a requirement for a *successful* suit under *Ex parte Young*, and a prerequisite for any injunctive relief under that doctrine, a valid federal law is not a prerequisite to the court's jurisdiction to adjudicate the merits of the claim. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (citation omitted).

Importantly, the question is whether the complaint "alleges" a violation of federal law, not whether that allegation is correct. See *id*. at 646 ("[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."). Accordingly, a claim under *Ex parte Young* may fail for many reasons – the plaintiff may not state a claim under the relevant legal provision, a regulation may be an invalid interpretation of the statute it enforces, the statute may be unconstitutional, or the plaintiff's case may falter for lack of

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[8](...continued)
Parte Young, 209 U.S. 123, 159-160 (1908). This, of course, explains why plaintiffs must prevail on their claims before obtaining equitable *relief* under *Ex parte Young*. But it does nothing to establish that a court must evaluate the constitutionality of a statute before assuming jurisdiction to decide whether the state official is, in fact, in violation of a valid federal law.

proof. But these failures do not deprive the court of jurisdiction to consider the claim.

Indeed, to hold otherwise would be to convert every merits challenge in an *Ex parte Young* case into a jurisdictional issue. Even if only the constitutional validity of the federal statute were considered a jurisdictional prerequisite under *Ex parte Young*, this would require courts to first consider the constitutionality of a federal statute in every *Ex parte Young* case before considering nonconstitutional grounds, and would even seemingly require the courts to challenge the constitutionality of federal statutes *sua sponte*. See, *e.g.*, *Gaar* v. *Quirk*, 86 F.3d 451, 453 (5th Cir. 1996). There is no legal basis for such a requirement.

"[U]nless the suit 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction' or 'wholly insubstantial and frivolous,' a federal court always has jurisdiction of a suit seeking to enjoin state officials from violating federal law." *Brennan* v. *Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988) (citations omitted). See also *Lewis* v. *New Mexico Dep't of Health*, 261 F.3d 970, 976 (10th Cir. 2001) ("[A]t the immunity stage * * * federal courts apply the limited jurisdictional standard used to assess whether a claim sufficiently confers subject matter jurisdiction, asking only whether a claim is 'wholly insubstantial and frivolous,' rather than reaching the merits of the claim.").

In this case, as in others, "[c]onstitutionality is an issue on the merits, not a jurisdictional one." *United States* v. *Lipscomb*, 299 F.3d 303, 350 (5th Cir. 2002).

Accordingly, the constitutionality of Title II and Section 504 are not properly before this Court at this stage in the litigation. See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 41-48 (1995); *Lewis*, 261 F.3d at 978-979; *Gros* v. *City of Grand Praire*, 209 F.3d 431, 436-437 (5th Cir. 2000).[9]

B. Even If This Court Had Discretion To Decide The State's Constitutional Challenges In This Appeal, It Should Decline To Do So

Even if this Court had discretion to entertain the State's constitutional claims, there are substantial reasons not to do so in this case. First, this Court will not need to decide the constitutionality of Title II and Section 504 unless the Plaintiffs prevail on the merits upon remand. Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). "It ought to go without saying, but apparently the circumstances call for a reminder, that the federal courts should not reach a constitutional question, especially one concerning the validity of an act of Congress, if the merits of the case may be settled on nonconstitutional grounds." *White* v. *United States Pipe & Foundry Co.*, 646 F.2d 203, 206 (5th Cir. 1981). "Moreover, if a constitutional question is presented on appeal, it should not be

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[9] The State could have asked the district court to certify the issue for immediate appeal under 28 U.S.C. 1292(b). Had it done so, and had the district court and this Court agreed that the issue should be decided immediately, there would be no question of appellate jurisdiction.

addressed if there is a possibility the case can be decided on narrower statutory grounds on remand." *Jordan* v. *City of Greenwood*, 711 F.2d 667, 669 (5th Cir. 1983).

Second, the Supreme Court is presently considering whether the abrogation provision of Title II is valid legislation to enforce the Fourteenth Amendment. See *Tennessee* v. *Lane*, cert. granted, No. 02-1667 (May 15, 2003). Thus, the decision in *Lane* may conclusively resolve the State's constitutional challenges. As discussed below, because *Lane* involves a challenge to the ADA's abrogation of sovereign immunity, it presents a somewhat different question than does the State's challenge to the constitutionality of the substantive requirements of the Act. However, the decision in *Lane* will at the very least provide important guidance for this case. Accordingly, if this Court determines to reach the merits of the State's constitutional challenge, it should await a decision in *Lane* before rendering its decision in this case.

Third, the constitutionality of the substantive provisions of Title II is a question of first impression and enormous import, one that implicates complex areas of constitutional law. Cf., *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (overruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968))); *United States* v. *McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc), cert. denied, 123 S. Ct. 1749 (2003). This Court should be hesitant to break new ground in the area unnecessarily.

Finally, the district court did not address the State's novel constitutional arguments below (see R-6-1118). "Generally this court will not reach the merits of an issue not considered by the district court." *Baker* v. *Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980). Moreover, the briefing on the constitutional questions in the district court did not address the full range of issues relevant to the proper adjudication of the State's constitutional claims. The United States raises below substantial arguments in favor of the constitutionality of Section 504 and Title II which were not fully briefed before the district court. Thus, the limited briefing and evaluation of the State's present claims in the district court further counsels against premature adjudication of those issues for the first time on appeal.

III. TITLE II IS VALID FOURTEENTH AMENDMENT LEGISLATION

Although we believe that the Court should not reach the State's constitutional challenges, if it does so, the Court should hold that the substantive requirements of Title II are valid legislation to enforce the Fourteenth Amendment, even if the abrogation provision is not.

A. The Substantive Requirements Of Title II As A Whole Are Valid Fourteenth Amendment Legislation, Even If The Abrogation Provision Is Not

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). That power is not unlimited, however, for Congress lacks the power to redefine legislatively the substance of the Fourteenth Amendment. *Ibid*. To police this distinction, the Supreme Court has required that "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Ibid*.

In *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), this Court held that "Congress has not validly acted through its Fourteenth Amendment § 5 power to abrogate state sovereign immunity" to claims under Title II. *Id*. at 984. While we respectfully disagree with that decision, this Court need not depart from it to

uphold the constitutionality of the substantive provisions of Title II. The Court in *Reickenbacker* specifically held open whether the substantive requirements of Title II were valid Fourteenth Amendment legislation even if the abrogation was invalid. The Court did so because it recognized that the Fourteenth Amendment review of an abrogation provision takes into account different factors than does review of the substantive requirements themselves. See 274 F.3d at 982. In evaluating the Title II abrogation provision, *Reickenbacker* examined the evidence of unconstitutional discrimination by States, but not local entities, since the abrogation provision had relevance only to the State and its agencies. See *id*. at 982 (following *Garrett*, 531 U.S. at 368-369). That mode of review, this Court acknowledged, "means that Title II of the ADA could still be a valid exercise of Congress' § 5 power, but simply not provide a basis for a *use* of that power to abrogate" state sovereign immunity. *Id*. at 982 n.60. See also *Thompson* v. *Colorado*, 278 F.3d 1020, 1032 n.7 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002). Deciding the broader question of whether the substantive provisions of Title II are valid Fourteenth Amendment legislation, therefore, requires comparing the terms of the Act to the legislative and historical record of unconstitutional state and local discrimination as a whole. See *Reickenbacker*, 274 F.3d at 982 n.60. As this Court observed in *Reickenbacker*, and as the Supreme Court noted in *Garrett*, that combined record is much more substantial than the predicate reviewed by this

Court in *Reickenbacker*. See *Garrett*, 531 U.S. at 369; *Reickenbacker*, 274 F.3d at 982.[10]

In addition, the limitations on the remedies available to enforce the substantive requirements of Title II in this Circuit after *Reickenbacker*, support the conclusion that the substantive requirements of the Act are proportional and congruent. In *Nevada Department of Human Resources* v. *Hibbs*, 123 S. Ct. 1972 (2003), limitations on the remedies available to enforce the statute supported the Court's conclusion that the statute was proportional and congruent. See *id*. at 1983-1984. In this Circuit, after *Reickenbacker*, the remedies available under Title II are significantly limited and no longer include enforcement actions against nonconsenting States directly, or suits against state officials for money damages. "Private suits against nonconsenting States – especially suits for money damages – may threaten the financial integrity of the States" and can significantly interfere with a State's ability to allocate scarce resources in accordance with the priorities of its electorate. *Alden* v. *Maine*, 527 U.S. 706, 750-751 (1999). At the same time, an abrogation provision creates "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id*. at 749.

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[10] The United States argued in *Simmons* v. *Texas Dep't of Criminal Justice*, No. 01-40503 (5th Cir.) (filed Aug. 2001) (brief available at *http://www.usdoj.gov/crt/briefs/simmons.pdf*), that this expanded record supports Title II as valid Fourteenth Amendment legislation. See also Brief for the United States, *California Med. Bd.* v. *Hason*, No. 02-479 (U.S.) (filed Feb. 2002) (available at *http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2002-0479.mer.aa.pdf)*. Space limitations prevent us from fully repeating those arguments here.

Therefore, even if the "predicate for money damages against an unconsenting State in suits brought by private persons" is absent, *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), the predicate for the substantive non-discrimination requirements of Title II is constitutionally sufficient, particularly in light of the evidence of both local and State conduct. Cf. *Hibbs*, 123 S. Ct. at 1983-1984.

B. In The Alternative, Title II, As Applied In The Olmstead *Setting, Is Valid Fourteenth Amendment Legislation*

It is the position of the United States that the congruence and proportionality test should be applied to the requirements of 42 U.S.C. 12132 as a whole and that this Court should hold that provision constitutional on its face. Although the Supreme Court has not directly addressed the scope of the congruence and proportionality review, the nature of the test and the Court's practice in past cases suggest that courts should examine the relevant provision in all its potential applications. Cf., *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 532-533 (1997); *Kimel*, 528 U.S. at 85-88; *Garrett*, 531 U.S. at 372-373; *Hibbs*, 123 S. Ct. at 1983-1984.

However, if this Court disagrees, it would be appropriate to uphold Title II as applied to *Olmstead* cases, and to leave its constitutionality in other applications for another day. As applied to unjustified institutionalization, Title II is a congruent and proportional response to a substantial record of unconstitutional state conduct and its continuing effects.

1. Congressional Record Of Unconstitutional State Conduct

"[P]ersons with mental disabilities have been subject to historic mistreatment, indifference, and hostility." *Olmstead*, 527 U.S. at 608 (Kennedy, J., concurring in judgment). That "lengthy and tragic history," *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring in the judgment in part), assumed an especially pernicious form in the late 1800s and early decades of the next century, 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; see also U.S. 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 cornerstone of that regime was forced institutionalization directed at separating individuals with disabilities from the community at large.[11] "A regime of state-mandated segregation" emerged in which "[m]assive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and 'nearly extinguish their race.'" *Cleburne*, 473 U.S. at 462

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[11] See *Spectrum* 19-20; see also *Employees of Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 n. 2 (1973) (noting that "the institutionalization of the insane became the standard procedure for society" and a "cult of asylum swept the country") (quoting D. Rothman, *The Discovery of the Asylum* 130 (1971)).

(Marshall, J., concurring in the judgment in part).[12] State statutes provided for the involuntary institutionalization of persons with mental disabilities and, frequently, epilepsy.[13] Some States also required public officials and parents, sometimes at risk of criminal prosecution, to report the "feeble-minded" for institutionalization. *Spectrum* 20, 33-34; T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 402 (1991). Additionally, almost every State accompanied institutionalization of those with mental disabilities with compulsory sterilization and prohibitions of marriage. *Cleburne*, 473 U.S. at 462-463 (Marshall, J., concurring in the judgment in part); see also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization law "in order to prevent our being swamped with incompetence."; "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough.").[14]

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[12] See also *id*. at 463 n. 9 (noting Texas statute, enacted in 1915 (and repealed in 1955), with stated purpose of institutionalizing the mentally retarded to relieve society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

[13] See *Spectrum* 19; T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 400 (1991); Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[14] See also 3 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. History of Pub. L. No. 101-336: The Americans with Disabilities Act 2242 (Comm. Print 1990) (testimony of James Ellis); M. Burgdorf & R. Burgdorf,

(continued...)

In subsequent years, the eugenics movement fell into disrepute, but the effects of the movement continue into the present. See *Spectrum* 20. In considering the ADA, Congress heard extensive testimony that unconstitutional treatment of the institutionalized as well as the effects of the long history of state-sponsored institutionalization of individuals with disabilities continued. The legislative hearings catalogued unconstitutional treatment and unjustified institutionalization of persons in state mental health and mental retardation facilities. See, *e.g.*, 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. History of Pub. L. No. 101-336: The Americans with Disabilities Act 2242 1203 (Comm. Print 1990) (Leg. Hist.) (Lelia Batten) (state 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* 32-35; see also California Att'y Gen., *Commission on Disability: Final Report* 114 (Dec. 1989). Congress also drew upon its prior experience investigating institutionalization in passing the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.*, and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* See, *e.g.*, 132 Cong. Rec. 10589 (1986) (Sen. Kerry) (findings of investigation of state-run facilities for the

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[14](...continued)
A History of Unequal Treatment, 15 Santa Clara Lawyer 855, 887-888 (1975).

mentally retarded "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief.").

Moreover, the Department of Justice's investigations in the 1980s under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.,* further documented egregious and flagrant denials of constitutional rights by state-run institutions for individuals with disabilities.[15] Unconstitutional uses of physical and medical restraints were commonplace in many institutions. For example, investigations frequently found institutions strapping mentally retarded residents to their beds in five-point restraints for the convenience of staff.[16] One facility forced mentally retarded residents to inhale ammonia fumes as punishment for

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[15] In the years immediately preceding enactment of the ADA, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than 25 States. In *California Medical Board* v. *Hason*, No. 02-479, the United States lodged with the Supreme Court summaries of some of the written notice of investigative findings produced by the Department of Justice in compliance with 42 U.S.C. 1997b(a)(1). Those summaries are reproduced in the addendum to this brief, along with the letters specifically cited in this brief. Copies of the letters forming the basis of the summary chart have also been served on counsel and can be provided to this Court upon request.

[16] See Notice of Findings Regarding Los Lunas Hospital and Training School 2 (1988); Notice of Findings Regarding Fairview Training Center 4-5 (1985) (residents frequently placed in physical restraints and medicated in lieu of being given training or treatment); Notice of Findings Regarding Westboro State Hospital 7 (1986) (geriatric patients in psychiatric hospital frequently given sedating drugs "as punishment for antisocial behavior, for the convenience of staff, or in lieu of treatment").

misbehavior.[17] Residents in other facilities lacked adequate food, clothing and sanitation.[18] Many state facilities failed to provide basic safety to individuals with mental illness or mental retardation, resulting in serious physical injuries, sexual assaults, and even deaths.[19] Others were denied minimally adequate medical care,

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[17] See Notice of Findings Regarding Los Lunas Hospital and Training School 2 (1988).

[18] See, *e.g.*, Notice of Findings Regarding Hawaii State Hospital 2-3 (1990) (residents lacked adequate food, had to wrap themselves in sheets for lack of clothing, and were served food prepared in a kitchen infested with cockroaches); Notice of Findings Regarding Westboro State Hospital 3 (1986) (investigation found that the "smell and sight of urine and feces pervade not only toilet areas, but ward floors and walls as well * * *. Bathrooms and showers were filthy. Living areas are infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels, and underwear."); Notice of Findings Regarding Fairview Training Center 6, 9 (due to lack of adequate staffing, many residents suffer from "the unhealthy effects of poor oral and other bodily hygiene. We observed several residents who were laying or sitting in their own urine or soiled diapers or clothes," while 70% of residents suffered from gum disease and 35% "had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments").

[19] Notice of Findings Regarding Los Lunas Hospital and Training School 3 (1988) (facility failed to provide minimally adequate supervision and safety, and as a result "a woman was raped, developed peritonitis and died"); Notice of Findings Regarding Rosewood Center 4 (1984) (inadequate supervision of residents contributed to rapes and sexual assaults of several residents; profoundly retarded resident left unsupervised drowned in bathtub; another died of exposure after leaving the facility unnoticed); Notice of Findings Regarding Fairview Training Center 3 (1985) (Department found "numerous residents with open wounds, gashes, abrasions, contusions and fresh bite marks" due to lack of training for residents and lack of adequate supervision by staff); Notice of Findings Regarding Northville Regional Psychiatric Center 2-3 (1984) (one resident died

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leading to serious medical complications and further deaths.[20]

Congress was aware that continued unnecessary institutionalization of people with mental disabilities also perpetuated the fears and irrational misconceptions about such individuals that are the legacy of an earlier era. In *Olmstead*, the Court observed that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." 527 U.S. at 600-601. Such irrational fears and beliefs, Congress found, are at the root of much of the discrimination faced by individuals with disabilities today. See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess., at 30 (1990) (much of the discrimination against individuals with disabilities "results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance,

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[19](...continued)
after staff placed him in a stranglehold and left him unconscious on seclusion room floor for 15-20 minutes before making any effort to resuscitate him); *id*. at 3 (several other residents found dead with severe bruising, many other incidents of "rape, assault, threat of assault, broken bones and bruises" found).

[20] See, *e.g.*, Notice of Findings Regarding Enid and Pauls Valley State Schools 2 (1983) (inadequate medical care and monitoring contributed to deaths of six residents); Notice of Findings Regarding Manteno Mental Health Center 4 (1984) (investigation of state mental health facility found "widespread occurrence of severe drug side-effects" that could be "debilitating or life-threatening" going "unmentioned in patient records, unrecognized by staff, untreated, or inappropriately treated"); Notice of Findings Regarding Napa State Hospital 2-3 (1986) (facility staff "violated all known standards of medical practice by prescribing psychotropic medications in excessively large daily doses" and by failing to monitor patients for serious, irreversible side effects).

irrational fears, and pernicious mythologies"); S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989) ("[O]ur 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.").

2. Congruence and Proportionality

The integration regulation of Title II, as interpreted by *Olmstead*, is a congruent and proportional response to the continuing instances and risk of unconstitutional state conduct in the area of institutions, and to the continuing effects of past violations. "A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal punctuation and citation omitted). The integration regulation elaborated in *Olmstead* does just that, eliminating unnecessary institutionalization of people with mental disabilities, while at the same time reducing the well-documented risks of unconstitutional neglect and abuse within state-run institutions. The regulation also acts remedially and prophylactically to address one of the important sources of the irrational stereotypes that Congress found at the heart of much government discrimination against people with disabilities. See *Spectrum* 43 ("Because discriminatory practices and prejudices are closely intertwined, an effective remedy of the former must incorporate a remedy for the latter."); *ibid*. (One of "two major avenues for changing such [discriminatory]

attitudes" is "increasing social contact and interaction of nonhandicapped and handicapped people").

At the same time, the integration regulation is carefully limited under *Olmstead* to take into account a State's limited resources and competing responsibilities, as well as to provide the State substantial discretion in the structuring and operation of its programs. See 527 U.S. at 603-606 (plurality). It does not require the State to close its institutions or find community settings for every individual regardless of her needs. Instead, Title II simply requires States "to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id*. at 607 (plurality). This requirement reflects Congress's attempt to implement the requirements of the Fourteenth Amendment, not an unconstitutional attempt to redefine them.

IV. TITLE II IS VALID COMMERCE CLAUSE LEGISLATION

Title II is also a valid exercise of Congress's authority under the Commerce Clause, a power Congress specifically invoked in enacting the ADA. See 42 U.S.C. 12101(b)(4). The Supreme Court has

> identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate * * * those activities that substantially affect interstate commerce.

United States v. *Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted). Title II is valid under the third *Lopez* category because it addresses discrimination that has a substantial effect on interstate commerce.[21]

This Court recently considered whether Congress acted within its powers under the third *Lopez* category in enacting the Fair Housing Amendments Act (FHAA), 42 U.S.C. 3604, which, like Title II, prohibits disability discrimination by public entities. In *Groome Resources Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 215-216 (5th Cir. 2000), the Court held that Congress validly prohibited disability discrimination by a parish zoning board under its power to regulate conduct with a substantial effect on interstate commerce. In so doing, the Court established the framework that must be applied in this case.

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[21] As the United States has argued to this Court in the pending case of *Meyers* v. *Texas*, No. 02-50452 (argued Mar. 12, 2003), Title II is valid legislation in some applications under the first and second *Lopez* categories as well.

"In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court" and as "elucidated in the Supreme Court's recent discussion in" *United States* v. *Morrison*, 529 U.S. 598 (2000). *Groome*, 234 F.3d at 203. The question is whether "a rational basis exist[s] for concluding that the regulated activity sufficiently affect[s] interstate commerce." *Id*. at 204 (quoting *Lopez*, 514 U.S. at 557). To answer that question, the court must consider four factors, none of which is independently determinative of Congress's power: (1) the "economic nature of the regulated activity"; (2) whether there is an express jurisdictional element; (3) the legislative basis for the enactment, including any congressional findings; and (4) the degree to which the relationship between the regulation and interstate commerce is attenuated. *Id*. at 204-205 (citing *Morrison*, 529 U.S. at 610-612).

A. Economic Nature Of Activity

Title II regulates economic conduct because (1) the activities regulated by Title II fall within economic activity, and (2) to the extent Title II regulates some activities that are not in themselves economic, the regulation of such activities is an essential part of the comprehensive scheme of economic regulation created by the ADA.

1. Title II Regulates Economic Conduct

This Court has "recognized a broad reading of commercial and economic activities under the Commerce Clause." *Groome*, 234 F.3d at 208. Title II addresses discrimination in many activities that can be easily classified as

economic, and have clear commercial counterparts whose activities frequently have a substantial effect on interstate commerce. Examples include the administration of public housing, universities, hospitals, nursing homes, recreational facilities, training programs, transportation services, and public utilities. See, e.g., *Camps Newfound/ Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 586 & n.18 (1997) (nonprofit nursing homes and hospitals can engage in activity that substantially affects interstate commerce); *Maryland* v. *Wirtz*, 392 U.S. 183, 193-195 (1968) (operation of public hospitals and schools can affect interstate commerce), overruled on other grounds, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The fact that such services are provided by a public entity does not, in itself, render them noneconomic. Cf., *e.g.*, *Garcia*, 469 U.S. at 537 (regulation not rendered beyond Commerce Clause simply because enterprise is operated by a public entity); *Wirtz*, 392 U.S. at 196-197 (same); *United States* v. *California*, 297 U.S. 175, 183-194 (1936) (same).[22]

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[22] See also *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983) (ADEA); *Fry* v. *United States*, 421 U.S. 542 (1975) (Economic Stabilization Act); *United Transp. Union* v. *Long Island R.R. Co.*, 455 U.S. 678 (1982) (Railway Labor Act); *United States* v. *California*, 297 U.S. 175, 183-184 (1936) (Safety Appliance Act); cf. *South Carolina* v. *Baker*, 485 U.S. 505, 511-513 (1988) (Tenth Amendment does not prevent Congress from regulating state bonds); see also *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003) (Title I of ADA); *Groome Resources Ltd.* v. *Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000) (FHAA).

In the context of this case, the ADA prohibits discrimination in the administration of residential programs for individuals with developmental disabilities, mainly in institutional settings, nursing homes and intermediate care facilities for the mentally retarded (ICFs/MR). In *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), the Supreme Court concluded that, in certain circumstances, the activities of nonprofit nursing homes and hospitals can fall within the scope of the Commerce Clause. See *id*. at 585-587 & n.18. Among other things, such entities "purchase goods and services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of sources, some of which are local and some out of State." *Id*. at 585-586. The same is true of the residential treatment services at issue here, some of which are provided in state nursing home and hospital-like facilities (see R-2-228-229).[23] Moreover, like private nursing homes and

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[23] For example, in both Texas and nationwide, most ICFs/MR are privately owned. See Karon & Beutel, *Intermediate Care Facilities for the Mentally Retarded: Facility and Client Characteristics, 1999* 13 (2001) (available at *http://www.chsra.wisc.edu/CHSRA/DD_QIs/facclient_char.pdf*) (Eighty-four percent of ICFs/MR are privately owned, about one-third by for-profit companies). One private, for-profit interstate provider of such services is ResCare, Inc., of Louisville, Kentucky, which reports that its 29,000 employees provide services to some "32,000 people in 32 states, Washington, D.C., Puerto Rico and Canada," including Texas. See ResCare website, *http://www.rescare.com/web/main/history.asp* (visited October 23, 2003). Providing services in community settings has the same types of connections to interstate markets. See, *e.g.*, J. Wiener, *et al.*, *Home and Community-Based Services in Seven States*, 23 Health Care Financing Review 100-105, 109 (Spring 2002) (available at *http://www.cms.hhs.gov/review/*

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hospitals, state residential care facilities for the mentally retarded combine the provision of medical services and residential housing, both of which are activities this Court has previously found can be economic under *Morrison*. See *Groome*, 234 F.3d at 208 (providing group home for Alzheimer patients involved "economic activity"); *United States* v. *Bird*, 124 F.3d 667, 682 (5th Cir. 1997) (medical services), cert. denied, 523 U.S. 1006 (1998).[24] Thus, the services at issue in this case are economic and can actively and substantially effect interstate commerce through the purchase of interstate labor, real estate and other goods.[25]

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[23](...continued)
02spring/02Springpg89.pdf).

[24] See also *Hospital Bldg. Co.* v. *Trustees of Rex Hosp.*, 425 U.S. 738, 744-745 (1976) (for-profit hospital); *Feminist Women's Health Ctr., Inc.* v. *Mohammad*, 586 F.2d 530, 539-540 (1978) (nonprofit clinic), cert. denied, 444 U.S. 924 (1979); *United States* v. *Jennings*, 195 F.3d 795, 801-802 (5th Cir. 1999) (medical office), cert. denied, 530 U.S. 1245 (2000); see also *Russell* v. *United States*, 471 U.S. 858, 862 (1985) (noting Congress's "power to regulate the class of activities that constitute the rental market for real estate").

[25] See, *e.g.*, J. Keilson, *Recruiting Human Service Employees in Good Times and Otherwise* 1, 3 (prepared for the United States Centers for Medicare & Medicaid Services) (available at *http://www.cms.hhs.gov/ promisingpractices/keilson.pdf*) (describing Massachusetts' attempts to recruit workers in competition with "nearly every private company, non-profit organization, and even other state agencies" by recruiting out-of-state and internationally).

2. Title II Is An Integral Part Of Comprehensive Scheme To Regulate Interstate Commerce

Even if Title II applies to some non-economic activities of public entities, this is not a fatal defect. "[A] complex regulatory program * * * can survive a Commerce Clause challenge without showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981); see also *Lopez*, 514 U.S. at 561 (recognizing rule); *Groome*, 234 F.3d at 210 (same). Thus, this Court has held that "[o]ne way in which the regulated activity might be economic is when * * * the intrastate activity is part of an economic regulatory scheme which could be undercut but for the particular intrastate regulation." *GDF Realty Invs., Inc.* v. *Norton*, 326 F.3d 622, 630 (5th Cir. 2003) (citing *Lopez*, 514 U.S. at 561). Under this test, "the larger regulation must be directed at activity that is economic in nature" and "the regulated intrastate activity must also be an 'essential' part of the economic regulatory scheme." *Id*. at 639. Title II regulates economic activity under this view because prohibiting discrimination in public services is essential to ensuring the full implementation of Congress's goal of removing disability discrimination from the quintessentially economic areas of employment and public accommodations.

First, Congress understood that discrimination in public services could substantially interfere with access to the opportunities for economic participation opened through Titles I and III. This case is one example. Few, if any, of the benefits of Title I or Title III are available to those whom the government has institutionalized without sufficient justification. See *Olmstead* v. *L.C.*, 527 U.S. 581, 601 (1999) ("[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including * * * work options, economic independence, educational advancement, and cultural enrichment."). Similarly, Congress had substantial evidence that barriers in public transportation would undermine the economic benefits of preventing discriminatory hiring practices or improving access to public accommodations. See, *e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 13 (1989) ("[A]ccess to transportation is the key to opening up education, employment, recreation; and other provisions of the [ADA] are meaningless unless we put together an accessible public transportation system in this country.") (testimony of Timothy Cook); National Council on the Handicapped, *On the Threshold of Independence* 63 (1988); *Spectrum* 42. In another example, discriminatory zoning practices, inaccessible sidewalks, and communications barriers with municipal utilities, tax offices and other officials all create interconnected barriers to participation in the national real estate market. Cf. *Groome*, 234 F.3d at 209-211. Accordingly, governmental discrimination interferes both with Congress's attempt to regulate economic activities directly under Titles I and III, but also Congress's attempt to achieve the broader economic

goal of increasing economic participation and self-sufficiency of individuals with disabilities.

Second, Congress could rationally conclude that permitting discrimination by public entities would, in some contexts, discourage private compliance with Title III by public accommodations. As in this case, Title II often applies to government services that have private-sector counterparts, such as housing, education, transportation, communication, recreation and health services. See 42 U.S.C. 12101(a)(3) (finding persistent discrimination in each of these areas). Requiring private entities, but not public providers of similar services, to bear the costs of accommodating individuals with disabilities would place the private providers at a competitive disadvantage and create a financial disincentive for private compliance with Title III. For example, a county-run community college that is not required to install wheelchair ramps or provide sign language interpreters would have lower operating costs than a private two-year college in the same area. The comparative burden on the private entity would likely be exacerbated by increased enrollment of students with disabilities who could not attend the public counterpart because of its inaccessibility. Private schools facing such prospects might well be discouraged from voluntary compliance with Title III, knowing that its compliance could draw more students (and expenses).

Finally, Congress understood that elimination of discrimination in employment and public accommodations required prohibiting similar discrimination by public entities which helps foster the stereotypical attitudes and

ignorance that Congress found at the core of much of the discrimination it was attempting to eradicate under Titles I and III. As the Supreme Court observed in *Olmstead*, government discrimination against individuals with disabilities, particularly unjustified institutionalization, "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." 527 U.S. at 600. Such assumptions and attitudes were at the core of much of the discrimination Congress was attempting to remove from the private sector. See, *e.g.*, 42 U.S.C. 12101(a)(7); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 30 (1990); S. Rep. No. 116, *supra*, at 7. Accordingly, Congress could rationally conclude that its regulation of discrimination in employment and public accommodations would be undermined if discrimination in public services was left unaddressed. See *Spectrum* 43. Prohibiting unwarranted institutionalization is a particularly important measure toward this end. See *ibid*.; 136 Cong. Rec. H2603 (daily ed. May 22, 1990) (statement of Rep. Collins) ("To be segregated is to be misunderstood, even feared," and "only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression.").

B. Jurisdictional Element

Like the Fair Housing Amendments Act upheld in *Groome*, Title II has no jurisdictional element. See 234 F.3d at 211. While "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce," *Morrison*, 529 U.S. at 612, it is not a necessary

requirement, especially where, as here, the effect of the regulated conduct on interstate commerce is apparent. See *Groome*, 234 F.3d at 211.

C. Congressional Findings

In enacting the ADA, Congress conducted a massive investigation into the nature and consequences of disability discrimination in America.[26] That investigation documented that disability discrimination, including discrimination in public programs, had a pervasive, negative impact on the national economy and interstate commerce.

As discussed above, Congress found persisting discrimination in a number of areas in which public entities participate in national markets along side private companies and nonprofit organizations, including housing and medical services. See 42 U.S.C. 12101(a)(3). And, as described previously, Congress also found that discrimination in public services generally had a complex, interactive effect with discrimination in the private sector. See pp. 38-42, *supra*; see also H. R. Rep. No. 485, Pt. 2, *supra*, at 37; *id*. at 84; H. R. Rep. No. 485, Pt. 3, *supra*, at 25; H. R. Rep. No. 485, Pt. 4, *supra*, at 25. The result, Congress found, was an

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[26] In addition to holding 13 committee hearings, Congress commissioned two reports by expert panels and designated a task force to hold 63 public forums across the country, from which Congress gathered statements from nearly 5,000 individuals regarding their personal experiences with disability discrimination, often at the hands of state and local governments. See 2 Leg. Hist. 1040; Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16-18 (1990). Congress also considered several reports and surveys. See S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, Pt. 2, *supra*, at 28.

interconnected web of barriers that had a substantial effect on the national economy and left America's approximately 43 million individuals with disabilities, as a group, "severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(1), (6).

Congress found, for example, that disability discrimination was "depriv[ing] our nation of a critically needed source of labor in a period where demographic and other changes in society are creating shortages of qualified applicants in many jobs." H.R. Rep. No. 485, Pt. 2, *supra*, at 44 (testimony of Attorney General Thornburgh). Data showed that two-thirds of Americans with disabilities of working age were unemployed, even though two-thirds of that group wanted a job. *Id*. at 32. Those who did work, earned about a third less than their non-disabled counterparts. *Ibid*. About half had household incomes of less than $15,000. *Ibid*. This diminished economic status combined with other discriminatory barriers to suppress economic participation as consumers.[27] See *ibid*.

Congress found that the cumulative effect of these interrelated sources of discrimination left millions in the "bondage of unjust, unwanted dependency on families, charity, and social welfare. Dependency that is a major and totally unnecessary contributor to public deficits and private expenditures." S. Rep. 116,

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[27] Polls showed that many people with disabilities "never go to a restaurant, never go to a grocery store, and never go to a church or synagogue." *Id*. at 34. A "large majority" never went to a movie or a sporting event. *Ibid*. This was due only in part to actual barriers in the places of public accommodations themselves. See *id*. at 35; S. Rep. No. 116, *supra*, at 13.

supra, at 16 (testimony of Sandy Perrino). President Bush reported that "[e]xcluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues." *Id*. at 17. Conversely, removing those impediments, Congress found, would result in "more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues." *Ibid*. (quoting testimony of Attorney General Thornburg).

In *United States* v. *Mississippi Department of Public Safety*, 321 F.3d 495 (5th Cir. 2003), this Court reviewed these congressional findings and legislative history and observed that they "ably demonstrate that Congress realized the effect that disability discrimination was having (and would continue to have) on interstate commerce in the absence of the ADA." 321 F.3d at 501. See also *Katzenbach* v. *McClung*, 379 U.S. 294, 299-300 (1964).

D. Attenuation

The connection between disability discrimination and interstate commerce documented by Congress in enacting the ADA is not unduly attenuated. This Court recently held that the requirements of Title I had a self-evident connection to interstate commerce. See *Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 499-501 (5th Cir. 2003). So does discrimination in public accommodations, which is addressed by Title III. Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964) (public accommodations provision of Civil Rights Act of

1964). So, too, one need not "pile inference upon inference" to determine that interstate commerce is affected by the discrimination prohibited by Title II. In many applications, Title II regulates public entities' participation in commercial activities that are part of a national market, as in the case of discrimination in public housing, universities, hospitals, nursing homes, recreational facilities, training programs, transportation services, and public utilities. Cf. *Lopez*, 514 U.S. at 574 (Kennedy, J.) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."). In other applications, Title II prevents discrimination in government regulation of interstate commercial activities, as in the case of licensing and zoning practices. In this case, the connection is apparent – institutionalization of individuals with disabilities directly inhibits their participation in national markets as employees and consumers. Finally, even at its most attenuated, the requirements of Title II are clearly directed at removing barriers that impose direct and substantial impediments to persons with disabilities' participation in traditional economic activities as workers and consumers.

V. TITLE II DOES NOT VIOLATE THE TENTH AMENDMENT

This use of Congress's Commerce Clause authority does not violate the Tenth Amendment. See *Reno* v. *Condon*, 528 U.S. 141, 150-151 (2000). The State argues (Br. 27) that Title II violates the Tenth Amendment "by directly regulating the States, in their sovereign capacities." But the Supreme Court has, in limited circumstances, rejected the assertion that Congress may not use its Commerce Clause power to regulate States "in their sovereign capacities," and has approved the use of the Commerce Clause to enact civil rights legislation and extend that legislation to state governments.[28]

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[28] For example, in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 78 (2000), the Supreme Court held that while extending the ADEA to States was not within Congress's power to enforce the Fourteenth Amendment, it did "constitute[] a valid exercise of Congress's power '[t]o regulate Commerce . . . among the several States,' Art. I, § 8, cl. 3," and "did not transgress any external restraints imposed on the commerce power by the Tenth Amendment." Similarly, in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the Supreme Court suggested, and this Court recently held, that extending Title I of the ADA to state employers was a valid exercise of Congress's Commerce Clause authority. See *id.* at 374 n.9; *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495 (5th Cir. 2003). The Supreme Court has also applied other Commerce Clause legislation to state operations, despite claims that doing so violated principles of federalism or the Tenth Amendment. See, *e.g.*, *Reno* v. *Condon*, 528 U.S. 141, 150-151 (2000) (Driver's Privation Protection Act of 1994 applied to state agency); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (minimum wage standards applied to state employers); see also *Groome Res. Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 215-216 (5th Cir. 2000) (FHAA applied to government zoning board).

Although the State does not cite *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), its assertion that Congress may not regulate States as States harkens back to the legal standard enunciated by that case. That case, of course, was overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court upheld Congress's authority to regulate the wages of state government workers, even though this measure was one "directly regulating the States" (Br. 27). In any case, even *National League of Cities* did not preclude Congress from ever applying Commerce Clause legislation to a State. In *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), the Court applied *National League of Cities* to Congress's attempt to use its Commerce Clause authority to prohibit age discrimination in state employment. The Court explained that regulating "States as States" was simply one of *three* necessary conditions for finding a Tenth Amendment violation.[29] The Court in *Wyoming* concluded that under these standards, prohibiting age discrimination in state employment did not violate the Tenth Amendment. *Id*. at 239-242. Because the ADEA required the State to "achieve its goals in a more individualized and careful manner" but did not require the State to abandon those goals, "the degree of federal intrusion * * * is sufficiently less serious than it was in *National League of Cities* so as to make it

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[29] The other two were: "Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional government functions.'" *Id*. at 237 (citations omitted).

unnecessary for us to override Congress's express choice to extend its regulatory authority to the States." *Id*. at 239-240.

The State further suggests (Br. 27) that Title II violates the Tenth Amendment because it "fall[s] outside the category of permissible, 'generally applicable' laws whose effect on States is incidental." The only authority the State cites for this alleged requirement is *Condon*, 528 U.S. at 150-151, and *Garcia*, 469 U.S. at 554. But neither case directly supports that assertion. *Condon* specifically declined to decide whether there is any such Tenth Amendment requirement, see 528 U.S. at 151, and *Garcia* simply observed that the regulation it was upholding applied to both state and private employers, 469 U.S. at 554. In any case, Title II is at least as generally applicable as the statute the Supreme Court upheld against Tenth Amendment challenge in *Condon*. In that case, the Supreme Court held that the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721 *et seq*., was "generally applicable" because it imposed related requirements to both state and private entities, even though those requirements were substantively quite different and imposed through separate statutory provisions.[30] Even more so than the DPPA, the ADA is "generally applicable" because it imposes comparable

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[30] Section 2721(a) of the Act applies solely to state agencies and employees, regulating their ability to disclose protected personal information obtained by the state department of motor vehicles. When disclosures are allowed, the recipients of that information, which may include private entities, are prohibited by Section 2721(c) from selling or disclosing that information to other parties, except as provided by the Act.

requirements on both public and private entities. See generally Title II, 42 U.S.C. 12131-12165 (public entities); Title III, 42 U.S.C. 12181-12189 (public accommodations). This is particularly true as the Act applies to this case, because the ADA regulations require both public and private entities to serve individuals with disabilities in the most integrated setting appropriate to their needs. See 28 C.F.R. 35.130(d) (public entities); 28 C.F.R. 36.203 (public accommodations); 42 U.S.C. 12182(b)(1)(B) (same).

Nor does the surcharge regulation violate the Tenth Amendment principles of *New York* v. *United States*, 505 U.S. 144 (1992), or *Printz* v. *United States*, 521 U.S. 898 (1997), as suggested by the State (Br. 27-28). *New York* and *Printz* quite properly prevent Congress from "commandeer[ing] the state legislative process by requiring a state legislature to enact a particular kind of law" or "conscripting the States' officers directly." *Condon*, 528 U.S. at 149 (upholding federal statute that regulates a State's dissemination of certain personal driver information). In *Condon*, the Supreme Court found that neither principle prohibits Congress from enacting a law that simply "regulate[s] a state activity," rather than "seek[ing] to control or influence the manner in which States regulate private parties." *Id*. at 150. While it is true that the ADA affects "the manner in which the States govern" (Br. 27), "[s]uch 'commandeering,' is * * * an inevitable consequence of regulating a state activity. * * * That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional

defect." *Condon*, 528 U.S. at 150-151 (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988)).

VI. SECTION 504 IS VALID SPENDING CLAUSE LEGISLATION

The State also argues (Br. 28) that Plaintiffs' *Ex parte Young* claims to enforce Section 504 must fail because Section 504 is not valid legislation under the Spending Clause. In particular, the State argues (Br. 29-31) that Section 504 violates the "relatedness" requirement of *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987), because it prohibits discrimination by an agency that receives any federal funding, rather than being limited to agencies that receive funding directly under the Rehabilitation Act itself. As argued above, the constitutionality of Section 504 is not relevant to the State's assertion of sovereign immunity in a suit proceeding under *Ex parte Young*. The State's constitutional challenge, therefore, is not properly before this Court in this interlocutory appeal. The State's argument is also meritless, as the United States has argued in a number of other cases presently pending before this Court, including *Miller* v. *Texas Tech University*, No. 02-10190, which is being heard en banc. We do not, therefore, undertake to repeat our arguments on this issue again in this case.[31]

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[31] *Miller* is one of three cases being heard by the Court en banc to determine whether a State that accepts federal funds waives its sovereign immunity to claims under Section 504. See also *Johnson* v. *Louisiana Dep't of Educ.*, No. 02-30318; *Pace* v. *Bogalusa City Sch. Dist.*, No. 01-31026. If this Court holds that acceptance of federal funds constitutes a waiver of sovereign immunity to Section 504 claims, the Eleventh Amendment will pose no bar to Plaintiffs' Section 504

(continued...)

CONCLUSION

The district court's denial of the State's motion to dismiss Plaintiffs' Title II and Section 504 claims on sovereign immunity grounds should be affirmed.

Respectfully submitted,

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[31](...continued)
claims in this case even if *Ex parte Young* did not properly apply.

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 13,020 words.
2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

_____
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CERTIFICATE OF SERVICE

I certify that two copies of the above Brief of the United States as Intervenor, along with a computer disk containing an electronic version of the brief, were served by first class mail, postage prepaid, on October 24, 2003, on the following parties:

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