No. 02-50452

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARJORIE MEYERS, by Next Friend Edgar C. Benzing, on behalf of herself and all others similarly situated; HELEN ELKIN, on behalf of herself and all others similarly situated; RUTH H. DAVIS, on behalf of herself and all others similarly situated; PHILLIP GREENBERG, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Intervenor

v.

STATE OF TEXAS; TEXAS DEPARTMENT OF TRANSPORTATION; WILLIAM G. BURNETT, Executive Director of the Texas Department of Transportation,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

This Court heard oral argument on March 12, 2003.

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JURISDICTIONAL STATEMENT

Plaintiff filed this case alleging violations of, among other statutes, Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*. The district court had jurisdiction pursuant to 28 U.S.C. 1331. On April 16, 2001, the district court dismissed Plaintiffs' complaint as barred by the State's Eleventh Amendment immunity. On April 20, 2002, Plaintiffs filed a motion to alter or amend the judgment. The district court denied that motion on March 12, 2002. Plaintiffs

then filed a timely notice of appeal on April 5, 2003. 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 issues:

1. 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.

2. Whether this Court should decide the constitutionality of Title II, or the validity of its implementing regulation, 28 C.F.R. 35.130(f), in this appeal when the district court has not yet determined whether Plaintiffs have stated a claim under the challenged provisions.

3. Whether 28 C.F.R. 35.130(f) is a reasonable and valid regulation to implement Title II.

4. Whether Title II is valid legislation to enforce the Fourteenth Amendment.

5. Whether Title II, or as authoritatively interpreted by 28 C.F.R. 35.130(f) and applied to this case, is valid Commerce Clause legislation consistent with the Tenth Amendment.

STATEMENT OF THE CASE

1. 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, and costs the United States billions of dollars in unnecessary expenses

resulting from dependency and nonproductivity." 42 U.S.C. 12101(a)(9).[1] 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 and to regulate commerce" 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.

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[1] This finding was based, in part, on evidence that some 43 million Americans have disabilities and that barriers to social and economic integration have left millions of these individuals in "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. No. 116, 101st Cong., 1st Sess. 16 (1989) (citation omitted). President Bush reported that "current spending on disability benefits and programs exceeds $60 billion annually. Excluding 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. Attorney General Thornburg similarly testified that removing those impediments 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." S. Rep. No. 116, *supra* at 17.

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.

2. 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. These regulations require, among other things, that public entities provide handicap accessible parking in certain circumstances.[2] The Attorney General also promulgated a "surcharge regulation" which provides that a "public entity may not place a surcharge on a particular individual with a disability * * * to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." 28 C.F.R.

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[2] In particular, the regulations require that newly constructed or altered facilities be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.151(a), (b). This requirement is met by compliance with federal architectural standards. See 28 C.F.R. 35.151(c), 36.406. Public entities may comply with either the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), 28 C.F.R. Pt. 36, App. A, or the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. Pt. 101, App. A. See 28 C.F.R. 35.151(c). Those standards require a certain number of accessible parking spaces "designated as reserved by a sign showing the symbol of accessibility." ADAAG § 4.6.4; see also UFAS § 4.6.4 (same). Accessible parking must also be provided in the existing facilities of public entities when necessary to assure that programs, services, and activities of a public entity are generally accessible to people with disabilities. See 28 C.F.R. 35.150. Public accommodations have similar obligations. See 28 C.F.R. 36.401(a), (c)(1), 36.402(a), 36.406(a); ADAAG §4.6.4.

35.130(f). See also 28 C.F.R. 36.301(c) (same for public accommodations). This provision applies to the broad range of accessibility requirements and modifications required by the Act, prohibiting surcharges for such things as the use of an elevator or ramp, voting assistance for the blind, or the services of an interpreter for the deaf in court proceedings.

3. Texas, like most States, has chosen to implement its obligations with respect to accessible parking under Title II, and to facilitate Texas public accommodations' compliance with Title III, by providing persons with disabilities special license plates that allow a vehicle to park in designated accessible parking spaces. See Tex. Transp. Code Ann. §§ 502.253, 681.006, 681.009.[3] The State charges no more for a handicap license plate than it charges for ordinary license plates. See *id*. § 502.253(d). The State also provides portable parking placards, which can be moved from one vehicle to another, and provide the same right to use designated handicap parking spaces. See *id*. § 681.002. However, the State imposes a five dollar charge for the placards, which must be renewed every four years. *Id*. § 681.003, 681.004.

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[3] To comply with its obligation to provide access to non-residents, the State also recognizes handicapped license plates and placards issued by other states and countries. See Tex. Transp. Code Ann. § 681.007. Similar laws in other states rely on Texas's issuance of license plates and placards to Texas citizens who travel to other states. See, *e.g.*, Ark. Stat. § 27-15-312; La. Rev. Stat. § 40:1742(d)(6); Pub. L. No. 100-641, 102 Stat. 3335 (Nov. 9, 1988) (establishing federal program to encourage states to participate in a "uniform system for handicapped parking").

4. Plaintiffs filed this action alleging that the five dollar fee for parking placards violated the surcharge regulation. Plaintiffs sought declaratory, injunctive and monetary relief, and named the State and the Director of its Department of Transportation as defendants (see R-35-1-2).[4] The State moved to dismiss the case on the grounds that Plaintiffs' claims were barred by the Eleventh Amendment and that the State's placard fee did not violate Title II or the surcharge regulation.

The district court dismissed Plaintiffs' suit, explaining its decision in a pair of opinions. In its April 16, 2001 order, the district court concluded (R-35-3) that "[b]efore addressing the merits of plaintiffs' claim, the Court must address whether the ADA validly applies to the States in light of the Supreme Court's recent decision" in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). The district court described (*ibid.*) that in *Garrett*, the Supreme Court had "held that Title I of the Americans with Disabilities Act does not validly abrogate the state's sovereign immunity based on the Eleventh Amendment." The court then observed (*id.* at 4) that this Court in *Neinast* v. *Texas*, 217 F.3d 275 (2000), cert. denied, 531 U.S. 1190 (2001), had recently held that "the regulation prohibiting the State from imposing the handicapped parking placard fee did not validly abrogate the State's Eleventh Amendment immunity." The district court concluded (*id.* at 5), based on these precedents, that "the ADA has serious 'constitutional shortcomings' with

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[4] References to "R-__-__" refer to the docket number and page number or range of a document in the district court record.

regard to the valid exercise of congressional power, and thus holds that the ADA is invalid as applied to the State in this case" (citation omitted).

Plaintiffs filed a motion to alter or amend the judgment, arguing (R-37) that even if Congress lacked the authority to validly abrogate the State's immunity to ADA claims, the Eleventh Amendment did not bar their request for declaratory and injunctive relief against the Secretary for the Texas Department of Transportation in his official capacity. The district court denied the motion (R-41), relying in large part on the recent authority of *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001). The district court read (R-41-3) that case to hold

> (1) the exception to Eleventh Amendment immunity created by *Ex parte Young* [209 U.S. 123 (1908)] was not available to plaintiffs even if the original complaint named individual state officials; and (2) Title II of the ADA was not a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment, and therefore did not abrogate the state's sovereign immunity under the Eleventh Amendment.

The court concluded (*ibid.*) that in "light of this clear Circuit precedent, the Court stands by its ruling * * * that Title II of the ADA has 'serious constitutional shortcomings' and is invalid as applied to the state in this case."

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to Plaintiffs' suit for injunctive relief against state officials to enforce the requirements of Title II of the ADA. The district court's reliance on this Court's decision in *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), to reach the contrary conclusion was misplaced. *Reickenbacker* simply held that the plaintiffs *in that case*, could not seek relief under *Ex parte Young*, 209 U.S. 123 (1908), because they had dismissed their claims against the state officials, who are the only appropriate defendants for an *Ex parte Young* claim.

The State raises a number of alternative grounds for concluding that Plaintiffs cannot rely on *Ex parte Young*, but none of them has merit. The Supreme Court has recently, and repeatedly, reaffirmed the validity of *Ex parte Young* as a device for enforcing federal law consistent with principles of federalism and sovereign immunity. The Court has also long made clear that such suits may proceed against state officials even when the legal obligations are imposed on the State or a state agency, and do not mention state officials. Indeed, *Ex parte Young* itself allowed an individual to sue a state official in his official capacity to enforce the obligations the Fourteenth Amendment imposes on a "State." Moreover, there is no basis for the State's assertion that Congress intended to preclude suits to enforce the regulations promulgated to enforce Title II. As a general rule, when Congress authorizes a suit to enforce a statute, it necessarily authorizes suits to enforce the statute as authoritatively interpreted by

valid implementing regulations. There is no reason to believe that Congress intended the ADA to be an exception to that rule. Instead, the text, context and purposes of the ADA strongly support the conclusion that Congress intended that the regulations it required the Attorney General to issue would be applied by the courts in private actions under Title II.

Thus, Plaintiffs have validly invoked the *Ex parte Young* exception to Eleventh Amendment immunity. The district court erred in reaching a contrary conclusion and dismissing Plaintiffs' complaint. This Court should resist the State's invitation to go further and decide whether the surcharge regulation is valid or, more broadly, whether Title II is a constitutional exercise of Congress's Fourteenth Amendment authority or Commerce Clause power consistent with the Tenth Amendment. The district court did not decide these questions, and, for the most part, it appears that the State did not present its current constitutional arguments below. More importantly, the district court has not yet ruled on the State's assertion that Plaintiffs' have failed to state a claim under the provisions the State now challenges in this court. A ruling on that statutory ground may well obviate the need to decide the State's constitutional challenges, for it appears that Texas's practice of charging fees for placards but not for license plates does not violate Title II or the surcharge regulation. If Title II does not, in fact, require Texas to provide parking placards in addition to license plates, or prohibit charging fees for placards, then deciding whether Congress *could have* required Texas to provide placards free of any surcharge would render an advisory opinion

on a purely hypothetical question. Nor is this Court required to engage in such speculation in order to assure itself of its subject matter jurisdiction. A court is not required to adjudicate the merits of a plaintiff's *Ex parte Young* claim, or determine the validity of the underlying federal statute, in order to establish that it has jurisdiction to hear the case. Accordingly, this Court should vacate the district court's dismissal and remand the case with instructions to consider the State's motion to dismiss on the merits before ruling on the validity of Title II or its regulations.

If this Court reaches the State's challenges to the validity of Title II and the federal surcharge regulation, it should reject them. The federal regulation is a reasonable implementation of the requirements of Title II, preventing individuals with disabilities from being effectively precluded from the benefits Congress envisioned by the cumulative effect of repeated fees for accommodations many individuals with disabilities need on a daily basis. Moreover, as held open by this Court in *Reickenbacker*, 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. Title II's prohibition against disability discrimination by public entities is a proportional and congruent response to that overall record.

As applied to this case, the requirements of Title II is also a valid exercise of Congress's power under the Commerce Clause, as a means of removing obstructions to the uses of the channels and instrumentalities of commerce. Congress understood that a lack of accessible parking at the facilities of public entities and public accommodations posed a substantial barrier to individuals with disabilities' use of their vehicles and travel in interstate commerce. Congress could, consistent with its powers over the channels and instrumentalities of commerce, remove those barriers by requiring public entities to provide accessible parking and by prohibiting them from placing surcharges that would discourage the use of that accommodation. Finally, 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.

ARGUMENT

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

The Eleventh Amendment bars private actions 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 well-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).

The district court wrongly concluded that this Court's decision in *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), precluded *Ex parte Young* suits to enforce the ADA.[5] Indeed, this Court's decision instructed exactly the opposite, observing that "[s]overeign immunity can be waived, of course, and it is no bar to suits for injunctive relief against state officials." *Id*. at 976 (citing, among other cases, *Ex parte Young*, 209 U.S. at 159-160). Such injunctive relief was not available in *Reickenbacker*, however, because the plaintiffs were not seeking injunctive relief against state officials – they had "amended their complaint to remove state officials as defendants." *Id*. at 976-977 n.9. Thus, this

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[5] The district court also held (R-35-5-6) that the State had not waived its sovereign immunity by removing this case to federal court. The United States takes no position on Plaintiffs' challenge to that holding in this appeal.

Court simply held that "the *Ex parte Young* exception is unavailable *in the case now before us*." *Ibid*. (emphasis added).

The State makes little effort to defend the district court's interpretation of *Reickenbacker*, but instead asserts a variety of alternative grounds for holding that plaintiffs may not bring *Ex parte Young* suits to enforce the requirements of Title II. None has any merit.

A. *Ex parte Young* Suits Are Not Limited To Enforcement Of Fourteenth Amendment Legislation

The State first makes the broad assertion (Br. 19-24) that *Ex parte Young* suits may no longer be brought to enforce a statute unless Congress could have abrogated the State's immunity to private suits under that Act. This caveat would render *Ex parte Young* largely meaningless, since, as discussed below, the *Ex parte Young* device was established precisely to permit enforcement of federal law when sovereign immunity would bar a suit directly against a State. There is no basis for effectively overruling a precedent that has been consistently adhered to for almost 100 years.

The Eleventh Amendment provides immunity from suit, not an exemption from the otherwise constitutional requirements of federal law. See *Alden* v. *Maine*, 527 U.S. 706, 754-755 (1999) ("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."). The Supreme Court has recognized the tension between a State's interest in avoiding suit absent its

consent or a valid abrogation of its sovereign immunity, on the one hand, and the need to ensure compliance with federal law on the other. See, *e.g.*, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105-106 (1984). The Supreme Court has resolved this tension by striking a balance that permits suits against state officials in their official capacities for prospective relief from ongoing violations of federal law, but prohibiting such suits for retrospective relief, such as damages. As then-Justice Rehnquist explained in *Green* v. *Mansour*, 474 U.S. 64 (1985):

> 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. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Id. at 68 (citations omitted).

Accordingly, the Supreme Court has permitted *Ex parte Young* suits to enforce federal law regardless of whether Congress could have abrogated the State's immunity to such claims through an exercise of its Section 5 authority. See, *e.g.*, *Verizon Maryland, Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) (enforcement of federal Telecommunications Act of 1996); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 92, 96 & n.14 (1983) (challenge to state statutes as pre-empted by Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*); *Quern* v. *Jordan*, 440 U.S. 332, 333-334 (1979) (enforcement of federal welfare statute).

The Supreme Court's recent federalism cases have not altered this balance. One such case was *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997), in which the Court resolved a dispute over the proper scope and application of the *Ex parte Young* doctrine. The Court specifically rejected the suggestion that *Ex parte Young* was no longer available to enforce federal rights against state officials in their official capacity. The Court explained that the "*Young* exception to sovereign immunity was an important part of our jurisprudence" when it decided *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). "We do not, then, question the continuing validity of the *Ex parte Young* doctrine."[6] *Ibid.* Indeed, even as the Court has applied *Seminole Tribe*, it has repeatedly emphasized the continuing availability of *Ex parte Young* suits as a method of enforcing obligations that cannot be the basis of a valid abrogation of state sovereign

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[6] In *Coeur d'Alene*, the majority of the Court also turned back an attempt to substantially revise the *Ex parte Young* doctrine in light of the Court's recent federalism cases. Justice Kennedy, joined only by the Chief Justice, argued that respect for Eleventh Amendment principles required a case-by-case consideration of whether the State's sovereignty interests outweighed the need to enforce federal law. See 521 U.S. at 272-280. The rest of the Court, however, rejected this view. Writing for herself and Justices Scalia and Thomas, Justice O'Connor recognized that "[e]very *Young* suit names public officials, and we have never doubted the importance of state interests in cases falling squarely within our past interpretations of the *Young* doctrine." *Id.* at 296 (concurring in part and concurring in the judgment). Her opinion reaffirmed the "basic principle of federal law" that when "a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar," *id.* at 293, a position with which the four dissenting justices agreed, see *id.* at 298 (Souter, J., dissenting).

immunity. Thus, in *Alden* v. *Maine*, 572 U.S. 706 (1999), the Supreme Court held that Congress could not abrogate a State's sovereign immunity in state court to claims under the Fair Labor Standards Act, 28 U.S.C. 201 *et seq*.. The Court recognized, however, that even though Congress lacked the power to abrogate the State's immunity, this did not "bar all judicial review of state compliance with the Constitution and valid federal law." 527 U.S. at 755. Citing *Ex parte Young*, the Court reaffirmed that the Eleventh Amendment "does not bar certain actions against state officers for injunctive or declaratory relief." *Id*. at 757. Permitting such suits "strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Ibid*.

Similarly, in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the Court explained that its 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. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced * * * by private individuals in actions for injunctive relief under *Ex parte Young*.

Id. at 374 n.9 (citation omitted). In *Reickenbacker*, this Court reached the same conclusion, recognizing that the Eleventh Amendment "is no bar to suits for injunctive relief against state officials" under the ADA. 274 F.3d at 976.

The State argues (Br. 19-21) that this Court's statement in *Reickenbacker* and the Supreme Court's instruction in *Alden* and *Garrett* were dicta that fail to

account for the trend in the Court's recent federalism jurisprudence. But the State's suggestion that the Supreme Court has misunderstood the import of its own cases is both implausible and, for this Court, irrelevant. The statements in *Garrett* and *Reickenbacker* simply apply principles that have been settled for nearly 100 years. This Court may not conclude that that authority has been overruled *sub silentio* based on the State's interpretation of the general gist of the Supreme Court's federalism cases. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (lower courts are not to "conclude our more recent cases have, by implication, overruled an earlier precedent").

In any event, the State's theory is incompatible with the *holding* of *Verizon Maryland, Inc.* v. *Public Service Commission*, 535 U.S. 635 (2002). In that case, the Court considered whether plaintiffs could sue state officials in their official capacities for prospective relief to enforce the Telecommunications Act of 1996. See 535 U.S. at 638. No one urged that Congress had, or could have, abrogated the State's immunity to claims under the Act. In fact, Congress clearly lacked such power, since the Telecommunications Act is solely Commerce Clause legislation. See *Seminole Tribe*, 517 U.S. at 72-73. Nonetheless, the Court held that the plaintiffs' claims fell squarely within the *Ex parte Young* exception to Eleventh Amendment immunity. "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*,

535 U.S. at 645 (citation omitted). Concluding that the plaintiffs alleged an ongoing violation of the Telecommunications Act, the Court held that the Eleventh Amendment was no bar to the suit. *Id*. at 648.[7]

B. Congress Did Not Preclude Suits Against State Officials In Their Official Capacities To Enforce Title II

The State also asserts that an *Ex parte Young* suit to enforce the requirements of Title II is unavailable because: (1) Congress authorized suits only against public entities, not against public officials; and (2) Congress did not intend to provide *any* remedy for violations of the regulations promulgated to implement Title II. Neither argument has any merit.

1. Suits Against State Officials In Their Official Capacities To Enjoin Violations Of Title II Are Suits Against Public Entities For Purposes of Title II, But Are Not Suits Against The State For Purposes Of The Eleventh Amendment

Relying on the Seventh Circuit's decision in *Walker* v. *Snyder*, 213 F.3d 344, 346-347 (2000), the State asserts (Br. 25-30) 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. 26) 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." Again, 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

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[7] This Court reached the same conclusion in *AT&T Communications* v. *BellSouth Telecommunications Inc.*, 238 F.3d 636, 647-649 (5th Cir. 2001).

the Court's on-point instruction in *Garrett*,[8] and overrule scores of cases, including *Ex parte Young* itself.[9]

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, 395-396 (6th Cir. 2002) (citations

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[8] 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*, 274 F.3d at 976 (same).

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

omitted). Thus, contrary to the Seventh Circuit's apparent holding in *Walker*,[10] 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 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 (1985) (citations omitted); see also *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991). Thus, 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* approved the use of *Ex parte Young* to enforce provisions of the Telecommunications Act of 1996, which

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[10] The Seventh Circuit in subsequent cases 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).

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. 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[11] and Section 504.[12] By incorporating the "remedies, 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

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[11] 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. *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.").

[12] 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).

existing judicial interpretations when it adopts a preexisting remedial scheme); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) (same).

The State responds (Br. 28-29) that these cases rest on "mutually exclusive fictions," 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); *Coeur d'Alene*, 521 U.S. at 293 (plurality opinion); *Green,* 474 U.S. at 68; *Brennan* v. *Stewart*, 834 F.2d 1248, 1252-1253 (5th Cir. 1988).

2. Congress Did Not Intend To Preclude Suits To Enforce The Requirements Of Title II As Interpreted By The Implementing Regulations

The State next argues (Br. 30-33) that even if Congress intended to permit suits against state officials to enforce Title II, it did *not* intend for those suits to enforce requirements elaborated in the Title II regulations. In particular, the State insists (Br. 31-32) that by failing to *specifically* mention the implementing regulations in the Title II enforcement provision, 42 U.S.C. 12133, Congress made

clear its intent to preclude enforcement of obligations detailed in the regulations. This argument fails for two reasons.

First, Congress did not need to specifically mention the implementing regulations. As Justice Scalia recently explained in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), "regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced though a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id*. at 284 (citations omitted).[13] Accordingly, the State's attempt to distinguish Congress's intent to authorize enforcement of the regulations from its intent to authorize enforcement of Title II is without merit.

Second, even if such a distinction were meaningful, the text, history and purposes of the statute demonstrate that Congress intended to authorize suits based on the regulations' authoritative interpretation of Title II. Although Congress did not specifically mention enforcement of regulations in the Title II enforcement provision, it did provide that the "remedies * * * set forth in" Section 504 would

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[13] The regulation in *Sandoval*, however, presented a unique problem that is not encountered in an ordinary case such as this. Prior precedent required the Court to assume that a Title VI regulation regarding disparate impact was valid, even though the regulation prohibited conduct that the statute specifically permits. See 532 U.S. at 285-286. That strange circumstance is not present in this case, since none of the parties claim that the surcharge regulation may validly prohibit something that is permitted by Title II.

be the remedies available under Title II. See 42 U.S.C. 12133. At the time Congress enacted this provision, the courts were consistently relying on the Section 504 regulations in private enforcement actions under that statute. See, *e.g.*, *School Bd. of Nassau Co.* v. *Arline*, 480 U.S. 273, 279-281 (1987); *Alexander* v. *Choate*, 469 U.S. 287, 299, 305 (1985). Accordingly, when Congress adopted the "remedies * * * set forth in" Section 504, it understood that this included the remedy of private suits to enforce regulatory interpretations of the statute.

This conclusion is further bolstered by Congress's specific instruction that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [Section 504] *or the regulations* issued by Federal agencies pursuant to such title." 42 U.S.C. 12201(a) (emphasis added). Congress required that those same Section 504 regulations be the basis of the Attorney General's regulations implementing Title II. See 42 U.S.C. 12134. It is implausible to suggest that Congress intended the Courts to give effect to the requirements of the Section 504 regulations, yet ignore the regulations specifically promulgated for Title II based on those prior standards.

It is not surprising, therefore, that the Supreme Court and this Court have repeatedly applied Title II regulations in private enforcement actions. See, *e.g.*, *Olmstead* v. *Zimring*, 527 U.S. 581, 597-598 (1999); *Hainze* v. *Richards*, 207 F.3d 795, 802 (5th Cir. 2000); *Lightbourn* v. *County of El Paso*, 118 F.3d 421, 432 (5th Cir. 1997), cert. denied, 522 U.S. 1052 (1998).

II. THIS COURT NEED NOT, AND SHOULD NOT, CONSIDER THE STATE'S CHALLENGES TO THE VALIDITY OF THE SURCHARGE REGULATION IN THIS APPEAL

For the above reasons, the Eleventh Amendment does not bar Plaintiffs' suit to enforce the requirements of Title II against state officials under *Ex parte Young*. The State asserts (Br. 34 n.20) that even if Plaintiffs could sue to enforce the surcharge regulation, the State's five dollar fee for placards did not violate that provision. However, for the purposes of this appeal, the State specifically disavows (Br. 24 n.20) reliance on that limited alternative ground for affirming the district court's dismissal. Instead the State now asks this Court to hold that the surcharge regulation is invalid and that Title II is unconstitutional under the Commerce Clause and the Tenth Amendment (see Br. 34-49). These arguments have, at best, received cursory presentation and review in the lower court. Moreover, resolution of the State's constitutional challenge to Title II may be avoided by first deciding whether the Plaintiffs have stated a valid claim under the statute. Accordingly, consistent with fundamental principles of judicial restraint, this Court should remand this case to the district court for a determination of whether Plaintiffs state a claim under Title II.

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 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 664, 669 (5th Cir. 1983).

This fundamental rule of judicial restraint does not, of course, apply to issues that must be resolved to establish the court's subject matter jurisdiction. See *United States* v. *Texas Tech Univ.*, 171 F.3d 279, 285-286 & n.9 (5th Cir. 1999). The State appears to suggest (Br. 33, 34 n.20) that the court's subject matter jurisdiction in this case depends on the validity of Title II and its surcharge regulation. In particular, the State asserts (Br. 18) that Plaintiffs may rely on the *Ex parte Young* exception to Eleventh Amendment immunity only if they seek enforcement of a *valid* requirement of federal law. Absent a valid legal requirement, the reasoning goes, there can be no *Ex parte Young* exception and, therefore, the Eleventh Amendment deprives the court of subject matter jurisdiction over the claim.

This argument is mistaken. 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 Maryland, Inc.* v. *Public Service 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 proof. But these failures do not deprive the court of jurisdiction to consider the claim. See *Brennan* v. *Stewart*, 834 F.2d 1248, 1255 (5th Cir. 1988). 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.

Accordingly, this Court is not required by jurisdictional constraints to address the State's challenges to the validity of Title II. Instead, this Court must be guided by ordinary principles of avoiding unnecessary decisions on constitutional questions. Those principles require postponement of any consideration of the State's broad attacks on Title II unless and until it is established that Plaintiffs have stated a claim under the provisions the State urges this Court to strike down. See, *e.g.*, *White*, 646 F.2d at 206. Application of those principles is particularly appropriate in this case for several reasons.

First, there is a real possibility that the district court could resolve the case on narrower grounds by deciding that the State's placard fee does not violate the surcharge regulation. That inquiry turns upon whether parking placards for disabled persons are "required to provide that individual or group with the nondiscriminatory treatment required by the [ADA]," within the meaning of the regulation. See 28 C.F.R. 35.130(f). Although the Department of Justice has not yet formulated a final position on the question, our initial review indicates that the State's parking placard fee does not violate the regulation. That is because such placards generally are not "required" to provide nondiscriminatory access to buildings or facilities when a State already provides such access for people with disabilities by offering handicap license plates at no additional charge. The placard fee here thus could be understood as a fee for an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the ADA. 28 C.F.R. 35.130(f). The license plate alone may provide

the access "required to provide * * * the nondiscriminatory treatment required by the Act." *Ibid.*

Second, deciding the merits question first is particularly appropriate here because applying the relevant constitutional tests necessarily requires an interpretation of the federal provisions. For example, deciding whether the surcharge regulation is "congruent and proportional" necessarily requires understanding what the regulation, in fact, requires. See, *e.g.*, *University of Alabama* v. *Garrett*, 531 U.S. 356, 372-373 (2001) (discussing requirements of Title I in applying the Section 5 analysis). Similarly, deciding whether the conduct regulated by the surcharge regulation "substantially affects" interstate commerce or otherwise falls within Congress's Commerce Clause authority requires knowing what conduct the regulation actually prohibits. If, in the course of the constitutional analysis, the court determined that Congress did not actually prohibit charging fees for parking placards, it would be wholly inappropriate for the court to go on to consider whether Congress *could have* enacted such a requirement or whether the surcharge regulation would be constitutional in other situations not presented by this case.[14] Thus, deciding the validity of the surcharge

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[14] For example, it would also be inappropriate for this Court to speculate whether the regulation could validly apply to prohibit a State from charging blind voters for the assistance they require to cast a ballot, or charging a fee from a litigant who uses a wheelchair ramp to enter a courthouse, or requiring an indigent deaf criminal defendant to pay for the services of an interpreter to enable him to effectively participate in his own defense at trial.

regulation before deciding whether it even applies to this case presents a significant and wholly unnecessary risk that the Court will render advisory opinions on hypothetical questions.

Third, the State urges this court to hold Title II and the surcharge regulation invalid on grounds that it appears were, for the most part, neither passed upon nor pressed below.[15] In this Court, the State argues (Br. 33-35) that the surcharge regulation is invalid under *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and unconstitutional under the Commerce Clause and Tenth Amendment (see Br. 35-49). It appears, however, that in the district court the State simply argued, and the district court may have accepted (see R-35-5),[16] that this Court had previously held the surcharge regulation unconstitutional and unenforceable against the States in *Neinast* v. *Texas*, 217 F.3d 275 (2000), cert. denied 531 U.S. 1190 (2001), and *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001), neither of which applied *Chevron* or considered the Commerce Clause or the Tenth Amendment. Whether the State made the argument or not, the district court clearly did not decide whether the surcharge regulation was valid under

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[15] The United States has not had access to all the pleadings in the lower court.

[16] It is not clear whether the district court concluded that the substantive provisions of Title II and/or the surcharge regulation are unconstitutional, or that Plaintiffs' claims were simply barred by the Eleventh Amendment. Compare (R-35-5) (stating that Title II "is invalid as applied to the State in this case") with (*ibid.*) (deciding whether the State waived Eleventh Amendment immunity by removing the case to federal court, a question that would have been irrelevant if the court had found Title II substantively invalid).

Chevron and did not discuss whether Title II was valid under the Commerce Clause or the Tenth Amendment. "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). Nor does this Court ordinarily address arguments not raised below. See, *e.g.*, *Reickenbacker*, 274 F.3d at 984; *Quenzer* v. *United States*, 19 F.3d 163, 165 (5th Cir. 1993). The cursory presentation and evaluation of the State's present claims in the district court further counsels against premature adjudication of those arguments for the first time on appeal.

Fourth, 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). This Court should be hesitant to break new ground in the area unnecessarily.

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For these reasons, this Court should not entertain a challenge to the validity of Title II and its regulations until the State's motion to dismiss on the merits is decided. The State has specifically disavowed (Br. 34 n.20) any reliance on its merits argument in this appeal and has declined to brief the issue before this Court. Accordingly, this Court should vacate the district court's dismissal and remand this case for consideration of the State's motion to dismiss on the merits.

III. THE SURCHARGE REGULATION DOES NOT EXCEED THE SCOPE OF THE ATTORNEY GENERAL'S DELEGATED REGULATORY AUTHORITY

Should this Court reach the State's challenges to the validity of the surcharge regulation, it should reject them. The State first argues (Br. 35) that this Court in *Neinast* v. *Texas*, 217 F.3d 275 (2000), cert. denied, 531 U.S. 1190 (2001), held that the Attorney General exceeded his delegated authority in issuing the surcharge regulation because the regulation "imposes greater burdens on the States than Congress itself intended." That argument has no merit.

Neinast decided the limited question of whether "the ADA regulation at issue * * * validly abrogate[s] Texas's immunity from suit under the Eleventh Amendment." *Id*. at 277. See also *id*. at 280 (State argued that the surcharge regulation "exceeds Congress's remedial authority under § 5" of the Fourteenth Amendment and, therefore, "exceeds the congressional power of abrogation"). This Court specifically declined to decide whether the regulation was a reasonable interpretation of Title II, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), since the case before it concerned Congress's power to abrogate a State's sovereign immunity, "not an agency's power to implement by rule and interpret congressional mandates." 217 F.3d at 281. Indeed, under this Court's precedents, the validity of that abrogation was essential to the Court's subject matter jurisdiction and, therefore, this Court was required to examine that question first. See *United States* v. *Texas Tech Univ.*, 171 F.3d 279, 285-286 & n.9 (5th Cir. 1999). And once the Court concluded that the abrogation

was not valid, it was deprived of jurisdiction to decide any other question in the case, including whether the regulation was, as the State argues (Br. 35) "an invalid exercise of DOJ's delegated authority." See, *e.g.*, *Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Accordingly, *Neinast* decided only whether the regulation "exceeds the scope of Congress's power to abrogate the states' immunity *under § 5 of the Fourteenth Amendment*," 217 F.3d at 282 (emphasis added), not whether the regulation was consistent with Congress's broader intent to "invoke the sweep of congressional authority, *including * * * the power to regulate commerce*, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4) (emphasis added). Confronted with that question for the first time in this case, this Court should hold that the surcharge regulation is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

The surcharge regulation is a reasonable implementation of Title II in light of the congressional findings. Congress found that "individuals with disabilities *continually* encounter *various* forms of discrimination, including * * * the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. 12101(a)(5) (emphasis added). The Attorney General, therefore, could reasonably anticipate that individuals with disabilities would

consistently require modifications and assistance from a range of private and public entities in the course of their day-to-day lives. Subjecting individuals with disabilities to even modest surcharges for accessibility would, therefore, have a substantial cumulative effect that could undermine the effectiveness of the substantive requirements of the Act. This risk is especially significant in light of Congress's finding that "people with disabilities, as a group * * * are severely disadvantaged * * * economically." 42 U.S.C. 12101(a)(6). For example, Congress was told that twenty percent of persons with disabilities – more than twice the percentage for the general population – live below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. See National Council on the Handicapped, *On the Threshold of Independence* 13-14 (1988) (*Threshold*).[17] Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Ibid*. The Attorney General permissibly concluded, in light of these facts, that prohibiting surcharges for accessibility was a reasonable way to implement Title II consistent with Congress's intent to "assure

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[17] This report was one of two that Congress commissioned from the National Council on the Handicapped, an independent federal agency, as part of the process leading up to the enactment of the ADA. See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(8).[18]

IV. TITLE II IS VALID FOURTEENTH AMENDMENT LEGISLATION

The State also argues (Br. 35-49) that Title II's general prohibition against disability discrimination by public entities, which the surcharge regulation effectuates, is unauthorized by the Fourteenth Amendment. This argument is wrong. The substantive requirements of Title II are valid legislation to enforce the Fourteenth Amendment.

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 that the substantive requirements of Title II could be valid Fourteenth Amendment legislation even if the abrogation was invalid, because the Section 5 review of an abrogation provision takes into

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[18] While it may be that the regulation could have provided a complicated formula to permit some surcharges in some circumstances, the Attorney General reasonably concluded that the difficulty of administering such a rule, and the risk that individuals with disabilities would be excluded from important government services by the improper application of such a rule, counseled in favor of a complete surcharge ban. While some might disagree with that conclusion, it was not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

account different factors than does review of the substantive requirements themselves. In particular, in reviewing the Title II abrogation provision, this Court followed the Supreme Court's example in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and 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. *Reickenbacker*, 274 F.3d at 982. This 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.

Deciding the broader question of whether the substantive provisions of Title II are valid Section 5 legislation, therefore, requires comparing the terms of the Act to the legislative and historical record of unconstitutional state and local discrimination as a whole.[19] As this Court observed in *Reickenbacker*, and as the

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[19] This method of review is consistent with the Supreme Court's treatment of challenges to the validity of the substantive provisions of other statutes under Section 5. For example, in determining the constitutionality of the substantive provisions of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, the Supreme Court reviewed the entire record of unconstitutional conduct by state actors, including conduct by county and local governments. See *City of Boerne* v. *Flores*, 521 U.S. 507, 530-531 (1997). Similarly, in *Garrett,* the Court cited the substantive provisions of the Voting Rights Act of 1965, which were upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), as "appropriate" Section 5 legislation because it was predicated upon a documented "problem of racial discrimination in voting." *Garrett*, 531 U.S. at 373 (citing 383 U.S. at 312-313). Much of the evidence of unconstitutional conduct described in *South Carolina*, however, involved the conduct of *county* and *city* officials. See 383 U.S. at 312-

(continued...)

Supreme Court noted in *Garrett*, the record of unconstitutional treatment of individuals with disabilities by state and local officials as a whole is much more substantial than the more limited predicate reviewed by this Court in *Reickenbacker*. See *Garrett*, 531 U.S. at 369; *Reickenbacker*, 274 F.3d at 982. The United States argued in *Simmons* v. *Texas Department of Criminal Justice*, No. 01-40503 (5th Cir. 2001),[20] that this expanded record supports Title II as valid Fourteenth Amendment legislation. Space limitations prevent the United States from fully repeating those arguments here.[21] Moreover, none of the parties to this case have addressed whether the substantive provisions of Title II are valid Fourteenth Amendment legislation under *Reickenbacker*. Therefore, should this Court reach the constitutionality of the substantive provisions of Title II, it should order supplemental briefing on that question.

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[19](...continued)
314. Indeed, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of the evidence was either statistical evidence or lists of state laws. See, *e.g.*, *Voting Rights: Hearings Before Subcomm. No. 5 of the House Com m. on the Judiciary*, 89th Cong., 1st Sess. 5-8, 36 (1965); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 12 (1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965); S. Rep. No. 162, Pt. 3, 89th Cong., 1st Sess. 7-9, 33 (1965).

[20] This court resolved the appeal in *Simmons* without a published opinion.

[21] The United States' brief in *Simmons* is available in the record of that case and at *http://www.usdoj.gov/crt/briefs/simmons.pdf*.

V. TITLE II IS VALID COMMERCE CLAUSE LEGISLATION AS APPLIED TO THIS CASE

The State also argues (Br. 35-49) that Title II is not a valid exercise of Congress's Commerce Clause authority. Congress's power to enact civil rights legislation applicable to the States is not confined to Section 5 of the Fourteenth Amendment. The Supreme Court has approved of the use of Congress's Commerce Clause power to enact civil rights legislation. See *e.g.*, *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983) (Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq*.); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964) (Title II of Civil Rights Act of 1964, 42 U.S.C. 2000a); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (same); see also *United States* v. *Mississippi*, No. 02-60048, 2003 WL 245637 (5th Cir. Feb. 5, 2003) (Title I of ADA); *Groome Res. Ltd.* v. *Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000) (Fair Housing Amendments Act (FHAA), 42 U.S.C. 3604). Title II falls into this category as well.

The requirements of the ADA at issue in this case are a valid exercise of Congress's Commerce Clause power. 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). As applied to this case, the requirements of Title II are a valid exercise of Congress's Commerce Clause power under the first two *Lopez* categories because they address discrimination that interferes with the use of the channels and instrumentalities of interstate commerce.[22]

Congress's Commerce Clause authority includes the power to protect and regulate instrumentalities of interstate commerce, such as automobiles,[23] as well as to remove obstructions to the uses of channels of interstate commerce for interstate travel. See *Pierce County* v. *Guillen*, 123 S. Ct. 720, 731 (2003); *Hoke* v. *United States*, 227 U.S. 308, 320 (1913). As this Court recently explained in *Groome Resources Limited* v. *Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), Congress's power over the channels of interstate commerce was "one of the categories used to prohibit racial discrimination in public accommodations" in *Heart of Atlanta*, 379 U.S. at 256 (1964). See *Groome*, 234 F.3d at 203. In that case, the Supreme Court held that Congress validly exercised its Commerce Clause power to prohibit such discrimination in order to remove an impediment to interstate travel. See *Heart of Atlanta*, 379 U.S. at 255. The Court found that

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[22] In other applications, and as a whole, Title II also may be valid under the third *Lopez* category. However, this Court need not decide that question to resolve this case.

[23] See, *e.g.*, *United States* v. *Cobb*, 144 F.3d 319, 322 (4th Cir. 1998) (Congress may criminalize carjacking to protect instrumentality of commerce); *United States* v. *Bishop*, 66 F.3d 569, 588-590 (3d Cir. 1995) (same).

Congress could have reasonably concluded that interstate travel is obstructed when travelers are unsure of whether they will be able to use public accommodations along the way or at their final destination:

> This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.

Id. at 253. Similar impediments to interstate travel are created for individuals with disabilities when they are uncertain whether they will be able to access government facilities along the way (*e.g.*, rest stops, visitor bureaus, police stations, etc.) or at their final destinations (*e.g.*, state parks, museums, historic sites, state universities, public hospitals, etc.).[24] Although Congress was not required to document this common-sense conclusion,[25] there was ample basis for it

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[24] Access to public accommodations is also affected by state rules regarding issuance of handicap license plates and placards. Texas permits its public accommodations to rely on state-issued handicapped license plates and placards, see Tex. Transp. Code Ann. § 681.009, and public and private facilities in other states rely on Texas's issuance of plates and placards as a means for providing access to Texas citizens when traveling interstate. See, *e.g.*, Ark. Stat. § 27-15-312; La. Rev. Stat. § 40:1742(d)(6).

[25] The Court in *Heart of Atlanta* did not require specific legislative findings and, indeed, there were none. See 379 U.S. at 252. See also *Pierce County*, 123 S. Ct. at 731-732 (Commerce Clause legislation upheld where "Congress could reasonably believe" that measures would "ultimately [provide] greater safety on

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in the testimony and reports presented to Congress. For example, in a congressionally commissioned report, the National Council on the Handicapped told Congress that persons with disabilities reported that "lack of access to public buildings" and "the absence of accessible transportation" were among the most significant barriers they faced on a daily basis. *Threshold* 20-21, 41. See also, *e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 69 (1989) (ADA "is intended to enable people with disabilities * * * to get to, enter, and use a facility" which includes "accessibility of parking areas"); S. Rep. No. 116, *supra* at 13 ("[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 system of transportation in this country.") (citation omitted); H.R. Rep. No. 485, Pt. 2, 101st Cong. 2d Sess. 37-39 (1990); H. R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 58 (1990) (additional views of Cong. Hammerschmidt, *et al.*) ("Transportation holds the key to opportunity for millions of disabled Americans. No longer will the problem of 'how to get there' prevent the disabled from participating in recreational activities, running errands, visiting friends, and most of all, taking pride in a job well done.").

"How obstructions in [interstate] commerce may be removed – what means are to be employed – is within the sound and exclusive discretion of the

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[25](...continued)
our Nation's roads"); *McClung*, 379 U.S. at 299 ("[F]ormal findings * * * of course are not necessary.").

Congress." *Heart of Atlanta*, 379 U.S. at 261-262. Here, Title II and the implementing regulations rationally seek to remove the barriers that prevent individuals with disabilities from productively using private vehicles to participate in interstate travel and commerce, by ensuring that when they arrive at their destination, they are able to park, get out, and access the facilities at the destination of their travel.

VI. TITLE II DOES NOT VIOLATE THE TENTH AMENDMENT

This use of Congress's Commerce Clause authority does not violate the Tenth Amendment.[26] See *Reno* v. *Condon*, 528 U.S. 141, 150-151 (2000). The State argues (Br. 46) 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.[27]

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[26] The State concedes (Br. 46 n.24) that the Tenth Amendment would have no application if this Court concluded that Title II is valid legislation to enforce the Fourteenth Amendment.

[27] For example, in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (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." *Id*. at 78 (citation

(continued...)

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 Auth.*, 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. 46). 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

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[27](...continued)
omitted). 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 *Garrett*, 531 U.S. at 374 n.9; *United States* v. *Mississippi*, No. 02-60048, 2003 WL 245637 (5th Cir. Feb. 5, 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).

Amendment violation.[28] 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 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. 46-47) that the surcharge regulation 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, the surcharge regulation, and indeed Title II as a whole, are at least as generally applicable as the statute the Supreme Court upheld against

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[28] 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).

Tenth Amendment challenge in *Condon*. In that case, the Supreme Court held that the Driver's Privacy Protection Act of 1994 (DPPA), 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.[29] Even more so than the DPPA, the ADA is "generally applicable" because it imposes comparable 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 prohibit accessibility surcharges by both public and private entities,[30] and subject both public and private facilities to accessibility requirements, including the obligation to provide accessible parking in certain circumstances.[31]

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

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[29] 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.

[30] See 28 C.F.R. 35.130(f) (public entities); 28 C.F.R. 36.301(c) (public accommodations).

[31] See 28 C.F.R. 35.151 (public entities); 28 C.F.R. 36.304(a), (c)(1), 36.401 (public accommodations).

U.S. 898 (1997), as suggested by the State (Br. 47). *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. 47), "[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)).

CONCLUSION

The district court's judgment of dismissal should be vacated.

Respectfully submitted,

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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 12,735 words.
2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
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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 overnight mail, postage prepaid, on March 20, 2003, on the following parties:

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