No. 02-60048

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY,

Defendant-Appellee

REPLY BRIEF FOR THE UNITED STATES

RALPH F. BOYD JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706

TABLE OF CONTENTS

PAGE

ARGUMENT:

I. THIS ACTION IS NOT BARRED BY SOVEREIGN IMMUNITY 1

II. APPLICATION OF TITLE I OF THE ADA IN THIS CASE IS CONSTITUTIONAL 5

A. Enactment Of Title I Of The ADA Was Authorized By The Commerce Clause 6

B. Application Of Title I Of The ADA In This Case Does Not Violate The Tenth Amendment 14

CONCLUSION 18

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES: **PAGE**

ACORN v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) 17

Agostini v. *Felton*, 521 U.S. 203 (1997) 4

Arizona v. *California*, 460 U.S. 605 (1983) 4

Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 2, 6

Circuit City Stores v. *Adams*, 532 U.S. 105 (2001) 9

Close v. *Glenwood Cemetery*, 107 U.S. 466 (1883) 6

EEOC v. *Board of Regents of the Univ. of Wis.*, 2002 WL 773025 (7th Cir, Apr. 30, 2002) 2, 4, 5

EEOC v. *Kentucky Retirement Sys.*, 16 Fed. Appx. 443, 2001 WL 897433 (6th Cir. 2001), cert. denied, 122 S.Ct. 809 (2002) 2, 3, 17

EEOC v. *Waffle House*, 122 S. Ct. 754 (2002) 2, 3, 4-5

EEOC v. *Wyoming*, 460 U.S. 226 (1983) . . . . . *passim*

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 7, 16

General Tel. Co., v. *EEOC*, 446 U.S. 318 (1980) 2

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 7

Groome Res., Ltd. v. *Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000) . . . . . *passim*

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 7

Hodel v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) 14

Jones v. *United States*, 529 U.S. 848 (2000) 8

CASES (continued): **PAGE**

Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 7

Nathenson v. *Zonagen Inc.*, 267 F.3d 400 (5th Cir. 2001) 16

National Labor Relations Bd. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 7

National League of Cities v. *Usery*, 426 U.S. 833 (1976), overruled, 469 U.S. 528 (1985) 7, 14, 16, 17

New York v. *United States*, 505 U.S. 144 (1992) 17

Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 2

Printz v. *United States*, 521 U.S. 898 (1997) 17

Reno v. *Condon*, 528 U.S. 141 (2000) 5, 18

Russell v. *United States*, 471 U.S. 858 (1985) 8, 9

South Carolina v. *Baker*, 485 U.S. 505 (1988) 18

United States v. *Bailey*, 115 F.3d 1222 (5th Cir 1997) 8

United States v. *Bird*, 124 F.3d 667 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998) 8, 13

United States v. *Darby*, 312 U.S. 100 (1941) 7, 13

United States v. *Lopez*, 514 U.S. 549 (1995) . . . . . *passim*

United States v. *Morrison*, 529 U.S. 598 (2000) . . . . . *passim*

CONSTITUTION AND STATUTES: **PAGE**

United States Constitution,
Commerce Clause, Art. I, § 8, Cl. 3 . . . . . 6, 7, 13, 16
Tenth Amendment 6, 14, 16, 18
Eleventh Amendment 1

Age Discrimination in Employment Act,
29 U.S.C. 621 *et seq.* 2, 6, 14, 15

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* . . . . . *passim*
42 U.S.C. 12101(a)(1) 10
42 U.S.C. 12101(a)(3) 10
42 U.S.C. 12101(a)(5) 10
42 U.S.C. 12101(a)(6) 10
42 U.S.C. 12101(a)(8) 11
42 U.S.C. 12101(a)(9) 11
42 U.S.C. 12101(b)(4) 6

Title I, 42 U.S.C. 12111 *et seq.* . . . . . *passim*
42 U.S.C. 12111(8) 15
42 U.S.C. 12111(9) 15
42 U.S.C. 12111(10) 15
42 U.S.C. 12112(5)(A) 15
42 U.S.C. 12113(a) 15
42 U.S.C. 12113(b) 15

Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.* 2, 3
Title VII, 42 U.S.C. 2000e *et seq.* 2
Sec. 706, 42 U.S.C. 2000e-5 . . . . . 2, 3
Sec. 707, 42 U.S.C. 2000e-6 3

Driver's Privacy Protection Act, 18 U.S.C. 2721-2725 18

Fair Housing Act, 42 U.S.C. 3601 *et seq.* 13, 14

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 16

18 U.S.C. 844(i) 8

LEGISLATIVE HISTORY: **PAGE**

S. Rep. No. 116, 101st Cong., 1st Sess. (1989) 11

H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990) 11

Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong., 1st Sess. 208-209 (1989) 11

MISCELLANEOUS:

John M. Barry, *Jobless Rate is Highest Since '94*, Washington Post, May 4, 2002, http://www.washingtonpost.com/wp-dyn/articles/A29929-2002May3.html 9

Bureau of Labor Statistics, *News*, USDL 02-255 (May 3, 2002), http://www.bls.gov/news.release/empsit.toc.htm 9

Carol S. Faber, U.S. Census Bureau, *Geographical Mobility Updates: Population Characteristics, March 1998 to March 1999*, *Current Population Reports, P 20-531*, Table 9 (June 2000), http://www.census.gov/population/socdemo/migration/p20-531/tab09.txt 9-10

http://www.monster.com/ 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-60048

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY,

Defendant-Appellee

REPLY BRIEF FOR THE UNITED STATES

I

THIS ACTION IS NOT BARRED BY SOVEREIGN IMMUNITY

Defendant erroneously contends (Def. Br. 4-17)[1] that the United States is barred by the Eleventh Amendment from bringing this action to enforce Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12111 *et seq.* That contention is foreclosed by the Supreme Court's unqualified statement that, notwithstanding the States' immunity from individual suits for damages to enforce Title I, the States are still subject to enforcement actions for damages by the United

---

[1] Citations to "Def. Br. __" refer to pages in the defendant's brief in this appeal. Citations to "U.S. Br. __" refer to pages in the United States' opening brief as appellant in this appeal. Citations to "R. __" refer to pages in the Record on appeal.

States. *Board of Tr. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001). Both the Sixth and the Seventh Circuits recently applied this principle to hold that the EEOC may bring an action against a state employer to enforce the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq*., even when the action is based upon individual claims of discrimination. *EEOC* v. *Board of Regents of the Univ. of Wis.*, No. 01-2998, 2002 WL 773025 (7th Cir, Apr. 30, 2002); *EEOC* v. *Kentucky Ret. Sys.*, Nos. 00-5664, 6366, 6367, 16 Fed. Appx. 443, 2001 WL 897433 (6th Cir., Aug. 2, 2001), cert. denied, 122 S. Ct. 809 (2002).

The linchpin of the defendant's argument is its assertion that the United States "stand[s] in the shoes" (Def. Br. 5, 7) of the individual charging party in this case because the action was brought under Section 706 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5. That contention is wholly unsupportable in light of the Supreme Court's decisions in *EEOC* v. *Waffle House*, 122 S. Ct. 754 (2002); *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980); and *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977). As the Court explained in *Waffle House*, when an agency of the federal government brings a Section 706 action to enforce either Title I of the ADA or Title VII of the Civil Rights Act of 1964, it "does not function simply as a vehicle for conducting litigation on behalf of private parties" 122 S. Ct. at 761 (quoting *Occidental Life*, 432 U.S. at 368), and "is not merely a proxy for the victims of discrimination." 122 S. Ct. at 761 (citing *General Telephone*). As we explained in our opening brief (U.S. Br. 10-13), these decisions make it clear that the United States acts to vindicate the public interest in

nondiscrimination when it brings actions to enforce Title I, whether it uses its authority under Section 706 or under Section 707. See also *Kentucky Ret. Sys.*, 16 Fed. Appx. at 449, 2001 WL 897433 at **5. Thus, contrary to defendant's contention (see Def. Br. 7), the United States is the real party in interest, and not merely a "nominal" party in this case.

Defendant misconstrues the Court's ruling in *Waffle House*, characterizing it (Def. Br. 10) as holding only that "the EEOC may seek recovery on behalf of individuals without them being parties to the suit" and stating that "it applies only to suits against private employers based on claims that could have been brought by the individual." In fact, the claims in *Waffle House* could *not* have been brought by the individual in federal court, because they were barred by an arbitration agreement. The Court held that the EEOC nonetheless could maintain an action to enforce Title I of the ADA, and could seek full relief, including backpay and damages, for the individual. Nothing in the decision limited its holding or the principles underlying it to actions against private employers. Nor does it make a difference that the individual's suit in *Waffle House* would have been barred by an arbitration agreement, while an individual action for damages in this case would be barred by the State's sovereign immunity.[2] The federal government's action in

---

[2] Although the individual charging party is barred from bringing his own action for damages, he is not barred from intervening in an action for damages brought by the United States. See *Arizona* v. *California*, 460 U.S. 605, 613-614 (1983) ("The Tribes do not seek to bring new claims or issues against the states, but only ask

(continued...)

both cases may proceed because the federal agency has an interest in the case apart from that of the employee. See *Waffle House*, 122 S.Ct. at 766. The Seventh Circuit expressly rejected the relevance of any distinction between claims barred by an arbitration agreement on the one hand and by sovereign immunity on the other:

> [W]hen we read *Waffle House* together with the cautionary language of *Garrett*, which indicates that despite the fact that sovereign immunity bars private suits, the federal employment statutes can be enforced by the United States, we find little room in which to maneuver -- even if we were inclined to. If ultimately *Waffle House* is to be distinguished from a case such as this one, that distinction should be drawn not by us, but rather by the Supreme Court."

EEOC v. *Board of Regents*, 2002 WL 773025 at *2, citing *Agostini* v. *Felton*, 521 U.S. 203 (1997).

It also does not matter, as defendant contends (Def. Br. 9-10), that the doctrines of res judicata, mootness, or mitigation of damages may ultimately limit the relief available to an individual victim in an action brought by the federal government. As the Court explained in *Waffle House*, the applicability of these principles does not "render the [federal agency] a proxy for the employee" or undermine the Court's prior holdings that the federal government pursues its own

---

[2](...continued)
leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised").

interests independently of the individual victims when it enforces the employment discrimination laws. See *Waffle House*, 122 S. Ct. at 766.

Finally, defendant cites a series of cases holding that a State is barred from suing another State without its consent when it merely pursues claims on behalf of individual claimants. See Def. Br. 12-15. These decisions have no application to actions brought by the United States to enforce Title I of the ADA or similar employment discrimination statutes. As the Court emphasized in *Waffle House*, the statutory enforcement scheme "clearly makes the [federal agency] the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." 122 S. Ct. at 763; *EEOC* v. *Board of Regents*, 2002 WL 77305 at *2. The United States brought this case to vindicate the public interest in the enforcement of the statute, not as a proxy for a private grievant. The action is not barred by the State's sovereign immunity.

II

APPLICATION OF TITLE I OF THE ADA IN THIS CASE IS CONSTITUTIONAL

As an alternative ground for affirmance, defendant argues (Def. Br. 17-28) that the ADA, at least as applied to the States, is unconstitutional, or, alternatively, that it is unconstitutional as applied in this case. Consideration of this question begins "with the time-honored presumption that the [statute] is a 'constitutional exercise of legislative power.'" *Reno* v. *Condon*, 528 U.S. 141, 148 (2000),

quoting *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883); see *United States* v. *Morrison*, 529 U.S. 598, 607 (2000).

Defendant's contentions are untenable in light of the Supreme Court's statement in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001), that "Title I of the ADA still prescribes standards applicable to the States," and in light of its decision in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), which upheld the extension of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, to state and local employees, and in particular to state law enforcement personnel such as game wardens. In *Wyoming*, 460 U.S. at 243, the Court held that the extension of the ADEA to public employees was authorized by the Commerce Clause and that it did not contravene the Tenth Amendment. *Id.* at 235-242.

A. Enactment Of Title I Of The ADA Was Authorized By The Commerce Clause

Defendant argues at length (Def. Br. 17-24) that enactment of the ADA was not within Congress's power under Section 5 of the Fourteenth Amendment. Title I of the ADA, however -- the only part of the statute at issue in this case -- is squarely based on Congress's power to regulate interstate commerce.[3]

1. In *EEOC* v. *Wyoming*, the Supreme Court held that the ADEA,"both on its face and as applied in this case, was a valid exercise of Congress's powers under

[3] When it enacted the ADA, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce[.]" 42 U.S.C. 12101(b)(4).

the Commerce Clause." 460 U.S. at 243; *id.* at 235-236 (citing *National League of Cities* v. *Usery*, 426 U.S. 833, 840-841 (1976), overruled on other grounds by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); and *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 243-244 (1964)). See also *Gregory* v. *Ashcroft*, 501 U.S. 452, 467-468 (1991); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 78 (2000). The decisions of the Supreme Court uniformly conclude that regulation of the national employment market is within Congress's powers under the Commerce Clause. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*); *National Labor Relations Bd.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-43 (1937) (upholding National Labor Relations Act of 1935, 29 U.S.C. 151 *et seq.*); cf. *National League of Cities*, 426 U.S. at 841 (application of wage and hour laws to municipal employees "undoubtedly within the scope of the Commerce Clause"); *id.* at 849 ("no[] doubt" that overtime pay requirement has "sufficiently rational relationship to commerce"); see *Garcia*, 469 U.S. at 537. As explained below, the Supreme Court's intervening Commerce Clause decisions confirm that Congress may regulate the national employment market.

2. Whatever the bounds of the commerce power, Title I of the ADA fits comfortably within Congress's authority to regulate commercial activity. As this Court has recognized, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Groome Res., Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 204 (5th Cir. 2000), quoting *Morrison*,

529 U.S. at 610, and *United States* v. *Lopez*, 514 U.S. 549, 560 (1995). "Congress may 'regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.'" *Morrison*, 529 U.S. at 611, quoting *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring); see *Russell* v. *United States*, 471 U.S. 858 (1985) (statute prohibiting arson of property used in an activity affecting interstate commerce protects two-unit apartment building because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties"); *United States* v. *Bird*, 124 F.3d 667, 675-677 (5th Cir. 1997) (upholding Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248(a)(1), as protective of national market for abortion-related services), cert. denied, 523 U.S. 1006 (1998); *Groome*, 234 F.3d at 205-211 (upholding reasonable accommodation provision of Fair Housing Act, 42 U.S.C. 3604(f)(3)(B), as regulation of economic activity and of national market for housing); cf. *Jones* v. *United States*, 529 U.S. 848, 855 (2000) (requirement in 18 U.S.C. 844(i) that property be used in an activity affecting commerce "is most sensibly read to mean active employment for commercial purposes").

Title I directly regulates employment, and employment -- the exchange of services for compensation -- is a quintessential economic activity. Cf. *United States* v. *Bailey*, 115 F.3d 1222, 1236 (5th Cir. 1997) (Smith, J., dissenting) ("It is axiomatic that the word 'commerce' is, and has always been, tantamount to 'trade,' the exchange of goods and services by purchase and sale"); see *ibid.* (characterizing a *quid pro quo* as "the defining characteristic of a commercial

transaction"); cf. *Circuit City Stores* v. *Adams*, 532 U.S. 105, 113 (2001) (term "contract evidencing a transaction involving interstate commerce" includes employment contracts) (citation and quotation marks omitted). Indeed, in rejecting the argument that gender-motivated violence had a substantial effect on interstate commerce because of its aggregate impact on women's ability to participate in a variety of economic activities, the *Morrison* Court implicitly acknowledged that employment itself is commerce. See *Morrison*, 529 U.S. at 615 ("If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption").

Moreover, just as there is a national market for housing, see *Russell*, 471 U.S. at 862; *Groome*, 234 F.3d at 209-211, so too is there a national employment market. National employment data are regarded as an important measure of the nation's economy. See John M. Barry, *Jobless Rate is Highest Since '94*, Washington Post, May 4, 2002, at A1;[4] cf. Bureau of Labor Statistics, *News*, USDL 02-255 (May 3, 2002).[5] Job seekers may use the Internet to find and apply for jobs across the country. See, *e.g.* http://www.monster.com/ (visited May 10, 2002). And millions of American workers cross state lines each year to offer their services to new employers. Carol S. Faber, U.S. Census Bureau, *Geographical Mobility*

---

[4] See http://www.washingtonpost.com/wp-dyn/articles/A29929-2002May3.html (visited May 10, 2002).

[5] See http://www.bls.gov/news.release/empsit.toc.htm (visited May 10, 2002)

Updates: Population Characteristics, March 1998 to March 1999, *Current Population Reports, P 20-531*, Table 9 (June 2000).[6]

Congress has the authority to regulate even intrastate commercial activities, such as the employment transactions at issue in this case, where "'the activity is any sort of economic enterprise, however broadly one might define those terms'; or [where] the activity exists as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Groome*, 234 F.3d at 205, quoting *Lopez*, 514 U.S. at 561.

3. Congressional findings describe the impact on the national economy of employment discrimination against individuals with disabilities. See *Morrison*, 529 U.S. at 612. Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities," 42 U.S.C. 12101(a)(1); that "discrimination against individuals with disabilities persists in such critical areas as employment," *id.* at 12101(a)(3); that such discrimination consists of the "failure to make modifications to existing facilities and practices" as well as "outright intentional exclusion," *id.* at 12101(a)(5); that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged * * * vocationally [and] economically," *id.* at 12101(a)(6); that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity * * * and

---

[6] See http://www.census.gov/population/socdemo/migration/p20-531/tab09.txt (visited May 10, 2002).

economic self-sufficiency for such individuals," *id.* at 12101 (a)(8); and that continued discrimination "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," *id.* at 12101(a)(9).

The ADA's legislative history supports these findings. Committee reports include surveys indicating that, at the time of the law's enactment, over sixty-five percent of adults with disabilities, or as many as 12 million persons, were not working, and that fifty percent of such adults had household incomes of $15,000 or less. S. Rep. No. 116, 101st Cong., 1st Sess. 9 (1989) (Senate Report) (reporting results of Lou Harris poll). Testimony given in hearings and cited in the reports explained that the statute was necessary to increase national productivity. See, *e.g.*, H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 45 (1990) (House Report) (statement of Robert Mosbacher, Jr.) ("If we are to remain competitive as a nation in the international marketplace, we must have a well trained, well educated and highly motivated workforce. Millions of disabled Americans . . . are well educated and can be easily trained. . . . [and] are some of the most highly motivated people in our society today."); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 208-209 (1989) (Senate Hearings) (statement of Attorney General Thornburgh) ("I think it is fair to say . . . if one

were to even take a look at this in a cold-hearted accounting sense, that the availability of an increased work force and the greater productivity that can ensue from our economy as a whole through opening up these kinds of opportunity, provides reason in and of itself to pursue this.").

Legislators heard testimony stating that, although it was difficult to quantify the exact economic cost or benefit of the legislation, ending workplace disability discrimination would result in more persons with disabilities working, in increased earnings, and in increased spending on consumer goods. See Senate Hearings at 208-209 (testimony of Attorney General Thornburgh); see also House Report at 45 (statement of Jay Rochlin, Executive Director, President's Committee on Employment of People with Disabilities) ("Consider the economic impact of that simple accommodation. It enables Tina to have a job which pays well. She owns both a home and a car and supports her mother in addition to herself"). Congressional committees also heard of the billions of dollars spent annually by federal, state, and local governments on disability benefits and lost income tax revenues. See, *e.g.*, Senate Report at 17 (statement of President George H.W. Bush). Finally, the legislative history responds to the economic concerns of employers fearful of the cost of providing reasonable accommodations, suggesting that the discriminatory conduct the ADA seeks to prohibit is itself often directly motivated by commercial concerns. See House Report at 33-34 (statement of Jay Rochlin). Were the ADA's federal regulatory scheme not in place, employers who could save money by not offering employees reasonable accommodations might

possess a competitive advantage over employers in other states subject to disability discrimination laws. See *Darby*, 312 U.S. at 122-123 (FLSA aimed at spread of substandard labor conditions through interstate competition).

4. As the legislative history indicates, there is a direct connection between the exclusion of individuals with disabilities from the national employment market and interstate commerce. See *Morrison*, 529 U.S. at 612-613; *Lopez*, 514 U.S. at 563-567. Congress rationally concluded that regulation of employment discrimination was necessary to regulate the national markets in employment. It is not necessary to "pile inference upon inference," see *Lopez*, 514 U.S. at 567, to see the effect of such discrimination on interstate commerce. Unlike the statutes at issue in both *Morrison* and *Lopez*, Title I regulates an economic activity that substantially affects interstate commerce. *Ibid.* Its enactment was therefore within Congress's powers under the Commerce Clause.[7]

---

[7] A jurisdictional element requiring proof of a connection to interstate commerce in each application of the statute "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *Morrison*, 529 U.S. at 612; *Groome*, 234 F.3d at 204. Such an element, however, is not always required. It is "only one method, and not always a necessary one, by which Congress may achieve that end." *Bird*, 124 F.3d at 675. As this Court explained in *Groome*, the lack of an interstate commerce element in the statutes at issue in *Morrison* and *Lopez* was "relevant only because there was no obvious interstate economic connection in those cases, involving as they did, non-economic and intrastate activities." 234 F.3d at 211. Because Title I of the ADA, like the Fair Housing Act, regulates economic activity that substantially affects interstate commerce, no jurisdictional element is necessary.

B. Application Of Title I Of The ADA In This Case Does Not Violate The Tenth Amendment

Defendant erroneously contends (Def. Br. 24-28) that application of Title I in this case violates the Tenth Amendment. The Supreme Court rejected this contention with respect to the extension of the ADEA to state and local employers generally, and in particular to the forced retirement of a state game warden in *EEOC* v. *Wyoming*. Applying both the *Wyoming* analysis and principles set forth in more recent Tenth Amendment decisions leads to the same conclusion in this case.

To determine whether the Tenth Amendment barred application of the ADEA to the discharge of a State game warden in *Wyoming*, the Court applied a three-part test derived from its decision in *National League of Cities* v. *Usery*:

> [I]n order to succeed, a claim that the congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' 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 governmental functions.'

Wyoming, 460 U.S. at 237, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-288 (1981).

Wyoming held that application of the ADEA to prohibit forced retirement of state game wardens did not "'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.'" 460 U.S. at

239. The management of state parks, the Court acknowledged, was a "traditional state function." But application of the ADEA would not substantially interfere with that function because it would not impair the State's asserted interest in mandatory retirement of game wardens -- ensuring that wardens were physically fit for their jobs: "Under the ADEA * * * the State may still, at the very least, assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit. Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *Ibid.*

Similarly, while Title I of the ADA prohibits discrimination on the basis of disability and requires employers to make reasonable accommodation to the physical limitations of their employees or applicants, it includes several provisions that protect the employer's interest in a qualified, efficient, and safe workforce. It protects only "qualified individual[s] with a disability," 42 U.S.C. 12111(8); requires only *reasonable* accommodations that do not impose an undue hardship on the employer's operations, *ibid.*; see *id.* at 12111(9), 12111(10), 12112(5)(A); permits the use of qualification standards that are "job-related and consistent with business necessity," *id.* at 12113(a); and does not require the employment of an individual who would "pose a direct threat to the health or safety of other individuals in the workplace," *id.* at 12113(b). Title I would permit the defendants in this case to "at the very least, assess the fitness [of its police cadets] and dismiss

those [cadets] whom it reasonably finds to be unfit." *Wyoming*, 460 U.S. at 239. Thus, under the *Wyoming* analysis, application of Title I to State employees generally and in this case in particular does not violate the Tenth Amendment.[8]

Subsequent developments in Tenth Amendment law make this result even more clear. In *Garcia*, the Court repudiated as "unsound in principle and unworkable in practice" the analysis applied in *National League of Cities,* 469 U.S. at 546-547, and rejected a Tenth Amendment analysis that sought "to articulate affirmative limits on Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty." *Id.* at 556. Thus, after invalidating the application of the Fair Labor Standards Act (FLSA) to state and local employees in *National League of Cities*, the Court upheld its application to the employees of a local transit authority in *Garcia*. The Court found nothing in the application of the FLSA "that is destructive of state sovereignty or violative of any constitutional provision" where the transit authority "face[d] nothing more than

---

[8] We note that, because this is an appeal from an order granting defendant's motion to dismiss the United States' complaint, this Court should "accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiff[.]" *Nathenson* v. *Zonagen Inc*., 267 F.3d 400, 406 (5th Cir. 2001). The United States' complaint alleged that Mr. Collins was admitted to the training academy for the Mississippi Highway Safety Patrol; that he was able to perform the essential functions of the job with reasonable accommodation; that he was dismissed from the academy because of his disability; and that defendant failed to make reasonable accommodations to his physical limitations (R. 2). At this stage of the litigation, defendant's rendition of its version of the facts (Def. Br. 1) and of what it imagines the United States "demands" (Def. Br. 26) are simply irrelevant.

the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Id.* at 554. As the Sixth Circuit recognized in *Kentucky Retirement Systems*, because the *Garcia* standard is less exacting than that applied in *National League of Cities* and in *Wyoming*, "*Garcia* merely reinforced the Court's determination in *Wyoming* that Congress is constitutionally authorized to require state employers to abide by the ADEA." 16 Fed. Appx. at 450, 2001 WL 897433 at **6.

In succeeding decisions, the Supreme Court has made it clear that a federal statute violates the Tenth Amendment if it seeks to "'compel the States to enact or administer a federal regulatory program.'" *Printz* v. *United States*, 521 U.S. 898, 933 (1997), quoting *New York* v. *United States*, 505 U.S. 144, 188 (1992); see also *ACORN* v. *Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996) (invalidating statute found to be "an attempt by Congress to force States to regulate according to Congressional direction"), cert. denied, 521 U.S. 1129 (1997). Both *Printz* and *New York*, however, carefully distinguished such impermissible statutes, which "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *New York*, 505 U.S. at 176, from statutes of general applicability that apply to both public and private entities. See *Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 160.

A federal statute that merely "'regulate[s] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties'" does not violate the Tenth Amendment. *Reno* v. *Condon*, 528 U.S. 141,

150 (2000), quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988). In *Reno*, the Court upheld the Driver's Privacy Protection Act (DPPA), 18 U.S.C. 2721-2725, which restricts the States' ability to disclose personal information obtained from driver's license and automobile registration records. Like the DPPA, Title I of the ADA applies equally to public and private actors. See 528 U.S. at 146, 151. It is a statute of general applicability that regulates the employment practices of state and local governments, as well as private entities. It does not require state governments "in their sovereign capacity to regulate their own citizens," "to enact any laws or regulations," or "to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. Title I is therefore consistent with the Tenth Amendment.

CONCLUSION

The district court's order dismissing the United States' complaint in this case should be reversed and the case remanded for further proceedings.

Respectfully submitted,

RALPH F. BOYD JR.
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706

CERTIFICATE OF SERVICE

I certify that paper and electronic copies of the foregoing reply brief for the United States were sent by first class mail this 13th day of May, 2002, to the following counsel of record:

Rickey T. Moore
5th Floor
Office of the Attorney General
for the State of Mississippi
450 High Street
Carroll Gartin Justice Building
Jackson, MS 39201

_____

Linda F. Thome
Attorney
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the brief contains 4,721 words.

2. The brief has been prepared in proportionally spaced typeface using Wordperfect 9, in Times New Roman, 14 point type.

3. I understand that 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.

LINDA F. THOME
Attorney
Department of Justice
Civil Rights Division
Appellate Section - PHB 5014
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-4706