IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VIRGIL LANCASTER,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil Action No. 94-1016-BH-C**
	)	
CITY OF MOBILE, ALABAMA,	)	
	)	
Defendant	)	
	)	

UNITED STATES' MEMORANDUM OF LAW
IN SUPPORT OF THE CONSTITUTIONALITY OF THE
AMERICANS WITH DISABILITIES ACT

INTRODUCTION

This is an employment discrimination case, brought pursuant to Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-17. Plaintiff Virgil Lancaster alleges that the City of Mobile ("the City") discriminated against him on the basis of his learning disability in its job application and hiring processes. Specifically, Lancaster alleges that the City failed to provide him with reasonable accommodations during its written examination for the position of "body/paint mechanic," and that the City did not hire Lancaster for this position

because Lancaster failed the written examination.[1]

On December 13, 1995, this Court directed the parties to brief the question of whether the ADA is constitutional under the Commerce Clause and the Fourteenth Amendment to the Constitution. This Court subsequently certified the question of the ADA's constitutionality to the Attorney General pursuant to 28 U.S.C. § 2403, and granted the United States' motion to intervene as of right. The United States demonstrates below that Congress properly exercised its powers, under both the Fourteenth Amendment and the Commerce Clause, in prohibiting disability discrimination by local government employers under Title I of the ADA.[2]

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[1] Title I of the ADA requires public employers to provide reasonable accommodations for the known disabilities of job applicants, including the "appropriate adjustment or modifications of examinations." 42 U.S.C. §§ 12111(9)(B); 12112(a); 12112(5)(A). Providing an oral, rather than written, examination to an otherwise qualified job applicant with a learning disability is the type of accommodation required under the statute unless the employer can show that this would impose an "undue hardship." 42 U.S.C. § 12112(5)(A). Cf. Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (suit under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794) (failure to hire dyslexic individual for position of heavy equipment operator, because of applicant's failure to pass written examination, without provision of alternative oral exam or adjustment of entry requirements that would have accommodated applicant's dyslexia, discriminates on the basis of disability).

[2] In order to uphold the constitutionality of Title I, the Court need not reach the Commerce Clause issue, if it finds the statute authorized under the Fourteenth Amendment.

ARGUMENT

I. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., is Congress' most extensive piece of civil rights legislation since the Civil Rights Act of 1964. Its purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses.

In enacting the ADA, Congress explicitly invoked "the sweep of congressional authority, including the power to enforce the fourteenth amendment and 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). This case concerns Title I of the ADA, 42 U.S.C. §§ 12101-17, which prohibits disability discrimination by private and public employers. 42 U.S.C. §§ 12111(5)(A), 12112(a). Because the Defendant in this action is a city employer, this memorandum addresses only the constitutionality of Title I's provisions with respect to such employers. As set forth below, both the Fourteenth Amendment and the Commerce Clause provide authority for Congress to enact these provisions.

II TITLE I OF THE ADA IS A VALID EXERCISE OF CONGRESS' POWER TO REMEDY DENIALS OF EQUAL PROTECTION PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT

A. Congress' Section 5 Powers Are Broad

Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment," including those barring the states from depriving citizens of "equal protection of the laws." U.S. Const. Am. 14, § 5. It is well established that Congress' authority under the Fourteenth Amendment includes the power to reach the conduct not only of States, but of local governments, such as the City of Mobile. See, e.g., Lombard v. Louisiana, 373 U.S. 267, 273 (1963); The Civil Rights Cases, 109 U.S. 3 (1883); Ex Parte Virginia, 100 U.S. 339 (1880).[3]

Section 5 authorizes Congress not only to provide remedies for violations of the Fourteenth Amendment, but also to amplify its substantive protections. Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966); cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., concurring and dissenting)(Congress' power to enforce the Fourteenth Amendment includes "the power to define situations which Congress determines threaten principles of equality and to adopt

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[3] See also Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, 2nd ed. § 16.1, at 524:

> . . . actions of any governmental entity give rise to state action for the purposes of constitutional limitations. Any subdivision of a state, . . . such as a city, represents government or state authority to a sufficient degree to invoke constitutional restrictions on its actions.

prophylactic rules to deal with those situations"). The Federal courts, in a variety of contexts, have upheld legislation under Section 5 that created broader rights than the Constitution itself mandates.

For example, in Katzenbach v. Morgan, 384 U.S. 641, the Supreme Court held that Congress had authority to bar the states from requiring literacy tests of persons who had attained a sixth grade education in Puerto Rico, even though the Court had previously ruled in Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959), that a state's use of literacy tests does not deny equal protection. The Court reasoned that Congress could prohibit such tests to protect against what Congress found to be a denial of equal protection, the judiciary's more limited view of equal protection notwithstanding. Morgan, 384 U.S. at 649, 652. The Court explained that Section 5 does not "confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional," id. at 648-649, but rather grants it broad power to "extend[]" the protections provided by the Constitution. Id. at 657.[4]

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[4] See also Flores v. City of Boerne, 73 F.3d 1352, 1358-61 (5th Cir. 1996)(upholding enactment of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., as valid exercise of Congress' Section 5 powers, despite the Supreme Court's holding in Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), reh'g denied, 496 U.S. 913 (1990), that the First Amendment does not bar application of a facially neutral, generally applicable law to religiously motivated conduct); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983)

There is thus no merit to the City's suggestion that Section 5 of the Fourteenth Amendment empowers Congress only to enact legislation redressing race discrimination. See Defendant's Supplemental Brief in Support of Summary Judgment at 18. The Equal Protection Clause itself has never been so narrowly construed. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985), citing Plyler v. Doe, 457 U.S. 202, 216 (1982). Indeed, the Supreme Court, using various levels of scrutiny, has held that the Clause prohibits discrimination on the basis of, inter alia, sex,[5] national origin,[6] alienage,[7] disability,[8] poverty,[9] illegitimacy,[10] length of residency,[11] property

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(upholding the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), as a valid exercise of Congress' Section 5 powers despite the Supreme Court's holding in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), that a state mandatory retirement law did not violate the Equal Protection Clause); E.E.O.C. v. Elrod, 674 F.2d 601, 608-09 n.6 (7th Cir. 1982)(same).

[5] See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

[6] See, e.g., Oyama v. California, 332 U.S. 633 (1948).

[7] See, e.g., Plyler, 457 U.S. 202; Graham v. Richardson, 403 U.S. 365 (1971).

[8] See, e.g., Cleburne, 473 U.S. 432.

[9] See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956).

[10] See, e.g., Mills v. Habluetzel, 456 U.S. 91 (1982); Matthews v. Lucas, 427 U.S. 495 (1976).

[11] See, e.g., Zobel v. Williams, 457 U.S. 55 (1982).

ownership,[12] and living in a household of unrelated persons.[13] Moreover, as the cases collected in footnote 4, supra, demonstrate, Congress has power under Section 5 of the Fourteenth Amendment to enact legislation providing for broader rights than the Amendment itself secures directly.

B. As Applied to State and Local Government Employers, Title I of the ADA Is A Valid Exercise Of Congress' Section 5 Powers[14]

In examining congressional authority to legislate under Section 5, the proper focus is on whether the legislation is "appropriate legislation" under the Amendment, rather than whether the conduct prohibited in the legislation specifically violates the Equal Protection Clause or other provisions of the Amendment. Morgan, 384 U.S. at 648-9. In determining whether a statute is properly within Congress' power, judicial review is limited to determining "whether [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Id. at 651 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (footnote omitted)).

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[12] See, e.g., Quinn v. Millsap, 491 U.S. 95 (1989).

[13] See, e.g., United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

[14] The only question before this Court is whether Congress has the authority to reach the discriminatory conduct of public -- not private -- employers under Title I of the ADA.

1. As Applied to State and Local Government Employers, Title I of the ADA is "Appropriate Legislation" to Enforce the Fourteenth Amendment

As applied to public employers, Title I of the ADA is unquestionably "appropriate legislation" to enforce the Equal Protection Clause. First, Title I certainly "may be regarded as an enactment to enforce the Equal Protection Clause." Indeed, in enacting Title I, Congress specifically invoked its "power to enforce the fourteenth amendment." 42 U.S.C. § 12101(b)(4). Congress also formally found, inter alia, that:

> . . . (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, . . . ;
>
> (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination; . . .
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> (7) individuals with disabilities are a discrete and insular minority who 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;
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> (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals. . . .

42 U.S.C. § 12101(a). As applied to public employers, the prohibition of arbitrary, discriminatory employment decisions,

based not on an individual's ability to perform a job, but on misperceptions and stereotypic assumptions concerning what members of a class can and cannot do, is the very essence of equal protection guarantees.[15]

Second, title I of the ADA is "plainly adapted" to furthering the aims of the Equal Protection Clause. Title I ensures that persons with disabilities are provided equal employment opportunities and are protected from discriminatory government conduct. The statute specifically prohibits discrimination by public employers against qualified individuals with disabilities in job application procedures; the hiring or discharge of employees; employee compensation; advancement; job training; and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).[16]

Finally, Title I "is not prohibited by but is consistent with the 'letter and spirit of the constitution.'" Title I protects a class of individuals vulnerable to disparate and adverse treatment by State and local government employment

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[15] Cf. Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 699-700 (1st Cir. 1983) (Age Discrimination in Employment Act may be regarded as an enactment to enforce the Equal Protection Clause); E.E.O.C. v. County of Calumet, 686 F.2d 1249, 1252-53 (7th Cir. 1982) (same); Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979) (Title VII of the 1964 Civil Rights Act may be regarded as an enactment to enforce the Equal Protection Clause), cert. denied, 446 U.S. 917 (1980); United States v. New Hampshire, 539 F.2d 277, 280-81 (1st Cir. 1976) (same), cert. denied, 429 U.S. 1023 (1976).

[16] Cf. Ramirez, 715 F.2d at 699-70; County of Calumet, 686 F.2d at 1252-53; Scott, 597 F.2d at 900; New Hampshire, 539 F.2d at 280-81.

practices, while not requiring employers to hire individuals who are not "otherwise qualified," i.e., those who cannot perform the "essential functions of the job," 42 U.S.C. §§ 12111(8), 12112(a), 12112(b)(5)(A), or those who pose a "significant risk to the health or safety of others." 42 U.S.C. §§ 12111(3), 12113(a), 12113(b). As such, the Act is tailored to the traditional Equal Protection goal of protecting a discrete class of individuals from arbitrary and capricious action by the State, and thus is a valid exercise of Congress' Section 5 powers.[17]

2. Case Law Regarding Earlier Civil Rights Statutes Further Supports the Conclusion that Congress had the Authority to Enact Title I Under the Fourteenth Amendment

To the best of the government's knowledge, this is the first case in which the constitutionality of Title I has been drawn into question.[18] With respect to Title I, case law under earlier civil rights statutes supports the argument that Congress

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[17] Cf. Ramirez, 715 F.2d at 699-70; County of Calumet, 686 F.2d at 1252-53; Scott, 597 F.2d at 900; New Hampshire, 539 F.2d at 280-81.

[18] Three courts have rejected constitutional challenges to Title III of the Act, 42 U.S.C. §§ 12181-89, which prohibits disability discrimination in privately owned places of public accommodation and commercial facilities. See Abbott v. Bragdon, 912 F. Supp. 580, 592-94 (1995) (upholding Title III's application to a private dental practice); United States v. Morvant, 898 F. Supp. 1157, 1167 (E.D. La. 1995)(same); Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D.Cal. 1993)(upholding Title III's application to a restaurant), cert. denied, 114 S. Ct. 2726 (1994). Title III was enacted pursuant to Congress' power under the Commerce Clause. Abbott specifically considered and rejected the argument that Title III exceeded Congress' authority under the Commerce Clause under the standards set forth in United States v. Lopez, 115 S. Ct. 1624 (1995). Abbott, 912 F. Supp. at 592-94.

properly invoked its authority under the Fourteenth Amendment to prohibit disability-based employment discrimination by State and local governments.

It is well established that the 1972 amendments to Title VII, which extended that statute's coverage to State and local government employers, are properly grounded in Section 5. Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56, & 453 n.9 (1976). See also Freeman v. Michigan Dep't of State, 808 F.2d 1174, 1177 (6th Cir. 1987); Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980); United States v. Gregory, 818 F.2d 1114, 1119 (4th Cir. 1987), cert. denied 484 U.S. 847 (1987); Shawer v. Indiana University of Pennsylvania, 602 F.2d 1161, 1163-64 (3d Cir. 1979); United States v. New Hampshire, 539 F.2d 277, 280-81 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976). Just as Title VII's coverage of State and local governments is a valid exercise of Congress' Section 5 powers, so too is Title I's, whose enforcement provisions are directly patterned after Title VII. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 31, 48 (1990).[19]

A similar analysis was considered and adopted by the courts in determining whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 521 et seq., was a valid exercise of Congress' Section 5 powers in prohibiting discrimination by

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[19] Indeed, in discussing Title I's enforcement provisions, Congress stated that the ADA's prohibitions are "designed to provide civil rights protections for persons with disabilities parallel to those available to minorities and women." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 48 (1990).

public employers. The courts noted ADEA's similarities to Title VII and found that prior rulings upholding Title VII's constitutionality were persuasive authority for upholding ADEA as well. See Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 700 (1st Cir. 1983); E.E.O.C. v. County of Calumet, 686 F.2d 1249, 1253 (7th Cir. 1982); E.E.O.C. v. Elrod, 674 F.2d 601, 607 (7th Cir. 1982); Arritt v. Grisell, 567 F.2d 1267, 1270-71 (4th Cir. 1977). As the First Circuit stated: "The striking substantive similarity between the two acts militates strongly in favor of the conclusion that the identical reservoir of congressional power was the well-spring for both." Ramirez, 715 F.2d at 700.

Further support for Title I's constitutionality can be found in the constitutionality of Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, which prohibits discrimination on the basis of disability by programs and activities receiving federal financial assistance. The substantive provisions of Title I are modeled after Section 504. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 31 (1990). The Supreme Court has noted that Section 504 also was enacted pursuant to Congress' enforcement authority under the Fourteenth Amendment. See Welch v. Texas Dep't of Highways & Public Transp., 483 U.S. 468, 472 n.2 (1987), citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 244 n.4 (1985).

III TITLE I OF THE ADA IS A VALID EXERCISE OF CONGRESS' POWER TO REGULATE COMMERCE

In enacting Title I, Congress also invoked its authority under the Commerce Clause. 42 U.S.C. § 12101(b)(4). Because Title I's coverage of State and local governments falls well within Congress' power to enforce the Fourteenth Amendment, it is unnecessary for this Court to address the question of whether Title I is also a constitutional exercise of Congress' power to regulate commerce. Cf. E.E.O.C. v. Wyoming, 460 U.S. 226, 243 (1983). The Supreme Court, however, has held that the Commerce Clause affords Congress independent authority to prohibit discriminatory conduct by public employers. Wyoming, 460 U.S. at 243 (application of ADEA to State and local government employers is valid exercise of Congress' commerce powers and does not violate Tenth Amendment; no need to determine whether ADEA is also valid exercise of Congress' Section 5 powers).[20]

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[20] In its recent decision in Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996), the Supreme Court indicated that Congress enjoys greater power under the Fourteenth Amendment vis-a-vis States than it does under the Commerce Clause. Id. at 1125, 1128, 1131. The Court, citing Fitzpatrick, recognized Congress' power under the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity, but expressly overruled Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), in which a plurality had ruled that Congress could also abrogate Eleventh Amendment immunity of the States in Commerce Clause legislation. Id. at 1128. Seminole has no application in this case, however, because cities do not enjoy Eleventh Amendment immunity. Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

A. Title I of the ADA Reaches Only Those Employers that are Engaged in Industries Affecting Commerce and Thus is Within the Scope of Congress' Commerce Authority

As the Supreme Court recently reaffirmed in United States v. Lopez, 115 S. Ct. 1624 (1995), the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, empowers Congress to: (1) regulate the use of the channels of interstate commerce; (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) regulate or prohibit "activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." Id. at 1630 (citations omitted).

The jurisdictional provisions of Title I ensure that the statute reaches only those activities that substantially affect interstate commerce. Specifically, application of Title I is limited to those employers "engaged in an industry affecting commerce." 42 U.S.C. § 12111(5)(A). Title I incorporates the definitions of "commerce" and "affecting commerce" found in Title VII of the 1964 Civil Rights Act. 42 U.S.C. § 12111(7).[21]

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[21] See 42 U.S.C. §§ 2000e(g), 2000e(h):

> The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.
>
> The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or

After considering similar jurisdictional language in the National Labor Relations Act, 29 U.S.C. § 151 et seq., the Supreme Court held that that statute was a valid exercise of Congress' Commerce Clause powers. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937). Specifically, the Court held that the authority granted to the National Labor Relations Board -- namely, the authority to prevent unfair labor practices that "affect commerce":

> reach[es] only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of congressional power.

Id.

The Court in Lopez cited with approbation Jones & Laughlin Steel Corp., as well as other cases upholding the validity of statutes containing jurisdictional requirements such as Title I's. Lopez, 115 S. Ct. at 1628-29, 1631. As the Court noted, such jurisdictional elements "ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." Id. at 1631.

> the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business or activity.

See also Polish Nat'l Alliance of the United States of North America v. NLRB, 322 U.S. 643, 647 (1944) (when Congress "wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' interrupt,' or 'promote' interstate commerce").

Moreover, the Eleventh Circuit has recognized that cities, such as the City of Mobile, are "engaged in [industries] affecting commerce." See, e.g., Williams v. City of Montgomery, 742 F.2d 586, 588-89 (11th Cir. 1984)(City of Montgomery is an "employer" within the meaning of Title VII), cert. denied, 470 U.S. 1053 (1985); Dumas v. Town of Mt. Vernon, Alabama, 612 F.2d 974, 979 (5th Cir. 1980) (Town of Mt. Vernon is an "employer" within the meaning of Title VII). Thus, Title I of the ADA, like the National Labor Relations Act, is a valid exercise of Congress' Commerce Clause powers, both on its face and as applied to the facts of this case.

B. Title I of the ADA Proscribes Conduct That Congress Rationally Found Substantially Affects Interstate Commerce, and Thus is Within the Scope of Congress' Commerce Authority

Congressional findings further support the conclusion that Title I is a valid exercise of Congress' commerce powers. The Court has held that in determining whether a federal statute may be sustained as a proper exercise of Congress' Commerce Clause power, courts "must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." Hodel v. Virginia Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 276 (1981) (emphasis added). Courts may look to statutory findings, as well as congressional committee findings, to assess the rationality of Congress' conclusions. Lopez, 115 S. Ct. at 1631-1632; Katzenbach v. McClung, 379 U.S. 294, 299, 304 (1964) (noting that Congress is not required to make formal findings). Once the

court "find[s] that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end." McClung, 379 U.S. at 303-304 (cited with approval in Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 276).

In enacting Title I, Congress specifically found that disability-based discrimination adversely affects the national economy:

> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a).

Indeed, the record of the ADA's passage is replete with testimony concerning the specific burdens that disability-based employment discrimination places on interstate commerce. See S. Rep. No. 116, 101st Cong., 1st Sess. (1989); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2 (1990); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 3 (1990); see also 136 Cong. Rec. E1913-01 (daily ed. May 22, 1990)(statement of Rep. Hoyer). This testimony includes the fact that millions of persons with disabilities who want to work and who are able to work have been excluded discriminatorily from the workforce; that even those who do work earn incomes significantly less than those of their non-disabled counterparts; that employment discrimination makes persons with disabilities dependent on social welfare programs

and thus costs society billions of dollars annually in support payments; that elimination of employment discrimination will result in increased spending on consumer goods and increased tax revenues; that persons with disabilities comprise a pool of educated and talented workers necessary to offset potential upcoming labor shortages; and that the employment of persons with disabilities is essential if the nation is to remain competitive in the international marketplace. S. Rep. No. 116, 101st Cong., 1st Sess. at 16-18 (1989); H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2, at 32-34, 43-45 (1990).

Similar effects on interstate commerce have been upheld by the Supreme Court as legitimate bases for Congress' exercise of its commerce powers. See, e.g., Fry v. United States, 421 U.S. 542, 547 (1975) (increased purchasing power resulting from increased wages); Perez v. United States, 402 U.S. 146, 156 (1971) (loss of income and employment resulting from extortionate credit transactions); Maryland v. Wirtz, 392 U.S. 183, 195 (1968) (changing competitive positions in marketplace resulting from decreased wages and substandard labor conditions), overruled on other grounds, National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985); McClung, 379 U.S. at 299 (diminished spending resulting from race discrimination); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964) (diminished travel resulting from race discrimination); Wickard v. Filburn, 317 U.S. 111, 128 (1942) (changing market

conditions resulting from individual consumption of food products).

Lopez does not change this analysis. At issue in Lopez was the Gun-Free School Zones Act, which forbade the possession of firearms in a school zone, and which the Court ruled exceeded Congress' Commerce Clause power. The Lopez decision, however, specifically reaffirmed the validity of the Court's previous Commerce Clause decisions. Lopez, 115 S. Ct. at 1634. See id. at 1637 (Kennedy, J. and O'Connor, J., concurring)(affirming Commerce Clause precedent in the area of discrimination, and the principle that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"). Of particular concern in Lopez was the fact that the School Zones Act was a criminal statute, typically a subject of State and local, not federal legislation, id. at 1631 n.3, 1632, and "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise however broadly one might define those terms." Id. at 1630-31.

By contrast, as explained above, Title I of the ADA deals with commercial actors, public and private employers. Moreover, "the design of the statute ha[s] an evident commercial nexus," id. at 1640; it ensures access to employment, and is designed to ensure equality of opportunity and economic self-sufficiency to a significant sector of the national economy. Thus, in contrast to Lopez, where neither the prohibited conduct (possession of a gun near schools), nor its immediate effect (increase in violence in

schools) was commercial, the immediate effect of the prohibited conduct here is a burden to commercial transactions. Prohibition of employment discrimination on the basis of disability is thus well within Congress' power to protect and foster commerce. Lopez, 115 S. Ct. at 1630.[22]

CONCLUSION

For the reasons set forth above, Title I of the ADA should be sustained as a valid exercise of Congress' powers under the Fourteenth Amendment and the Commerce Clause.

Respectfully submitted,

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[22] The Eleventh Circuit recently rejected a Lopez challenge to the Freedom of Access to Clinic Entrances Act ("Access Act"), 18 U.S.C. § 248. Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995). The Court held that even after Lopez, Congress' findings "provide a rational basis for concluding that the Access Act regulates activity [the provision of reproductive health services] which 'substantially affects' interstate commerce," and that "the Access Act is a constitutional exercise of Congress' power under the Commerce Clause." Id. at 1521.