UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BETSY Y. RESTO ORTIZ, ET AL. Plaintiffs, vs. COMMONWEALTH OF PUERTO RICO, ET AL. Defendants.	)))))))))))	NO. 02-CV-1282 (DRD)

UNITED STATES' MEMORANDUM REGARDING WHETHER THE ELEVENTH AMENDMENT BARS THE PLAINTIFFS FROM SEEKING INJUNCTIVE RELIEF AND DAMAGES AGAINST PUERTO RICO UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT; SECTION 504 OF THE REHABILITATION ACT OF 1973; INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT

INTRODUCTION

Plaintiffs brought this action seeking injunctive relief and damages for the alleged failure of defendants to comply with an order by an Administrative Judge to provide a sign language interpreter for the student Betsy Y. Resto Ortiz. Although the Complaint is unclear, it appears that plaintiffs seek monetary and injunctive relief pursuant to three separate federal statutes: Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 [Section 504]; and the Individuals with Disabilities in Education Act, 20 U.S.C.1400 *et seq* [IDEA]. Defendants have moved to dismiss this action on the basis that Puerto Rico's Eleventh Amendment immunity bars the plaintiffs' claims under

each of these statutes. The Court has requested the United States to address defendants' claims.[1] The United States asserts here, as it has asserted in other Courts, that the Eleventh Amendment is not a bar to an individual claim made pursuant to these three statutes, and this case can go forward on the merits. However, before proceeding to our arguments, we address a preliminary matter.

At the present time, pending before the Court of Appeals for the First Circuit is the case *Badillo Santiago v. Andreu Garcia* (No. 01-2640), which concerns one of the issues before this Court: whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. In as much as that question is now before the Court of Appeals, we respectfully suggest that it would be appropriate to wait until the Court of Appeals issues its decision in that case. If the Court of Appeals holds that Title II contains a valid abrogation of Eleventh Amendment immunity, this Court will not need

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[1] Regardless of the validity of the abrogation as legislation to enforce the Fourteenth Amendment, Congress could remove Puerto Rico's sovereign immunity pursuant to its Article IV authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. Art. IV, § 3; see *National Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880) (Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments"). However, this Court has adopted a presumption that Congress would not have intended to remove Puerto Rico's immunity to suit if Congress did not have the power to abrogate States' Eleventh Amendment immunity, at least so long as a statute (like the ADA, see 42 U.S.C. 12102(3) or IDEA, 21 U.S.C. 1401(a)(6)) defines Puerto Rico as a State. See *Jusino Mercado* v. *Puerto Rico*, 214 F.3d 34, 40-44 (1st Cir. 2000); see also *Acevedo Lopez* v. *Police Dep't of Puerto Rico*, 247 F.3d 26 (1st Cir. 2001) (dismissing suit under Title I of ADA against Puerto Rico in light of *Garrett*). We question the validity of that presumption. We acknowledge, however, that this Court is bound by those cases, and provide the analysis in the brief on the assumption that this Court will reach the issue whether States can be subjected to private suit under Title II, Section 504 or IDEA in assessing whether Puerto Rico is subject to such suits.

to consider plaintiffs' claims under the Rehabilitation Act and IDEA. If, on the other hand, the Court holds that Title II of the ADA is not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, then this Court can determine whether plaintiffs may proceed under the Rehabilitation Act and/or IDEA.

Because the validity of the Title II's abrogation will be resolved by the Court of Appeals, in this brief we address first the question of whether Puerto Rico has waived its Eleventh Amendment immunity to suits brought under Section 504 and IDEA by accepting federal funds.

ARGUMENT

I. THE REHABILITATION ACT AND IDEA ARE EACH A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE SPENDING CLAUSE OF THE CONSTITUTION.

The Eleventh Amendment does not bar Plaintiffs' IDEA claims and Rehabilitation Act claims because defendants have waived their sovereign immunity by accepting federal funds. As demonstrated below, pursuant to the Spending Clause of the Constitution, Art. I, § 8, Cl. 1, Congress has the authority to condition its spending on a waiver of Eleventh Amendment immunity; for both IDEA and the Rehabilitation Act, Congress has enacted a clear statement that accepting federal funds would constitute a waiver of Eleventh Amendment immunity; and the Rehabilitation Act and IDEA are each a valid exercise of the Spending Clause.[2]

[2] In their Motion to Show Cause, defendants devote a large portion of their argument to challenging the abrogations of Eleventh Amendment immunity in Title II, the IDEA and Rehabilitation Act, contending that Congress exceeded its Section 5 authority. Because Puerto Rico knowingly and voluntarily waived its immunity to suit in federal court under Section 504 and IDEA by accepting federal funds, the Court need not reach the question of whether Congress has the constitutional authority to abrogate Puerto Rico's sovereign immunity pursuant to § 5 of the Fourteenth Amendment. *See Litman v. George Mason University*, 186 F.3d 544, 557 (4th Cir.

A. Congress Has Authority to Condition the Receipt of Federal Financial Assistance on the State Waiving its Eleventh Amendment Immunity

A State can waive its immunity either by State statute or constitutional provision or "by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). *Accord College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (States are free to waive their Eleventh Amendment immunity). Under the second method of waiver, a State may "by its participation in the program authorized by Congress . . . in effect consent[] to the abrogation of that immunity." *Edelman v. Jordan*, 415 U.S. 651, 672 (1974). The Supreme Court recently restated this maxim in *Florida Prepaid*:

> [W]e have held . . .that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. . . . Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.

527 U.S. at 686. *See also New York v. United States*, 505 U.S. 144, 168 (1992) (attachment of conditions to grants made under the Spending Clause is a permissible method of encouraging a State to conform to federal policy choices.")

"For a federal statute to produce a waiver of a State's immunity through the State's participation in a federal spending program," however, "the statute must provide a clear expression of Congress's 'intent to condition participation in the program[ ] . . . on a State's

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1999) *cert. denied*, 528 U.S. 1181 (2000) (declining to address the question of whether Congress had constitutionally abrogated Eleventh Amendment immunity pursuant to Title IX because the State-operated university "through its acceptance of [federal] funding, waived its Eleventh Amendment immunity"); *cf. Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (reciting rule that courts "should not pass on questions of constitutionality . . . unless such adjudication is unavoidable").

consent to waive its constitutional immunity.'" *Bradley v. Arkansas Dep't of Educ.*, 189 F.3d 745, 753 (8th Cir. 1999) (upholding State's waiver of Eleventh Amendment immunity under IDEA), *rev'd in part on other grounds*, *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (upholding waiver of State's Eleventh Amendment immunity under the Rehabilitation Act), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.*, 121 S. Ct. 2591 (June 29, 2001).

Thus, Congress may condition (and in this case has conditioned) the receipt of federal funds on defendants' waiver of Eleventh Amendment immunity to Section 504 claims and IDEA claims.

B. 42 U.S.C. 2000d-7 Validly Removes Eleventh Amendment Immunity for Private Claims under Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 abrogates the states' Eleventh Amendment immunity to suits brought under Section 504. Section 2000d-7 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964." Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance.[3]

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[3] Defendants do not dispute that the Puerto Rico Department of Education, received federal funds when the alleged violation occurred, and continue to receive federal funds. We are informed that the Puerto Rico Department of Education has been awarded federal funds from the United States Department of Education for FY 2001, including approximately $60,000,000 for special education. See Documents at Exhibit 1.

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

Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234. In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247.

Section 2000d-7 makes unambiguously clear that Congress intended States to be amenable to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance) if they accepted federal funds.[4] Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it could be sued in federal court for violations of Section 504 if it accepted federal funds. Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal

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

funds was the condition that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any financial assistance.[5]

State defendants suggest, without elaboration or support, that the waiver language in Section 2000d-7 is not a "clear declaration." *See* Defendants' Motion to Show Cause, filed April 3, 2002, at 27-28 [hereinafter, "Def. Mot"]. This suggestion is belied by the Supreme Court in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), where the Court acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. Likewise, the Fourth Circuit, after an extensive analysis of the text and structure of the Act, held in *Litman v. George Mason Univ*, 186 F.3d 544 554 (4th Cir. 1999) *cert denied* 528 U.S. 1181 (2000), that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." Six other courts of appeals agree that the Section 2000d-7 language clearly manifests an intent to condition receipt of federal financial assistance on consent to waive Eleventh Amendment immunity. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, *opinion amended*, 271 F.3d 910 (9th Cir. 2001) (Section 504); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504), *petition for cert. pending,* No. 01-1357; *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th

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

Cir. 2000) (en banc) (Section 504), *cert. denied*, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), *rev'd on other grounds*, 532 U.S. 275 (2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), *cert. denied*, 524 U.S. 937 (1998).[6]

Defendants appear to suggest their waiver was not knowing and voluntary, relying on an isolated decision in *Garcia* v. *SUNY Health Sciences Center*, 280 F.3d 98, 113 (2d Cir. 2001). Def. Mot. at 31. In *Garcia*, the Second Circuit agreed with the other courts of appeals that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id*. at 114 n.4. However, *Garcia* held that the waiver was not knowing because the state agency did not "know" in 1995 (the latest point the alleged discrimination had occurred) that the abrogation in Title II of the Disabilities Act was not effective and thus would have thought (wrongly, in the view of the Second Circuit) that Title II's abrogation for Title II claims made the waiver for Section 504 redundant. *Id*. at 114. This conclusion about a knowing waiver is, in our view, incorrect. It is wrong because every state agency did know from the plain text of Section 2000d-7 from the time it was enacted in 1986 that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title

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[6] State defendants ignore this precedent. Instead, they refer the Court to the *dissenting* opinions of Courts in the 4th and 8th Circuits. Def. Mot. at 29-30. These dissenting opinions have no weight.

II in 1990 and it was clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). It is simply untenable to suggest that abrogation for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute. *Garcia's* holding – that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's and has now regained its full effectiveness – creates an unprecedented patchwork of effective coverage.[7]

Moreover, the Second Circuit's opinion makes clear that at the point when there is a "colorable basis for a state to suspect" that it had retained its immunity to suit, the waiver for Section 504 would be effective "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity." *Id*. at 114 n.4. The courts of appeals are thus in accord on this issue. Defendants do not deny – nor could they – that the Puerto Rico Department of Education accepted federal funds in 2001 – which is the time period when plaintiffs allege that it failed to comply with the Administrative Order in this case. *See* FN 3, supra at 5. Nor, given that Defendants were arguing to this very Court in *Badillo-Santiago* in March, 2001 that Title II exceeds Congress's Section 5 powers, can they now argue that they were unaware in 2001 that Puerto Rico might be immune to suits under Title II of the ADA. *Badillo-Santiago v. Andreu-Garcia*, 167 F. Supp. 194, 196 (D. PR 2001). In sum, even if

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[7] It is clear that a waiver can be knowing and voluntary even if it was based on an incorrect understanding of the law. *See Brady v. United States*, 397 U.S. 742, 757 (1970) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); cf. *Newton v. Rumery*, 480 U.S. 386 (1987) (plaintiff may waive the right to bring a 42 U.S.C. 1983 action for unknown constitutional violations).

this Court adopted the minority holding in *Garcia,* which it should not, it would not be applicable in the instant case.

Finally, State defendants suggest, again without elaboration, that the Supreme Court's decisions in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) and *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), "change" the way this Court should evaluate whether Puerto Rico has waived its immunity in accepting Section 504 and IDEA funds. Def. Mot. at 30. This suggestion is misplaced because it ignores the obvious fact that those cases involved Congress' authority under Section 5, not, as here, the Spending Clause. Thus, the Court's analysis of Congress's authority under Section 5, is a separate and unrelated question from Congress's authority under the Spending Clause. As the Court in *Litman* recognized,

> We do not read *Seminole Tribe* and its progeny, including the Supreme Court's recent Eleventh Amendment decisions, to preclude Congress from conditioning federal grants on a state's consent to be sued in federal court to enforce the substantive conditions of the federal spending program. Indeed, to do so would affront the Court's acknowledgment in *Seminole Tribe* of the "unremarkable... proposition that States may waive their sovereign immunity."

186 F.3d at 556 (quoting *Seminole Tribe*, 517 U.S. at 65). *See also Pederson*, 213 F.3d at 876 (same; decided after *Garrett* and *Kimel*); *Douglas*, 271 F.3d at 820 (same).

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

The Supreme Court in *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress conditions the States' receipt of federal funds, it "'must do so unambiguously * * *, enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation.'"

Ibid. (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid*. And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id*. at 208. None of these limitations apply in this case.

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

2. The language of Section 2000d-7 and Section 504 alone make clear that the obligations it imposes are a condition on the receipt of federal financial assistance. *See, e.g., Litman*, 186 F.3d at 553-54. *See* discussion, supra at 6-8. Thus, the second *Dole* requirement is met. Moreover, Department of Education implementing regulations for Section 504 require that "an applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program or activity will be operated in compliance with this part." 34 CFR 104.5

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

was specifically for the free and appropriate education of children with disabilities. Thus, there can be no basis for defendants' suggestion that the federal grants are not related to the federal purpose.

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

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

4. Section 504 does not "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. Neither providing meaningful access to people with disabilities nor waiving sovereign immunity violates anyone's constitutional rights. The relevant state agency incurs these obligations only because it applies for and receives federal funds. "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). [8]

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[8] Because of the close identity between the substantive obligations of Title II and Section 504, whether Section 2000d-7 is valid Section 5 legislation for Section 504 claims will be governed by the First Court's determination regarding Title II's abrogation. *See Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 79-80 (2d Cir.2000); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

B. Sections 1403 and 1415 of the IDEA Validly Remove Eleventh Amendment Immunity for Private Claims under IDEA.

The IDEA, originally enacted in 1970 as the Education of the Handicapped Act (EHA), Pub.L. No. 91-230, §§ 601-662, 84 Stat. 175, confers on disabled children a substantive right to a "free appropriate public education." 20 U.S.C. § 1400(c); *see Honig v. Doe*, 484 U.S. 305, 308-10, (1988). A free appropriate education "consists of educational instruction specially designed to meet the unique needs of the [disabled] child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982). IDEA places on the states the primary responsibility for satisfying the goals of the statute. IDEA, described by several courts as a model of "cooperative federalism," *see, e.g., Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 151 (3d Cir.1994); *Town of Burlington v. Dep't of Educ*., 736 F.2d 773, 783 (1st Cir.1984), aff'd, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), authorizes federal funding for states providing the special education that the statute requires, but funding is contingent on state compliance with its array of substantive and procedural requirements, 20 U.S.C. § 1412.

Under IDEA, Puerto Rico receives federal funds for education. By accepting these funds, Puerto Rico consents to be sued for violations of the IDEA. Section 1403 of the IDEA, 20 U.S.C. § 1403 (Section 1403), specifically conditions receipt of federal funds on a waiver of state sovereign immunity.[9] Section 1403 reads in part: “A State shall not be immune under the

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[9] The United States maintains in the alternative that Section 1403 is a valid exercise of its authority under Section 5 of the Fourteenth Amendment. *See David D. v. Dartmouth Sch. Comm*., 775 F.2d 411, 421-22 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); *Crawford v. Pittman*, 708 F.2d 1028, 1037-38 (5th Cir. 1983); *Mitten v. Muscogee County Sch. Dist*., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); *Counsel v. Dow*, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988); *Board of Educ. v. Illinois State Bd. of*

eleventh amendment to the Constitution of the United States from suit in Federal Court for a violation of this chapter." *Id*. Section 1415(a) of the IDEA, 42 U.S.C. § 1415(a) provides that any state that receives financial assistance under the IDEA "shall establish and maintain certain procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." Specifically included among these procedures is the right to bring a civil action in federal court. 20 U.S.C. 1415 (i)(2). Sections 1403 and 1415 unequivocally and unambiguously condition receipt of Federal financial assistance under the IDEA on recipient States' waiver of Eleventh Amendment immunity from IDEA suits. *See Board of Educ. of Oak Park v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 1999), cert denied, 531 U.S. 824 (2000); *Beth V. v. Carroll*, 87 F.3d 80 (3d. Cir. 1996). By accepting federal IDEA funds, Puerto Rico has adopted this waiver of Eleventh Amendment immunity.

1. Sections 1403 and 1415 of the IDEA Constitute a Clear Statement That By Accepting Federal Financial Assistance Under IDEA, Puerto Rico has Waived Immunity to Private Suits Brought Under IDEA.

Section 1403 was enacted in response to the Supreme Court's holding in *Muth v. Dellmuth*, 491 U.S. 223 (1989). In *Muth*, the Court concluded that the predecessor to the IDEA did not contain an adequately clear and unambiguous statement of Congress's intent to require a waiver of State sovereign immunity. *Id.* at 232. The following year, Congress responded by adopting 20 U.S.C. § 1403, "which makes express" its intent that State recipients of IDEA funding surrender their Eleventh Amendment immunity from suit. *Beth V.*, 87 F.3d at 88. *See*

Educ., 979 F. Supp. 1203, 1208 (N.D. Ill. 1997); *Emma C. v. Eastin*, 985 F. Supp. 940, 947 (N.D. Cal. 1997).

also Lane v. Pena, 518 U.S. at 200 (1996) and supra at 7 (interpreting almost identical statutory language that was added to the Rehabilitation Act pursuant to the Rehabilitation Act Amendments of 1986, codified at 42 U.S.C. § 2000d-7).

Since IDEA was amended, the circuit courts of appeal that have addressed this issue have held that States which accept funds pursuant to IDEA have waived their immunity to suit in federal court. *See Board of Educ. of Oak Park v. Kelly E.*, 207 F.3d at 935. ("Although [IDEA] does not use words such as 'consent' or 'waiver,' it is hard to see why that should matter. Congress did what it could to ensure that States participating in the IDEA are amenable to suit in federal court."); *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 832 (8th Cir. 1999) (characterizing 20 U.S.C. § 1403 as "an unambiguous waiver of the States' Eleventh Amendment immunity").

In addition to § 1403, section 1415(i)(2) of the IDEA includes a provision explicitly authorizing lawsuits to enforce its provisions in State and federal court, further evidencing "Congress' view that private suits are integral to enforcement of IDEA."[10] *Beth V.*, 87 F.3d at 88

[10] Defendants read Section 1415 too narrowly when they describe the IDEA as limiting suits to "issues of identification, evaluation, or educational placement of the child." (Def. Mot. at 32.) The Third Circuit rejected such a limited construction of Section 1415 in *Beth V.*, noting that the IDEA authorizes suits "*with respect to any matter relating to*" the provision of a free appropriate public education. *Beth V.*, 87 F.3d at 86 (emphasis in original). Even those Courts that agree with defendants, have permitted parties to enforce the administrative rulings in Federal court. *See Jeremy H. by Hunter v. Mount Lebanon School District*, 95 F.3d 272, 278 (3d Cir.1996); *Robinson v. Pinderhughes*, 810 F.2d at 1273-75; *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir.1987); *Hoekstra v. Independent School District No. 283*, 916 F. Supp. 941, 945 (D. Minn.), *aff'd*, 103 F.3d 624 (8th Cir.1996), *cert. denied*, 520 U.S. 1244, 117 S.Ct. 1852, 137 L.Ed.2d 1054 (1997); *Slack v. State of Delaware Department of Public Instruction*, 826 F. Supp. 115, 120 (D. Del.1993); *Reid v. Board of Education, Lincolnshire-Prairie View School District* 103, 765 F. Supp. 965, 969 (N.D. Ill.1991); *Grace B. v. Lexington School Committee*, 762 F. Supp. 416, 418 (D. Mass.1991).

(authorizing suit against Pennsylvania Department of Education and citing 20 U.S.C. § 1415). Read in conjunction with § 1403, this explicit reference to private rights of action in the federal courts provides additional, explicit notice that Congress intended to provide IDEA monies only to States that waived their sovereign immunity. *See Bradley*, 189 F.3d at 753 ("When it enacted [20 U.S.C.] §§ 1403 and 1415, Congress provided a clear, unambiguous warning of its intent to condition State's participation in the IDEA program and its receipt of federal IDEA funds on the State's waiver of its immunity from suit in federal court on claims made under the IDEA").

IDEA is effective only when the State elects to receive federal funds. *See Beth V.*, 87 F.3d at 82 (noting that IDEA has "been described by several courts as a model of 'cooperative federalism'" and recognizing that IDEA funding "is contingent on State compliance with its array of substantive and procedural requirements"); *see also Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 151 (3d Cir. 1994) (recognizing that it is only when an education agency "receives an allocation of funds under" IDEA that it "incurs the responsibility" to comply with IDEA's terms). Thus, "the powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923). The documents from the U.S. Department of Education prove that Defendants have accepted federal funds for special education (IDEA funds) after the effective date of Section 1403. *See* FN 3, supra at 5. Accordingly, defendants have waived their Eleventh Amendment immunity to a suit under the IDEA. *See Kelly E.*, 207 F.3d at 935 ("States that accept federal money [under the IDEA] . . . must respect the terms and conditions of the grant"). "Requiring States to honor the obligations voluntarily assumed as a

condition of federal funding . . . simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U.S. 773, 790 (1983).

The IDEA presented Puerto Rico with a clear choice: Either agree to waive Eleventh Amendment immunity for suits enforcing the IDEA's provisions, or forego Federal financial assistance for educational programs for students with disabilities. Having accepted the federal funds, Puerto is bound by the IDEA's valid waiver provisions. See 20 U.S.C. §§ 1403, 1415.

2. IDEA's Waiver Requirement is a Valid Exercise of Congress's Spending Clause Authority

The IDEA is a valid exercise of Congress's Spending Clause authority and meets the criteria set out in *South Dakota v. Dole*, *see* discussion of Dole, supra at 10-11. There can be no dispute that (1) the general welfare is served by the IDEA which provides for free appropriate education for students with disabilities; (2) the IDEA clearly conditions the acceptance of federal funds on Puerto Rico's waiver of its Eleventh Amendment immunity; and (3) federal funds received by the State pursuant to the IDEA are expressly tied to implementing the provisions of that statute, and therefore the condition of waiving Eleventh Amendment immunity is directly related to Congress' interest in implementing the IDEA and providing for the education of children with disabilities. Finally, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id*. at 208. The IDEA does not "induce the States to engage in activities that would themselves be unconstitutional." *Id.* at 210.

C. STATE DEFENDANTS HAVE NOT BEEN COERCED INTO ACCEPTING FEDERAL FUNDS.

Defendants also argue, Def. Mot. at 27, that the nondiscrimination conditions in the Rehabilitation Act and IDEA are coercive, and therefore, not voluntary.

While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)), it saw no reason generally to inquire into whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid*. The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid*. (quoting *Steward Mach.*, 301 U.S. at 590). Accordingly, the Ninth Circuit has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), *cert. denied*, 522 U.S. 806 (1997).

Any argument that either of these statutes is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to difficult or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would

regulate health services within the State. *Id*. at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id*. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[11]

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding.

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

Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[12]

These cases demonstrate that the federal government can place conditions on federal. funding that require States to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. *See Jim C.*, 235 F.3d at 1081-1082 (en banc). *Accord New Hampshire Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980) ("We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stake that controls, but the rules of the game").

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline

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[12] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude an entity from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally condition the federal funds to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

the funds. See *Grove City Coll.*, 465 U.S. at 575; *Kansas* v. *United States*, 214 F.3d at 1202 ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted))

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

For all these reasons, Section 504 and Section 2000d-7, and IDEA, can be upheld under the Spending Clause.

II. CONGRESS'S ENACTMENT OF TITLE II OF THE ADA IS A VALID ABROGATION OF PUERTO RICO'S ELEVENTH AMENDMENT IMMUNITY.

In *University of Alabama* v. *Garrett*, 531 U.S. 356, 363 (2001), the Supreme Court reaffirmed that Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the States' Eleventh Amendment immunity to private damage suits. In assessing the validity of "§ 5 legislation reaching beyond the scope of § 1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *City of Boerne* v. *Flores*, 521

U.S. 507, 520 (1997)). This requires a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *ibid*.; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *id*. at 368; finally, the Court must assess whether the "rights and remedies created" by the statute were "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id*. at 372, 373.

Applying these "now familiar principles," *id*. at 365, the Court in *Garrett* held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the ADA. The Court concluded that Congress had identified only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as *employers* against people with disabilities), *id*. at 369, and had not made a specific finding that discrimination in public sector employment was pervasive, *id*. at 371-372. Thus, the Court held, Congress did not assemble a sufficient basis to justify Title I's abrogation of Eleventh Amendment immunity for its prophylactic statutory remedies. *Id*. at 372.

The Supreme Court specifically reserved the question that the district court seeks to have the United States address: whether Title II's abrogation can be upheld as valid Section 5 legislation. The Supreme Court noted that Title II "has somewhat different remedial provisions from Title I," *id*. at 360 n.1, and that the legislative record for those activities governed by Title II was more extensive, see *id*. at 372 n.7. Less than a week after deciding *Garrett*, the Supreme Court denied a petition for certiorari filed by California and let stand the Ninth Circuit's holding

that Title II's abrogation was valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (1999), cert. denied, 121 S. Ct. 1187 (2001).

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

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

Garrett instructs that in assessing the validity of Congress's Section 5 legislation, it is important to identify the constitutional rights at stake. See 531 U.S. at 365. Since there is no constitutional right to state employment, the Court looked to the Equal Protection Clause as the sole constitutional provision that Congress sought to enforce. *Ibid*. And because classifications

based on disability are not subject to heightened scrutiny, the Court faulted Congress for failing to identify incidents when state action did not satisfy the "minimum 'rational-basis' review applicable to general social and economic legislation." *Ibid*.

By contrast, Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. Those rights include the right to vote, to access the courts, to petition officials for redress of grievances, to receive due process from law enforcement officials, and to be confined where conditions are humane. To the extent that Title II enforces the Fourteenth Amendment by remedying and preventing government conduct that burdens these constitutional provisions and discriminates against persons with disabilities in their exercise of these rights, Congress did not need to identify *irrational* government action in order to identify and address *unconstitutional* government action. See *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813-814 (6th Cir. 2002) (en banc); *id*. at 820 (Moore, J., concurring) ("The fact that Title II implicates constitutional violations in areas ranging from education to voting also suggests that heightened judicial scrutiny under both the Due Process and Equal Protection Clauses is appropriate.")

Moreover, where a State is providing generally-available public services, justifications that would be sufficient to uphold policies in an employment setting often will not suffice to justify exclusion from government services. When a government interacts with its citizens as sovereign, the core purpose of the Constitution in protecting its citizens *qua* citizens is implicated in a way that it is not where the government is acting as employer. Thus, as the

Supreme Court has explained in the First Amendment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996); cf. *O'Connor* v. *Ortega*, 480 U.S. 709, 724 (1987) (holding that Fourth Amendment protects government employees, but declining to impose "probable cause" requirement on searches because of special needs of government as employer).

Therefore, the Supreme Court's statement in *Garrett* that the Equal Protection Clause does not require States to accommodate people with disabilities if it involves additional expenditures of funds, see 531 U.S. at 372, is best understood as limited to government actions in its capacity as an employer. That statement certainly would not permit States to deny persons with disabilities their right to vote on the ground that providing access to the polling place is costly. Even outside the arena of fundamental rights, the Supreme Court has made clear that a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under this standard, reducing costs or increasing administrative efficiency will not always suffice as justification outside the employment context. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636-637 (1974). Indeed, the Supreme Court has held that in order to comply with the Equal Protection Clause a State may be required to provide costly services free of charge where necessary to provide a class of persons meaningful access to important services offered to the public at-large. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110, 127 n.16 (1996).

In addition, courts have found unconstitutional treatment of persons with disabilities in a wide variety of public services, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment.[13] These cases provide the "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), of unconstitutional disability discrimination by States that the Court found lacking in the employment context.

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

Congress engaged in extensive study and fact-finding concerning the problem of unconstitutional discrimination against persons with disabilities, holding 13 hearings devoted

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

specifically to the consideration of the ADA.[14] In addition, a congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities – often at the hands of state governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) (*Leg. Hist.*); Task Force Report 16. Congress also considered several reports and surveys.

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[14] See *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transp. and Haz. Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecomm. Relay Servs., Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opps. and Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. (1989); *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. (1990); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (*May 1989 Hearings*); *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1989).

See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990); Task Force Report 16.[15]

1. *Congressional Findings*: As the Supreme Court in *Garrett* acknowledged, 531 U.S. at 372 n.7, the record of adverse conduct by States toward people with disabilities was both broader and deeper than the six incidents Congress identified with regard to state employment. Equally important, after amassing the record we discuss below, Congress brought its legislative judgment to bear on the issue and expressly found that discrimination was pervasive in these areas. In the area of employment, Congress made a finding about discrimination in private employment, but no analogous finding for public employment. *Id*. at 371-372. In contrast, Congress made express findings in the text of the statute itself of persisting discrimination in "education, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). The first three areas are fields predominately operated by States and the last is, under the terms of the statute, the exclusive domain of state and local governments. See 104 Stat. 337 (title of Title II is "Public Services"); 42 U.S.C. 12131(1) (limiting term "public entity" to state and local governments, and Amtrak).

Again, the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point with regard to public services, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of

[15] These included the two reports of the National Council on the Handicapped; the Civil Rights Commission's *Accommodating the Spectrum of Individual Abilities* (1983) (*Spectrum*); two polls conducted by Louis Harris & Assoc., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans* (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

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

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

That "lengthy and tragic history," *Cleburne*, 473 U.S. at 461 (Marshall, J.), of discrimination, segregation, and denial of basic civil and constitutional rights for persons with disabilities assumed an especially pernicious form in the early 1900s, when the eugenics movement and Social Darwinism labeled persons with mental and physical disabilities "a menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." *Id*. at 462 (Marshall, J.); see also Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 19 (1983) (*Spectrum*). Persons with disabilities were portrayed as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 20. "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J.). Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[16] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feeble-minded." *Spectrum* 20, 33-34. With the aim of halting reproduction and "nearly extinguish[ing] their race," *Cleburne*, 473 U.S. at 462 (Marshall, J.), almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage, see *id*. at 463; see also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding state compulsory sterilization law "in order to prevent our being swamped with incompetence"); 3 *Leg. Hist.* 2242 (James Ellis).

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

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *Cleburne*, 473 U.S. at 463 (Marshall, J.); see also *Board of Educ.* v.*Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education").[17] Numerous States also restricted the rights of physically disabled people to enter into contracts. See *Spectrum* 40.

3. *The Enduring Legacy of Governmental Discrimination*: "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J.). "[O]ut-dated statutes are still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Id*. at 467 (emphasis added).[18] Consequently, "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[19]

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

[18] For example, as recently as 1983, 15 States continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15-year-old girl).

[19] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society – notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded

Moreover, as we detail below based on the testimony of hundreds of witnesses before Congress and at the Task Force's forums,[20] Congress found, as a matter of present reality and historical fact, that discrimination pervaded state governmental operations and that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645; see 42 U.S.C. 12101(a)(2) and (a)(3).

In particular, Congress reasonably discerned a substantial risk that persons with disabilities will be subjected to unconstitutional discrimination by state governments in the form of "arbitrary or irrational" distinctions and exclusions, *Cleburne*, 473 U.S. at 446. In addition, the evidence before Congress established that States structure governmental programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights (such as the rights to vote, to petition government officials, to contract, to receive adequate custodial treatment, and to achieve equal access to the courts and public education) protected by the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. The scope of the testimony offered to

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from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history."); 134 Cong. Rec. E1311 (daily ed. 1988) (Rep. Owens) ("The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.").

[20] The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents – mostly handwritten letters and commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. See *id*. at 1336, 1389. Both the majority and dissent in *Garrett* relied on these documents, see 531 U.S. at 369-370, with the dissent citing to them by State and Bates stamp number, *id*. at 389-424 (Breyer, J., dissenting), a practice we follow.

Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. For ease of understanding, we have organized the evidence into sections touching on various areas of constitutional import.

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

Congress heard that "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature.'" The clerk then arbitrarily invented a reason to reject the registration. *Id*. at 1219. Congress was also aware that a deaf voter was told that "you have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Access to Voting Hearings*). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[21]

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[21] A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." Ala. 16. Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no

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

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

Id. at 1071 (Emeka Nwojke).

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

Numerous other witnesses explained that access to the courts[22] and other important government buildings and officials[23] depended upon their willingness to crawl or be carried. And Congress was told that state officials *themselves* had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory

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

[23] See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 40 (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 488, 491 (Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them"); *id*. at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have an elevator."); *id*. at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call my husband to drive in and help me because the newly renovated State House" lacked accessible bathrooms); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped." City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); Calif. Att'y Gen., *Commission on Disability: Final Report* 70 (Dec. 1989) ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989).

The physical exclusion of people with disabilities from public buildings has special constitutional import when court proceedings are taking place inside. For criminal defendants, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). The Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id*. at 819. Parties in civil litigation have an analogous Due Process right to be present in the courtroom and to meaningfully participate unless their exclusion furthers important government interests. See, *e.g.*, *Popovich*, 276 F.3d at 813-814 (en banc); *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985).

(b) *Education:* "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State undertakes to provide a public education, that right "must be made available to all on equal terms." *Ibid*. But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. For example, California reported that in its school districts (which are covered by the Eleventh Amendment, see n.28, *infra*), "[a] bright child with cerebral palsy is

assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability" and that in one California town, all disabled children are grouped into a single classroom regardless of individual ability. Calif. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Calif. Report*). "When I was 5," a witness testified to Congress, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[24]

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

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

A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[25] This evidence is consistent with the finding of the Commission on Civil Rights, also before Congress, that the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (29% of disabled persons had attended college, compared to 48% of the non-disabled population). Although such a finding does not indicate what percentage of the population have conditions such as mental retardation that might affect skills required for higher education, "they nonetheless are evidence of a substantial disparity." *Spectrum* 28.

(c) *Law Enforcement*: Persons with disabilities have also been victimized in their dealings with law enforcement. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint

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

from a blind woman because she could not make a visual identification, ignoring the possibility of alternative means of identifying the perpetrator. N.M. 1081. A person in a wheelchair was given a ticket and six-months probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. Va. 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331.[26] The discrimination continues in correctional institutions. "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller).[27] These problems implicate the entire array of constitutional protections for those in state custody for alleged or proven criminal behavior (including the Fourth Amendment right to be free from

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[26] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id*. at 1196 (Cindy Miller) (police "do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims"); *id*. at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Tex. 1541 (police refused to take an assault complaint from a person with a disability); *Calif. Report* 101-104 (additional examples). In addition, persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. H2633 (daily ed. May 22, 1990) (Rep. Levine); Wyo. 1777; Idaho 517.

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

unreasonable seizures, the substantive due process rights of pre-trial detainees, the procedural due process and Sixth Amendment rights to fair and open criminal proceedings, and the Eighth Amendment right to be free from cruel and unusual punishment upon conviction).

(d) *Institutionalization*: Unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were also catalogued. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id*. at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[28] Unnecessary institutionalization and mistreatment within state-run facilities may violate substantive due process. See *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (impermissible confinement); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479 U.S. 962 (1986) .

(e) *Other Public Services*: Congress heard evidence that irrational discrimination

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[28] See also *Calif. Report* 114. Congress also brought to bear the knowledge it had acquired of this problem in enacting the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. 1997 *et seq.*, and the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.* See, *e.g.*, 132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) (Sen. Kerry) (findings of investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief.").

permeated the entire range of services offered by governments. Programs as varied as zoning[29]; the operation of zoos,[30] public libraries,[31] public swimming pools and park programs[32]; and child

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

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

[31] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); Pa. 1391 (public library will not issue library cards to residents of group homes without the countersignature of a staff member – this rule applies to "those having physical as well as mental disabilities").

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

custody proceedings[33] exposed the discriminatory actions and attitudes of officials.[34]

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

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*

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

[34] See also H.R. Rep. No. 485, *supra*, Pt. 2, at 46 ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?"); 2 *Leg. Hist.* 1061 (Eric Griffin) ("I come to you as one of those * * * who was denied a public education until age 18, one who has been put through the back door, and kept out of the front door and segregated even if you could get in."); *id*. at 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id*. at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where busdrivers start moving before I have my balance or State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); *id*. at 1017 (Judith Heumann) ("Some of these people are in very high places. In fact, one of our categories of great opposition is local administrators, local elected officials."); 3 *Leg. Hist.* 2241 (James Ellis) ("Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote, the right to attend public school, and the right to live in their own community, with their own families and friends."); 2 *Leg. Hist.* 1768 (Rick Edwards) ("Why are the new drinking fountains in our State House erected out of reach of persons in wheelchairs? And why were curb cuts at the Indianapolis Airport filled in with concrete?"); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and

Postsec. Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999). Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980) (Powell, J., concurring). Accordingly, in exercising its power, "Congress is not limited to mere legislative repetition of [the] Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. Rather, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999). The operative question thus is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts, but whether in response to the historic and enduring legacy of discrimination, segregation, and isolation faced by persons with disabilities at the hands of States, Title II was "designed to guarantee meaningful enforcement" of their constitutional rights, *id*. at 373.

Title II fits this description. Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all.[35] Title II also permits exclusion if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that she can meet all but the non-essential eligibility requirements of a program or service, the government's interest in

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programs in which discrimination against persons with disabilities arises).

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

excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. Title II thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000).

Title II thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. That margin of statutory protection does not redefine the constitutional right at issue. Instead, the statutory protection is necessary to enforce the courts' constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court, remedying the continuing effects of prior unconstitutional discrimination, and deterring future constitutional violations. "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997), Title II is on the remedial and prophylactic side of that line.

Title II requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). That requirement, however, is carefully tailored to the unique features of disability discrimination that Congress found persisted in public services in two ways. First, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on discrimination would be insufficient to erase the stain of discrimination. Cf. *Green* v. *County Sch. Bd.*, 391

U.S. 430, 437-438 (1968) (after unconstitutional segregation, government is "charged with the affirmative duty to take whatever steps might be necessary" to eliminate discrimination "root and branch"). Therefore, Title II affirmatively promotes the integration of individuals with disabilities – both in order to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably conclude that if it did not intercede the demonstrated failure of state governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations, would freeze in place the effects of their prior exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. Congress also correctly concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

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

where a *post hoc* judicial remedy may be of limited utility to an individual given the difficulty in remedying unconstitutional denials of intangible but important rights, such as the right to vote, to a fair trial, or to educational opportunity. By establishing prophylactic requirements, Congress provided additional mechanisms for individuals to avoid irreparable injuries and to ensure that constitutional rights were fully vindicated.

Further, Congress tailored the modification requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the position. 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16. And Congress determined, based on the consistent testimony of witnesses and expert studies, that contrary to the misconceptions of many, the vast majority of accommodations entail little or no cost.[36] And any costs are further diminished when measured against the financial and human costs of denying persons with disabilities an education or excluding them from needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyler*, 457 U.S. at 223-224, 227.

Title II's elevated burden of justification is not an impermissible effort to redefine constitutional rights; it is, instead, an appropriate means of rooting out hidden animus and

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

remedying and preventing pervasive discrimination that is unconstitutional under judicially defined standards. In short, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id*. at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access).

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

The record Congress compiled and the findings it made suffice to support Title II's substantive standard as appropriate Fourteenth Amendment legislation applicable to States and localities.[37] As such, it is one in a line of civil rights statutes, authorized by Civil War Amendments, that apply to States *and* local governments. See, *e.g.*, Titles III, IV, VI and VII of the Civil Rights Act of 1964,42 U.S.C. 2000b-2000e *et seq*.; Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq*.; Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*.; Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*

Aside from the substantive provisions of Title II, *Garrett* held that to sustain an *abrogation* of Eleventh Amendment immunity as appropriate Section 5 legislation, only

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[37] The Interstate Commerce Clause is also the basis for these substantive obligations. See *Walker* v. *Snyder*, 213 F.3d 344, 346 (7th Cir. 2000), cert. denied *sub nom. United States* v. *Snyder*, 121 S. Ct. 1188 (2001). Under either basis, suits against state officials for prospective relief can proceed regardless of the validity of the abrogation. See *Garrett*, 531 U.S. at 374; *Randolph* v. *Rodgers*, 253 F.3d 342 (8th Cir. 2001); *Roe No. 2* v. *Ogden*, 253 F.3d 1225 (10th Cir. 2001).

constitutional misconduct committed by those who are "beneficiaries" of the Eleventh Amendment can be relied upon. 521 U.S. at 369. The line between those government entities entitled to Eleventh Amendment immunity and those which are not is not always easy to identify. For example, while school districts are generally found not to be "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd.* v. *Doyle*, 429 U.S. 274, 280–281 (1977), there are some significant exceptions to this rule.[38] Similar state-by-state inquiries are required in the law enforcement arena. See *McMillian* v. *Monroe County*, 520 U.S. 781, 795 (1997) (holding that county sheriff in Alabama is a state official and noting "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another"). In other situations, such as voting, local officials are simply administering state policies and programs. While nominally the action of a local government, the discrimination individuals with disabilities endure is directly attributable to the State. Cf. *Railroad Co.* v. *County of Otoe*, 83 U.S. 667, 676 (1872) ("Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly."). Thus, as *Garrett* makes clear, actions of such local officials can be attributed to the States for

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[38] See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) (California school districts protected by Eleventh Amendment); *Rosenfeld* v. *Montgomery County Pub. Schs*., 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts protected by Eleventh Amendment). The law in other States remains in flux. Cf. *Martinez* v. *Board of Educ. of Taos Mun. Sch. Dist*., 748 F.2d 1393 (10th Cir. 1984) (New Mexico school districts protected by Eleventh Amendment), overruled, *Duke* v. *Grady Mun. Schs*., 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973) (Utah school districts protected by Eleventh Amendment), overruled, *Ambus* v. *Granite Bd. of Educ.*, 995 F.3d 992 (10th Cir. 1992) (en banc).

purposes of the "congruence and proportionality" inquiry. See 531 U.S. at 373 (attributing to "States" and "State officials" conduct regarding voting that was done by county "registrar[s]" and "voting officials" in *South Carolina* v. *Katzenbach*, 383 U.S. at 312).

Given the fact that some school districts and law enforcement officials are "beneficiaries of the Eleventh Amendment," *Garrett*, 531 U.S. at 369, and that some local practices are done at the States' behest, the evidence before Congress regarding the treatment of people with disabilities by education, law enforcement, voting, and other officials is relevant in assessing Congress's legislative record about State violations. Because the demarcation is unclear at the margins, we have in this brief provided the evidence before Congress concerning both state and local governments. But even limited to the evidence concerning States acting through their own agencies, there was a sufficient basis to sustain Congress's determination that States engaged in a pattern of unconstitutional conduct.

We acknowledge that the Tenth Circuit in *Thompson* v. *Colorado*, No. 99-1045, 2001 WL 1705488 (10th Cir. Oct. 9, 2001), reached the contrary conclusion. After surveying the record before Congress, *Thompson* concluded that there *was* "some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government 'services, programs, or activities.'" *Id*. at *10. The panel found even a larger number of incidents involved "refusals by public entities to make accommodations," *ibid*., which would be unconstitutional if invidiously motivated and, the court determined, could also sometimes rise to the level of constitutional violations regardless of intent. Nonetheless, the panel determined that it could not sustain Title II's abrogation as valid Fourteenth Amendment legislation because "[b]ased on the 'minimal evidence of unconstitutional state discrimination'

against the disabled, Title II's accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination." *Id*. at *11 (citation omitted). The Fifth Circuit appears to have reached a similar conclusion in *Reickenbacker* v. *Foster*, 274 F.3d 974, 981-983 (2001).

Thompson and *Reickenbacker* were based on the legal misapprehension that the burden is on the United States to prove that the statute was constitutional and that Congress was obligated to compile a detailed record to support its findings. To the contrary, it is well-established that Congressional legislation is entitled to a strong presumption of constitutionality. See *United States* v. *Morrison*, 529 U.S. 598, 607 (2000); *Reno* v. *Condon*, 528 U.S. 141, 147 (2000). Thus, a court should declare a statute beyond Congress's authority "only upon a *plain showing* that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607 (emphasis added). This is particularly true when the constitutional question is predicated on empirical questions regarding the existence and scope of a problem. "We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (*Turner II*) (collecting cases) (internal quotation marks omitted).

Of course, when heightened scrutiny is involved, a legislature may be required to point to some factual predicate indicating that its determination that there is a problem meriting infringement on constitutional rights is reasonable. But even then a legislature need not show that it reached the correct conclusion, see *Turner II*, 520 U.S. at 211, and may rely on facts outside the "record" in making its determination, see *id*. at 212-213 (relying on post-enactment evidence); cf. *Erie* v. *Pap's A.M.*, 529 U.S. 277, 297-298 (2000) ("The city council members,

familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place * * * and can make particularized, expert judgments about the resulting harmful secondary effects [of the expressive conduct].").

Indeed, when the Supreme Court has reviewed legislation under a heightened scrutiny standard and required some evidence to sustain legislation, it has permitted a statute to be upheld on the basis of less persuasive and voluminous evidence than was before Congress. In *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), for example, the Court held that it was not even "a close call" that the State had sustained its burden of showing that "sometimes large contributions will work actual corruption of our political system," thus justifying infringement on First Amendment rights, by pointing to an affidavit by a state legislator, two newspaper articles, and four incidents discussed in another judicial opinion. *Id*. at 393, 395. In *Burson* v. *Freeman*, 504 U.S. 191 (1992), likewise, the Court held that a statute prohibiting campaigning near polling places survived strict scrutiny analysis based on history, consensus, and "simple common sense." *Id*. at 211; see also *Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618, 628 (1995) (upholding regulation of commercial speech based on a single study and noting that "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, *Thompson* and *Reickenbacker* held Congress to an improper standard of proof.

In assessing Congress's exercise of its power to enforce the Fourteenth Amendment, the Supreme Court has reiterated that the volume of evidence in the record is "not determinative." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *Florida Prepaid*, 527 U.S. at 646; see also *Boerne*, 521 U.S. at 531 ("Judicial deference, in most cases, is based not on the state of the

legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'"). It is true that the Supreme Court in *Garrett* looked to the underlying legislative record in an effort to determine whether there was a basis for upholding the legislation as an appropriate prophylactic remedy. But in that case the Court found (contrary to the situation here) that Congress had made *no* relevant findings regarding States and further determined (again, contrary to the situation here) that the only relevant evidence in the legislative record, involving six examples of unconstitutional conduct, was equivalent to no record at all.

But here there are findings reflecting Congress's determination that States engaged in forms of discrimination that can rise to the level of unconstitutional conduct: "outright intentional exclusion, * * * failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services." 42 U.S.C. 12101(a)(5). Given the deference to Congress's preeminent fact-finding role, the evidence in the "record" mandates a judicial holding that Congress could have reasonably reached the conclusion (expressed in statutory findings) that States were unconstitutionally discriminating against persons with disabilities. See *Popovich*, 276 F.3d at 820 (Moore, J., concurring). While the record may not have been as extensive as the courts in *Thompson* and *Reickenbacker* would have liked, it was constitutionally sufficient.

Congress's finding, in turn, is sufficient to support the statute as valid Fourteenth Amendment legislation. Once Congress's determination regarding the existence of constitutional violations has been confirmed, the scope of the remedy is purely a matter of legislative choice. Cf. *M'Culloch* v. *Maryland*, 17 U.S. 316, 423 (1819) ("But where the law is

not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."). There is no requirement that the solution Congress adopts be the least-restrictive legislation to remedy and prevent the unconstitutional state conduct it has identified. Instead, as the Supreme Court explained in *City of Boerne* v. *Flores*, 521 U.S. at 536, and reiterated in *Kimel*, 528 U.S. at 80-81: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." But see *Garcia* v. *SUNY Health Sciences Ctr.*, No. 00-9223, 2001 WL 1159970, at *6-*7 (2d Cir. Sept. 26, 2001) (holding, without discussing the constitutional violations or findings, that Title II's reasonable modification requirement was not valid Section 5 legislation); cf. *Popovich*, 276 F.3d at 812 (holding that Title II's obligations could not be upheld in their entirety under the Equal Protection Clause).

It is true that Title II's broad coverage contrasts with that of Section 5 of the Voting Rights Act of 1965, which the Court noted approvingly in *Garrett*, 531 U.S. at 373-374. The operative question, however, is not whether Title II is broad, but whether it is broader than necessary. It is not. The history of unconstitutional treatment and the risk of future discrimination found by Congress pertained to all aspects of governmental operations. Only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if persons with disabilities were relegated to institutions or trapped in their homes by lack of transportation or inaccessible sidewalks. Ending

unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreation services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem; to do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13. "Difficult and intractable problems often require powerful remedies * * * ." *Kimel*, 528 U.S. at 88. It is in such cases that Congress is empowered by Section 5 to enact "reasonably prophylactic legislation." *Ibid*. Title II is just such a powerful remedy for a problem which Congress found to be intractable. Title II's abrogation is thus effective in removing defendants' immunity from suit.

III. PLAINTIFFS' MAY PROCEED AGAINST A STATE OFFICIAL ACTING IN HIS OFFICIAL CAPACITY UNDER THE PRINCIPLES IN *EX PARTE YOUNG*.

Even if this Court ultimately finds the Eleventh Amendment bars private suits under the ADA, Rehabilitation Act and IDEA against a State sued in its own name, plaintiffs may still proceed in this action in order to obtain prospective injunctive relief. See *University of Alabama* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (although the State was immune from suit under Title I of the ADA, Title I's "standards can be enforced * * * by private individuals in actions for injunctive relief under *Ex parte Young*.").

The Supreme Court in *Garrett* reaffirmed the well established principle that the Eleventh Amendment immunity does not authorize States to violate federal law. Thus, a holding that

"Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages * * * does not mean that persons with disabilities have no federal recourse against discrimination." 531 U.S. at 374 n.9; see also *Alden* v. *Maine*, 527 U.S. 706, 754-55 (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.").

It was to reconcile these very principles — that States have Eleventh Amendment immunity from private suits, but that they are still bound by federal law — that the Supreme Court adopted the rule of *Ex parte Young*. See *Alden*, 527 U.S. at 756.[39] *Ex parte Young*, 209 U.S. 123 (1908), held that when a state official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is acting *ultra vires* and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective relief, see *Edelman* v. *Jordan*, 415 U.S. 651, 664, 667-668 (1974), against an official in his or her official capacity, see *Kentucky* v. *Graham*, 473 U.S. 159, 167 n.14 (1985). By limiting relief to prospective injunctions of officials, the Court avoids courts entering judgments directly against the State but, at the same time, prevents the State (through its officials) from continuing illegal action.

The *Ex parte Young* doctrine has been described as a legal fiction, but it was adopted by the Supreme Court almost a century ago to serve a critical function in permitting federal courts to

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[39] The Eleventh Amendment is also no bar to the United States suing the State. See *Garrett*, 531 U.S. at 374 n.9 (noting that United States could sue a State to recover damages under the ADA); *Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.").

bring state policies and practices into compliance with federal law. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); see also *Alden*, 527 U.S. at 757 ("Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause."). *See also Rhode Island Department of Environmental Management v. United States*, 286 F.3d 27, 45 (1st Cir. 2002) (recognizes *Ex Parte Young* doctrine).

In addition to compensatory damages that would be barred by the Eleventh Amendment absent abrogation or waiver, plaintiff's complaint seeks an order for the Commonwealth of Puerto Rico to comply with the order of the Administrative Judge, and provide a qualified sign language interpreter. This is clearly the type of forward-looking relief permissible under *Ex parte Young*. See *Melo* v. *Hafer*, 912 F.2d 628, 635-636 (3d Cir. 1990), aff'd on other grounds, 502 U.S. 21 (1991). Thus, the Eleventh Amendment is no bar to a suit proceeding against defendant Cesar Rey in his official capacity for such relief. *See e,g, Bradley*, 189 F.3d at 753-54 *(Ex Parte Young* allows plaintiffs to enjoin Department of Education officials to provide prospective relief under IDEA).

CONCLUSION

For the foregoing reasons, the Eleventh Amendment does not bar this lawsuit against Puerto Rico. However, even if this Court finds that Puerto Rico cannot be sued, plaintiffs may proceed against defendant Cesar Rey in his official capacity to obtain prospective relief.

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Respectfully submitted,

John Ashcroft
Attorney General of the United States

Ralph F. Boyd, Jr.
Assistant Attorney General, Civil Rights
Division

____
John Wodatch
Philip L. Breen
Allison Nichol
Laura F. Einstein
United States Department of Justice
Civil Rights Division/Disability Rights
Section - NYA
950 Pennsylvania Avenue NW
Washington, Dc 20530
202-514-9583; 202-616-6862 (fax)

Lisa E. Bhatia Gautier
Assistant U.S. Attorney #206014
Room 452, Federal Building
150 Chardon Street
Hato Rey, Puerto Rico 00918
Tel. (787)766-5656 Fax (787)766-6219