UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA, Plaintiff, v. MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY A Department of the State of Mississippi, Defendant.	)	CIVIL ACTION NO. 3:00CV377BN

UNITED STATES' MEMORANDUM IN OPPOSITION
TO THE DEFENDANT'S MOTION TO DISMISS

Defendant argues that the holding in Board of Trustees v. Garrett, 121 S. Ct. 955 (2001), renders Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq., facially unconstitutional and therefore "unenforceable by anyone for any relief." Defendant's challenge must fail. As Defendant notes, the Court in Garrett held that private parties may not sue state agencies for money damages under Title I's employment discrimination provisions. Garrett, 121 S. Ct. at 967-68. The Court also stated, however, that "[t]itle I of the ADA still prescribes standards applicable to the States" and that "[t]hose standards can be enforced by the United States in actions for money damages." Id. at 968 n.9. These statements expressly envision the present action. Because federal jurisdiction for this claim is constitutionally supportable, the United States' action against Defendant to enforce Title I of the ADA should properly proceed.

STATEMENT OF THE CASE

Ronnie Collins is a career law enforcement officer who, in 1993, applied to be a state trooper with the Mississippi Highway Safety Patrol.[1] Mr Collins passed the entrance examinations and was accepted into the trooper training academy after the Safety Patrol's medical examiner--whom Mr. Collins had told of his insulin dependent diabetes--concluded that he was medically qualified to be a state trooper. Mr. Collins did not ask for accommodations for his diabetes prior to entering the academy because he did not think any were necessary. As he became exposed to the routine of the academy, however, he asked for accommodations at least three times within two days, each time requesting the opportunity to eat specific additional foods in order to control his diabetes. Academy officials denied Mr. Collins his requests. As a result, Mr. Collins experienced, for the first time in his life, severe hypoglycemia. In this state, he became ill and therefore temporarily unable to participate in his training classes. Rather than offering Mr. Collins appropriate medical assistance, his superiors summarily discharged him from the academy. Mr. Collins then timely filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Defendant had violated the ADA.

STATUTORY FRAMEWORK

The ADA established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Among its

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[1] Mr. Collins has been in law enforcement for over twenty years. In 1978, he joined the United States Army Reserves. In 1980, he became a corrections officer at the Mississippi State Penitentiary in Parchman, Mississippi. In 1988, he was employed as a police officer by the City of Drew, Mississippi. Mr. Collins currently works as an internal affairs investigator at the State Penitentiary.

express purposes is the invocation of "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities," id. at § 12101(b)(4), thereby "bring[ing] persons with disabilities into the economic and social mainstream of American life." S. Rep. No. 101-116, at 2 (1988); H.R. Rep. No. 101-485(II), at 22 (1990).

Title I of the ADA addresses employment discrimination.[2] It provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Id. at § 12112(a). The term "covered entity" is defined as "an employer, employment agency, labor organization, or joint labor-management committee."[3] Id. at § 12111(2). An "employer" is "a person engaged in an industry affecting commerce who has 15 or

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[2] Although Defendant's Supplemental Memorandum In Support of Its Motion to Dismiss [hereinafter Def.'s Mot.] acknowledges that the present action is "brought pursuant to Title I of the Americans with Disabilities Act," see Def.'s Mot. at 1, it also "submits that this Court should hold the ADA unconstitutional . . . in its entirety," see id. at 6, and cites cases expressly deciding only whether a regulation implementing Title II of the ADA properly abrogates state sovereign immunity. See id. at 4-5 (discussing Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (deciding whether ADA regulation prohibiting public entities from charging fee for issuance of parking placards constitutionally abrogated state sovereign immunity), and Neinast v. State of Texas, 217 F.3d 275 (5th Cir. 2000) (same)). Although it is an open question in the Fifth Circuit whether Title II of the ADA also covers employment discrimination, see Eber v. Harris County Hosp. Dist., 130 F. Supp.2d 847, 851 n.1 (S.D. Tex. 2001) (citing Decker v. Univ. of Houston, 159 F.3d 1355 (5th Cir. 1998) (unpublished)), this Memorandum will address the only claim raised in the present action thus far, the United States' claim of employment discrimination pursuant to Title I.

[3] State and local governments are "covered entities." See 42 U.S.C. § 12111(2), (5)(A), (7); cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 449 & n.2 (1976). See also infra note 8.

more employees." Id. at § 12111(5). Such "person[s]" may be "one or more individuals, governments, governmental agencies, [or] political subdivisions." 42 U.S.C. § 2000e(a).[4] Finally, the term "industry affecting commerce" means "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce . . . and further includes *any governmental industry, business, or activity*." Id. at § 2000e(h) (emphasis added). By incorporating these definitions into the ADA, Congress intended that all non-federal government agency employment be regulated by the statute.

SUMMARY OF ARGUMENT

In Garrett, the Supreme Court held that Congress did not validly abrogate state sovereign immunity from suit by private individuals for money damages under Title I of the ADA, because such application exceeded Congress's Fourteenth Amendment enforcement authority. Defendant contends that, after Garrett, *any* enforcement of Title I against it exceeds Congress's power to enforce the Fourteenth Amendment. It is unnecessary for this Court to decide whether Title I is constitutional Fourteenth Amendment legislation, however, because Title I is a valid exercise of Congress's authority under the Commerce Clause.[5] Title I is valid Commerce Clause legislation because Congress had a rational basis to conclude that employment and employment

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[4] Title I's definitions of the terms "person" and "industry affecting commerce" are taken from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., which prohibits employment discrimination on the basis of race, color, religion, national origin, or sex. See 42 U.S.C. § 12111(7).

[5] See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (holding Title II of Civil Rights Act of 1964 to be constitutional Commerce Clause legislation and stating that "we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which [Congress] acted was not adequate . . . but merely that since the commerce power is sufficient for our decision here we have considered it alone").

discrimination substantially affect interstate commerce. Title I establishes uniform standards governing the national labor market, and in so doing regulates economic activity with a nonattenuated, substantial effect on interstate commerce.

Furthermore, application of Title I's provisions to the Defendant does not encroach impermissibly upon state sovereignty. Title I is a valid law, enacted pursuant to Congress's affirmative commerce power, that is generally applicable to both public and private entity employers.

ARGUMENT

I. TITLE I OF THE ADA IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE

"The Constitution creates a Federal Government of enumerated powers." United States v. Lopez, 514 U.S. 549, 552 (1995). Among these powers is the authority "[t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Congress's power to regulate activities affecting interstate commerce is plenary: "[t]his power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, 9 Wheat. 1, 189-90 (1824). Nevertheless, "[t]he enumeration [of commerce powers] presupposes something not enumerated." Gibbons, 9 Wheat. at 195. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). The federal courts define the limits to Congress's commerce power, see, e.g., United States v. Morrison, 529 U.S. 598, 614 (2000), beginning, however, with "the

time-honored presumption that [every statute] is a 'constitutional exercise of legislative power.'" Reno v. Condon, 120 S. Ct. 666, 670 (2000) (Rehnquist, J.) (quoting Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883)).

The Supreme Court has identified three broad categories of activity that Congress may regulate under its Commerce Clause power, including "the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce."[6] Lopez, 514 U.S. at 558-59 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) and Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)). Courts review federal statutes regulating activities affecting commerce for rationality: "whether Congress could have had a rational basis to conclude that its enactment . . . was a valid exercise of its commerce power." United States v. Knutson, 113 F.3d 27, 29 (5th Cir. 1997) (citing Lopez, 514 U.S. at 557-58) (emphasis omitted); see also United States v. Hickman, 179 F.3d 230, 232-33 (5th Cir. 1999) (equally divided en banc) (Higginbotham, J., dissenting). In Lopez and Morrison, the Supreme Court directed lower courts to consider, as part of this review, whether the statute in question regulates activity that might be considered *economic* activity; whether it contains an express jurisdictional element that might restrict its application to only those activities that have an explicit connection with or effect on interstate commerce; whether congressional findings support Congress's judgment that the regulated activity has a substantial effect on interstate commerce; and whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated. See Morrison, 529 U.S. at 609-13

[6] Congress may also regulate the use of the channels of interstate commerce, and the instrumentalities of interstate commerce. See Morrison, 529 U.S. at 608-09.

(discussing Lopez, 514 U.S. at 559-67). The Fifth Circuit has adopted this framework for analyzing challenges to statutes purported to be valid exercises of Congress's commerce power. See United States v. Kallestad, 236 F.3d 225, 227-28 (5th Cir. 2000); Groome Resources Ltd. v. Parish of Jefferson, 234 F.3d 192, 205-15 (5th Cir. 2000). Not all of these elements need to be present, however, in order for a statute to be deemed constitutional Commerce Clause legislation. See, e.g., Groome, 234 F.3d at 211 (5th Cir. 2000). Furthermore, individual instances of even purely intrastate activity may be aggregated in order to ascertain a substantial effect on interstate commerce. See Lopez, 514 U.S. at 556-61 (citing Wickard v. Filburn, 317 U.S. 111, 127-28)); Kallestad, 236 F.3d at 228 & n.21.

A. Title I Is Constitutional Because Employment Is Indisputably Economic Activity.

In determining whether activity regulated by purportedly valid Commerce Clause legislation is economic in nature, the term "economic" is to be given a broad construction. See Morrison, 529 U.S. at 610 (describing test as whether statute has anything to do "with 'commerce' or any sort of economic activity, *however broadly one might define those terms*") (emphasis added); Gibbons, 9 Wheat. at 189-90; Groome, 234 F.3d at 208-09; cf. United States v. Gregg, 226 F.3d 253, 262 (3d Cir. 2000); Gibbs v. Babbitt, 214 F.3d 483, 492 (4th Cir. 2000). The Supreme Court has regularly upheld federal legislation regulating employment, identifying employment relationships as economic activity which, in *toto*, substantially affects interstate commerce. See, e.g., EEOC v. Wyoming, 460 U.S. 226, 248 (1983) (Stevens, J., concurring) (concurring in judgment upholding Age Discrimination in Employment Act under Commerce Clause and stating that "[t]oday, there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the

economy"); Wirtz, 392 U.S. at 190-93 (upholding Fair Labor Standards Act under Commerce Clause), overruled on other grounds by National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); United States v. Darby, 312 U.S. 100, 112-23 (1941) (upholding Fair Labor Standards Act); Jones & Laughlin Steel Corp., 301 U.S. at 33-43 (upholding National Labor Relations Act); Texas & New Orleans R.R. Co. v. Brotherhood of Ry. and S.S. Clerks, 281 U.S. 548, 570-71 (1930) (upholding Railway Labor Act). As the Court noted recently, in *all* of the cases where it has sustained federal regulation, even of admittedly intrastate activity, based upon the activity's substantial effects on interstate commerce, "the activity in question has been some sort of economic endeavor." Morrison, 529 U.S. at 611; see also id. at 615 (recognizing "interstate commerce" to include "*employment*, production, transit, or consumption") (emphasis added). Most recently, the Court reiterated that employment contracts containing arbitration provisions may be regulated under the Federal Arbitration Act because they are "contract[s] evidencing a transaction involving commerce" and thus covered by the Act.[7] See Circuit City Stores, Inc., v. Adams, 121 S. Ct. 1302, 1307-11 (2001).

The import of these cases is clear: federal employment regulation, including that contained in Title I of the ADA, is unquestionably regulation of *economic* activity. Employment is, at its core, the exchange of services for salary and other compensation. See United States v. Bailey, 115 F.3d 1222, 1236 (Smith, J., dissenting) (calling a *quid pro quo* "the defining characteristic of a commercial transaction"). The aggregate of every individual employee-

[7] The Federal Arbitration Act is also a valid Commerce Clause enactment. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967).

employer relationship is the national labor market. See Lopez, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."). In today's economy, most employees are fungible, in that their services may be replaced by those of other qualified workers. Employees are also portable: each year, millions of American workers cross state lines to offer their services to new employers. See United States Department of Commerce, U.S. Census Bureau, General Mobility of Employed Civilians 16 Years and Over, by Sex, Age, and Major Occupation Group, at http://www.census.gov/population/socdemo/migration/p20-531/tab09.txt. Job seekers may use the Internet to find and apply for jobs across the country. See, e.g., http://www.monster.com; cf. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 11 (1877) (holding that transmission of information over interstate telegraph lines was interstate commerce).

Additionally, courts have held that the presence of a national regulatory scheme, which could be undercut unless economic activity is regulated, is further evidence of the activity's substantial effect on interstate commerce. See Morrison, 529 U.S. at 611(citing Lopez, 514 U.S. at 573-74 (Kennedy, J., concurring)); Lopez, 514 U.S. at 561; Hodel v. Indiana, 452 U.S. 314, 329 n.17 (1981); Groome, 234 F.3d at 209-11; Gibbs, 214 F.3d at 497-99. Like the National Labor Relations Act and the Fair Labor Standards Act, Title I of the ADA creates a comprehensive federal scheme to regulate the national labor market, in this instance by establishing uniform standards for ending disability discrimination in the market. The ADA lists among its purposes providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," and ensuring that "the Federal Government

plays a central role in enforcing [these] standards." 42 U.S.C. § 12101(b)(2), (3). Title I designates the EEOC and the Department of Justice as the federal agencies charged with implementing and enforcing these standards. See id. at § 12117(a); cf. United States v. Bird, 124 F.3d 667, 688-89 (5th Cir. 1997) (DeMoss, J., concurring in part and dissenting in part) (finding no federal regulatory scheme where no federal administrative agency designated to regulate abortion industry). In addition to enforcement and mediation efforts, both the EEOC and the Department are directed by statute to provide technical assistance to employers as to the content of the ADA's anti-discrimination standards. See 42 U.S.C. § 12206; see also http://www.eeoc.gov/qs-employers.html; http://www.usdoj.gov/crt/ada/adahom1.htm.

B. Although Title I Does Not Contain an Express Jurisdictional Element, Such an Element Is Unnecessary Because Employment Is Economic Activity.

A statutory jurisdictional element "may establish that [an] enactment is in pursuance of Congress' regulation of interstate commerce," Morrison, 529 U.S. at 612, by providing for case-by-case evaluation of the regulated activity's effect on commerce. See, e.g., Lopez, 514 U.S. at 561-62 (discussing United States v. Bass, 404 U.S. 336, 347-50 (1971)); United States v. Luna, 165 F.3d 316, 320-21 (5th Cir. 1999). Just as the presence of such an element does not necessarily render a statute constitutional, however, see Kallestad, 236 F.3d at 229, neither does the absence of a jurisdictional element necessarily make a commerce-regulating statute invalid. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 302-03 (1964) (citing Darby, 312 U.S. at 120-21); Groome, 234 F.3d at 211; Bird, 124 F.3d at 675 (stating that "a jurisdictional element . . . is only one method, and not *always* a necessary one," by which Congress may ensure that statutes regulate activities substantially affecting interstate commerce). In Groome, for example, in

which the Fifth Circuit upheld the constitutionality of the Fair Housing Act Amendments (FHAA), the court held that the explicit economic nature of commercial rental housing made the presence of an express jurisdictional element within the statute unnecessary. See Groome, 234 F.3d at 211. "[T]he requirement of a jurisdictional element . . . is relevant only [where there is] no obvious interstate economic connection." Id.

Like the FHAA, Title I of the ADA does not contain an express jurisdictional element, or at least no such element addressing government employment.[8] As discussed above, however, like the FHAA Title I regulates a national market in a core economic activity, here employment. Because the economic nature of the activity regulated by Title I is so obvious, in this case the absence of a jurisdictional element is not dispositive to the Commerce Clause analysis.

C. Congress Made Substantial Findings Regarding Effects Of Employment Discrimination On The Economy.

"Congress normally is not required to make formal findings as to the substantial burdens

[8] To clarify: Title I prohibits disability discrimination in employment by employers having 15 or more employees, 42 U.S.C. § 12111(2), (5)(A), and further defines employers as "person[s] engaged in an industry affecting commerce." Id. at § 12111(5)(A). But although the words "affecting commerce" have been called "jurisdictional words of art," United States v. Pierson, 139 F.3d 501, 503 (5th Cir. 1998), the phrase "industry affecting commerce," as part of Title I's definition of "employer," does not provide for individualized analysis by a court of whether any particular government employer substantially affects commerce. Title I defines "person" to include governments and governmental agencies. See 42 U.S.C. § 12111(7) (citing 42 U.S.C. § 2000e(a)). It defines "industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce . . . and further includes *any governmental industry, business, or activity*." Id. at § 12111(7) (citing 42 U.S.C. §2000e(h)) (emphasis added). Congress's incorporation of these terms into the definition of "employer" thus signals its intent to reach *all* government employers with 15 or more employees. Because the term "employer," so defined, does not provide for an individualized analysis of substantial effect on commerce, it does not function as a jurisdictional element of the sort described in Lopez, Bass, and Luna.

that an activity has on interstate commerce." Lopez, 514 U.S. at 562. In enacting Title I of the ADA, however, Congress did make such findings describing the effect of employment discrimination on the national labor market and interstate commerce. Specifically, Congress found that such discrimination excludes persons with disabilities from the nation's workforce, which in turn results in decreased national productivity and increased dependence upon government benefit programs. These findings appear in the statute itself and are grounded in its legislative history, both of which may be used to "evaluate the legislative judgment that [employment discrimination] substantially affected interstate commerce." Id. at 562-63; see also Bird, 124 F.3d at 678 & n.14. The ADA's formal findings state that "discrimination against individuals with disabilities persists in such critical areas as employment," 42 U.S.C. § 12101(a)(3); that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged . . . vocationally [and] economically," id. at § 12101(a)(6); and that "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." Id. at § 12101(a)(9).

The ADA's legislative history supports these Congressional findings on the effects upon commerce of disability discrimination in the national labor market. Committee reports include surveys indicating that, at the time of the law's enactment, over sixty-five percent of adults with disabilities, or as many as 12 million persons, were not working, and that fifty percent of such adults had household incomes of $15,000 or less. See S. Rep. No. 101-116, at 9 (1989) (reporting results of Lou Harris poll). Testimony given in hearings and cited in the reports

invoked a rationale for the law based on the need for increased national productivity.[9] See, e.g., H.R. Rep. No. 101-485, at 45 (statement of Robert Mosbacher, Jr.) ("If we are to remain competitive as a nation in the international marketplace, we must have a well trained, well educated and highly motivated workforce. Millions of disabled Americans . . . are well educated and can be easily trained. . . . [and] are some of the most highly motivated people in our society today."); Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources, 101st Cong. 196-97 (1989) [hereinafter Senate ADA Hearings] (statement of Attorney General Thornburgh) ("I think it is fair to say . . . if one were to even take a look at this in a cold-hearted accounting sense, that the availability of an increased work force and the greater productivity that can ensue from our economy as a whole through opening up these kinds of opportunity, provides reason in and of itself to pursue this.").

Examination of the legislative history reveals similar evidence as to the positive effect of Title I on markets in goods and services. Legislators heard testimony stating that, although it was difficult to quantify the exact economic cost or benefit of the legislation, ending workplace disability discrimination would result in more persons with disabilities working, in increased earnings, and in increased spending on consumer goods. See Senate ADA Hearings at 208-09 (testimony of Attorney General Thornburgh); see also H.R. Rep. No. 101-485(II), at 45 (1990) (statement of Jay Rochlin, Executive Director, President's Committee on Employment of People

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[9] Although the Court in Lopez rejected a "national productivity" rationale for federal regulation of gun possession in a school zone, it did so because it found the connection between such gun possession and economic activity to be too attenuated. See Lopez, 514 U.S. at 564. Because employment is itself economic activity, Title I's regulation of employment relationships is more clearly supported by arguments based on predicted increased national productivity. See Part I.D. infra.

with Disabilities) ("Consider the economic impact of that simple accommodation [modification in employment policy]. It enables Tina to have a job which pays well. She owns both a home and a car and supports her mother in addition to herself."). Congressional committees also received testimony as to the billions of dollars spent annually by federal, state, and local governments on disability benefits, lost income tax revenues that could also presumably be spent in purchasing interstate goods and services. See, e.g., S. Rep. 101-116, at 17 (1989) (statement of President George H.W. Bush). Activity connected with employment relationships and so affecting the production and consumption of goods to be sold in the marketplace may clearly be regulated by Congress acting pursuant to its Commerce Clause power.[10] See, e.g., Darby, 312 U.S. at 122-23; Jones & Laughlin Steel, 301 U.S. at 38-40.

"Congressional findings, even if not explicitly reiterated in each incarnation of the legislation, 'clearly subsist in the cumulative memory of Congress.'" Groome, 234 F.3d at 212 (quoting Knutson, 113 F.3d at 30). Here this collective memory includes the accounting of the economic effects of employment discrimination rendered not only in the ADA and its legislative history, but also as part of the testimony given during enactment of Title VII of the Civil Rights Act of 1964, which prohibited employment discrimination based on race, sex, color, religion, and

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[10] Furthermore, the ADA legislative history also contains arguments addressing the economic concerns of employers fearful of the high cost of providing reasonable accommodations, see H.R. Rep. No.101-485 at 33-34 (statement of Jay Rochlin), suggesting that the discriminatory conduct the ADA seeks to prohibit is itself often directly motivated by commercial concerns. Cf. Gregg, 226 F.3d at 262. Were the ADA's federal regulatory scheme not in place, employers who could save money by not offering employees reasonable accommodations might possess an advantage over employers in neighboring states subject to disability discrimination laws; this is yet another potential substantial effect of employment discrimination upon interstate commerce. Cf. Darby, 312 U.S. at 122-23.

national origin. See id. at 212-13 (discussing legislative history of Fair Housing Act in context of upholding Fair Housing Amendments Act under Commerce Clause); cf. Wirtz, 392 U.S. at 189 (examining findings from legislative history for Fair Labor Standards Act in upholding later amendments to Act extending coverage under "enterprise" theory); Luna, 165 F.3d at 321. In hearings before the Senate Subcommittee considering fair employment legislation in 1963, a Labor Department official stated that the Gross National Product could rise by 2.5 percent, or $17 billion, if the educational achievements of nonwhite workers were fully utilized by prohibiting employment discrimination. See Equal Employment Opportunity: Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong. 116 (statement of Under Secretary of Labor John F. Henning). Also included in the legislative record is a memorandum from the Department of Labor on Title VII's constitutionality under the Commerce Clause. See id. at 127. The memorandum reviewed applicable Supreme Court labor law precedent and concluded: "Since Congress, in the exercise of its power over interstate commerce, can make it unlawful to discriminate because of union membership and because of filing complaints or giving testimony under the foregoing labor laws, it is clear that the Congress also has power to prevent discrimination on the basis of race, color, religion, or national origin."[11] Id. at 131.

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[11] Similarly, the legislative history of the Rehabilitation Act of 1973, which contains a provision prohibiting discrimination on the basis of disability in programs or activities receiving federal financial assistance, see 29 U.S.C. § 794, also includes testimony as to the effect on the economy of employment discrimination. See Hearing on H.R. 17 before the Select Subcomm. on Education of the House Comm. on Education and Labor, 93rd Cong. 77 (1973) (statement of John F. Nagle, Chief of the Washington Office, National Federation of the Blind) (applauding anti-discrimination provision as a means for disabled people "to attain a normal, productive and fulfilling life"); id. at 37-38 (testimony of Stephen Kurtzman, Assistant Secretary for Legislation,

D. The Effect Of Employment Discrimination On The Economy Is Nonattenuated.

"The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." Morrison, 529 U.S. at 614. Such findings are no replacement for a rational conclusion by Congress that it needs to reach economic conduct, even such conduct occurring intrastate, in order to regulate an interstate market. Kallestad, 236 F.3d at 229. As discussed above, in this case Congress rationally concluded that regulation of employment discrimination was necessary in order to regulate the national markets in employment. When employers fail to reasonably accommodate disabled employees, those employees have fewer, and perhaps more geographically disparate, opportunities for gainful employment. In turn, as the ADA findings cited above suggest, unemployed persons with disabilities have less disposable income with which to purchase goods and services moving through the interstate economy. The substantial effects upon interstate commerce of the bar to participation in the economy caused by employment discrimination are clear; it is unnecessary to "pile inference upon inference" to see those effects, as is the case with the prohibition of the possession of a firearm within a school zone at issue in Lopez, or regulation of gender-related violence at issue in Morrison, both arguably noneconomic activities falling within the states' general police power. Compare Groome, 234 F.3d at 214, with Lopez, 514 U.S. at 567, and Morrison, 529 U.S. at 615-17.

Courts may invalidate legislative enactments as exceeding the limits of the affirmative

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U.S. Dep't of Health, Education, and Welfare) (noting that "resources invested today in preventing or reducing dependency can yield major long-term economies" because disabled person who might receive $100,000 in public assistance payments over lifetime could, if working, pay taxes totaling $42,000 over lifetime).

commerce power only upon a plain showing that Congress has exceeded its constitutional bounds. See Morrison, 529 U.S. at 607. The analysis limned above demonstrates clearly that Title I is valid Commerce Clause legislation. In enacting these provisions of the ADA, Congress rationally concluded that regulation of employment discrimination was necessary to advance the national interest in the interstate and, indeed, international markets in employment and in consumer goods and services. That this economic regulation also has the goal of undermining discriminatory social norms should not defeat its constitutionality. See Hickman, 179 F.3d 230, 235-36 (Higginbotham, J., dissenting) (discussing Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 258 (1964)). This Court should join those other courts that have found Title I to be valid Commerce Clause legislation. See, e.g., Erickson v. Board of Governors, 207 F.3d 945, 952 (7th Cir. 2000); State Police for Automatic Retirement Assoc. v. DiFava, No. CIV. A. 01-10053-PBS, 2001 WL 360549 at *3 (D. Mass. Mar. 28, 2001).

II. APPLICATION OF TITLE I TO THE DEFENDANT DOES NOT VIOLATE THE TENTH AMENDMENT

Despite the Supreme Court's statement in Garrett that "Title I of the ADA . . . prescribes standards applicable to the States," see Garrett, 121 S. Ct. at 968 n.9, Defendant also raises a challenge to Title I based in the Tenth Amendment. See Def.'s Br. at 4, 6, 7 n.7. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "[It] confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." New York v. United States, 505 U.S. 144, 157 (1992). In this instance, Defendant apparently argues that application of Title I to its

employment of state troopers falls outside the outer limits of the federal commerce power.

This argument must also fail. Congress may subject state governments to federal laws applicable generally to both public and private entities, see Condon, 528 U.S. at 151 (2000), including laws governing employment relationships. See Garcia, 469 U.S. at 554-57 (upholding application of Fair Labor Standards Act to municipal agency); cf. EEOC v. Wyoming, 460 U.S. at 243 (reaching same result regarding Age Discrimination in Employment Act). Title I of the ADA is such a generally applicable law: it prohibits disability discrimination in the employment practices of public and private employers alike. Title I does not commandeer state legislatures to enact its regulatory scheme. Cf. New York, 505 U.S. at 174-177; ACORN v. Edwards, 81 F.3d 1387, 1392-94 (5th Cir. 1996). Nor does it compel states "to assist in the enforcement of federal statutes regulating private individuals." Condon, 528 U.S. at 151; cf. Printz v. United States, 521 U.S. 898, 935 (1997). Application of the ADA here is therefore consistent with the Tenth Amendment.

The Supreme Court's statements in Garrett that Title I prescribes standards applicable to the States, and that those standards may be enforced by the United States in civil actions, suggest that it has considered Defendant's Tenth Amendment argument and rejected it. This Court should accordingly do the same.

CONCLUSION

For all of the reasons stated above, the United States submits that this action should properly proceed.

Respectfully submitted,

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June ___, 2001

Certificate of Service

Notice is hereby given that the United States has served true and correct copies of UNITED STATES' RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS and UNITED STATES' MEMORANDUM IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS by express mail upon Defendant:

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