IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GARY E. WILLIAMS, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. CCB 94-880
MARTIN WASSERMAN, et al.,	)	
Defendants.	)	

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

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INTRODUCTION

This case was filed by individuals with mental disabilities confined in Maryland State institutions against certain State officials. Plaintiffs seek prospective injunctive and other relief, including transfer to community-based care.[1] On April 22, 1996, the United States sought leave of this Court to file an amicus brief addressing issues raised by the parties in their respective motions for summary judgment relating to this Court's interpretation of title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12131-12134, and the substantive due process rights of institutionalized persons under the Fourteenth Amendment. Leave was granted pursuant to an Order dated May 16, 1996, and the United States filed its brief on April 22, 1996.

In its decision on the issues raised in these motions, see Williams v. Wasserman, 937 F. Supp. 524 (D. Md. 1996), the Court held, inter alia, that, "* * * while the ADA does not place an affirmative obligation on the state to create or fundamentally alter a program of community-based treatment options, the ADA does oblige the defendants to make those options available to otherwise qualified individuals without regard to the severity or particular classification * * * of their disabilities." Id. at 530. The Court also cited the Third Circuit's decision in Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1994), with approval for the proposition that "the ADA and its attendant regulations clearly

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[1/] The Eleventh Amendment is not a bar to this suit because the only defendants in this action are State officials sued in their official capacities for prospective injunctive relief. CSX Transportation v. Board of Public Works, 138 F. 3d 537, 540-541 (4th Cir. 1998) (explaining Ex parte Young, 209 U.S. 123 (1908)).

define unnecessary segregation as a form of illegal discrimination against the disabled." Williams, 937 F.Supp. at 530, citing Helen L., 46 F.3d at 333.

Following trial on the merits and the submission of post-trial briefs, defendants, by letter to this Court dated October 2, 1998, raised for the first time the question of whether Congress has the power, under title II of the ADA, to require the States to provide health-related services to persons with disabilities in the most integrated setting appropriate, and requested this Court's permission to submit a memorandum addressing that question. On October 15, 1998, defendants submitted a supplemental post-trial brief (corrected copy filed October 19, 1998), asserting that Congress lacked power under both the Fourteenth Amendment and the Commerce Clause to impose such a requirement on the States. Plaintiffs submitted their reply on November 9, 1998. By letter dated November 5, 1998, the United States notified this Court that it intended to file a motion to intervene in this case for the limited purpose of defending the constitutionality of the ADA and an accompanying brief addressing the defendants' constitutional arguments. We requested permission to file by December 9, 1998, which permission was granted by marginal ruling dated November 11, 1998. Concurrently with this brief, the United States has filed its motion seeking leave to intervene as of right for the sole purpose of defending the constitutionality of the ADA. Defendants do not oppose our intervention.

The United States demonstrates below that Congress properly exercised its powers, under both Section 5 of the Fourteenth Amendment and the Commerce Clause, in prohibiting disability-based discrimination by State and local governmental entities under title II of the ADA.

ARGUMENT

I

TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Citing the Supreme Court's recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the defendants contend that, if title II of the ADA is interpreted to require States to provide health-related services to persons with disabilities in the most integrated setting appropriate, it exceeds Congress's power to legislate under Section 5 of the Fourteenth Amendment.[2] See Defendants' Supplemental Post-Trial Reply Brief (Defs.' Br.) at 2. To date, four courts of appeals have upheld the ADA as

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[2/] The constitutionality of the ADA is currently before the 4th Circuit in several cases. See Amos v. The Maryland Department of Safety and Correctional Services, 126 F.3d 589 (4th Cir. 1997), vacated, 118 S. Ct. 2339 (1998) (oral argument held December 4, 1998) and Brown v. North Carolina Department of Motor Vehicles, 987 F. Supp. 451 (E.D.N.C. 1997), appeal pending, No. 97-2784 (4th Cir.)(oral argument held October 26, 1998). The argument was pressed by defendants, but not passed on, in Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996), aff'd on the basis of Amos, 131 F.3d 136 (Table), 1997 WL 770564 (4th Cir. Dec. 11, 1997), petition for cert. granted, vacated, and remanded for further consideration in light of Penn. Dept. of Corrections v. Yeskey, 118 S. Ct. 1952 (1998), (119 S. Ct. 33) (Oct. 5, 1998). The Fourth Circuit stayed Pierce v. King, pending Amos. The United States has intervened in these cases to defend the constitutionality of the ADA.

valid Section 5 legislation. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) cert. denied, 118 S. Ct. 2340 (1998); Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (Oct. 5, 1998); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir. 1998); Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998). We agree with these courts and urge this Court to follow their well-reasoned decisions.[3]

Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-346 (1879). A statute is thus "appropriate legislation" to enforce the Equal Protection Clause if the statute "may be regarded as an enactment to enforce

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[3/] Whether or not the ADA was validly enacted by Congress under the Fourteenth Amendment has been typically challenged by defendants as part of the broader question of whether the abrogation of a State's Eleventh Amendment immunity contained in the ADA is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). However, as noted above, because plaintiffs here seek only prospective injunctive relief against State officials, the abrogation of Eleventh Amendment immunity is not an issue.

the Equal Protection Clause, [if] it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); Abril v. Virginia, 145 F.3d 182, 187 (4th Cir. 1998). And, contrary to defendants' apparent view of the law, neither the Fourteenth Amendment itself, nor the Supreme Court's opinion in City of Boerne, prohibits Congress from enacting legislation that provides greater relief than the Constitution requires.[4]

[4/] We also note that application of the ADA in the context of this case is not inconsistent with the Tenth Amendment or notions of State sovereignty. The Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996). A long "line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); see also EEOC v. Wyoming, 460 U.S. at 243 n.18. Thus, even if this case is narrowly characterized as addressing the State's care of uninsured and impoverished persons with mental disabilities, there is nothing talismanic about such care that places it outside the legitimate scope of Congress' Fourteenth Amendment power.

A. The ADA Is An Enactment To Enforce The Equal Protection Clause

Although Congress need not announce that it is legislating pursuant to its Section 5 authority, see Usery v. Charleston County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977), Congress declared that its intent in enacting the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment * * *, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4). While such a declaration is not dispositive of Congress's authority, it carries significant weight. "Given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court is "not lightly [to] second-guess such legislative judgments." Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990).

While defendants concede that people with disabilities are protected by the Equal Protection Clause, they suggest (Defs.' Br. at 11-12) that, because classifications on the basis of disability are not subject to strict scrutiny, Congress has exceeded its power to protect that class under the Fourteenth Amendment if the ADA is interpreted to require States to provide health-related services to people with disabilities in the "most integrated setting appropriate." 28 C.F.R. 35.130(d).[5] However,

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[5/] The anti-discrimination provision of title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

as discussed in detail below, Congress may enact legislation that provides greater protection than the Constitution itself requires.

To the extent defendants are attempting to argue, more broadly, that it is beyond Congress's power to legislate unless the courts have declared a classification "suspect" or "quasi-suspect," they are clearly wrong. Neither the prohibitions of the Equal Protection Clause nor Congress's Section 5 authority is

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benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. In 42 U.S.C. 12134, Congress directed the Attorney General to promulgate regulations implementing this general mandate. The "integration regulation," relevant here, requires, as one of title II's general prohibitions against discrimination, that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). As we have indicated in an earlier filing in this case, the Department of Justice has taken the consistent position that the "integration regulation" means that "where professionals (with appropriate input) have determined that community-based services are appropriate for disabled individuals, States must end unnecessary segregation in State-operated institutions and provide community based services for those individuals." Memorandum of the United States in Support of Plaintiffs' Motion for Partial Summary Judgment on ADA Claims and in Opposition to Defendants' Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment at 14.

This Court has already agreed, in denying defendants' Motion for Summary Judgment, that the Department of Justice's regulations are entitled to substantial deference and are consistent with the purposes of the ADA, see, Williams v. Wasserman, 937 F. Supp. 524 at 530-31, discussing unnecessary segregation as a form of illegal segregation under title II and its regulations and citing with approval Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1994), requiring the State of Pennsylvania to make attendant care services available to the plaintiff in her home under the existing home care program. See also, L.C. by Zimring v. Olmstead, 138 F.3d 893 (11th Cir. 1998) (addressing title II's integration mandate), pet. for cert. filed, No. 98-536 (S. Ct. Sept. 29, 1998).

limited to suspect or quasi-suspect classifications. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918). Thus "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988); see, e.g., Romer v. Evans, 517 U.S. 620, 631-634 (1996); Mills v. Maine, 118 F.3d 37, 46 (1st Cir. 1997) (collecting cases). And, in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985), the Supreme Court made clear that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary. Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "unprotected from invidious discrimination." Id. at 446.

In affirming Congress's power to prohibit discrimination against persons with disabilities pursuant to Section 5, the Seventh Circuit explained, "[i]nvidious discrimination by governmental agencies * * * violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating

a remedy against such discrimination [through the ADA], Congress was acting well within its powers under section 5 * * *." Crawford, 115 F.3d at 487; accord Clark, 123 F.3d at 1270-1271. This is consistent with the Fourth Circuit's holding in Arritt v. Grisell, 567 F.2d 1267, 1271 (1977), that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., is a valid exercise of Congress's Section 5 authority, despite the fact that age is not a suspect classification.[6]

Courts have reached a similar conclusion in cases involving the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., which requires "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). The four courts of appeals to address the question have held that Congress validly exercised its Section 5 authority in enacting the IDEA. See 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. 1988), cert. denied, 488 U.S. 955 (1988); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421 n.7 (1st Cir. 1985),

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[6/] A majority of the courts of appeals are in accord. See, e.g., Coger v. Board of Regents, No. 97-5134, 1998 WL 476164, at *5-*11 (6th Cir. Aug. 17, 1998); Scott v. University of Miss., 148 F.3d 493, 501-503 (5th Cir. 1998); Keeton v. University of Nev. Sys., No. 97-17184, 1998 WL 381432, at *2-*3 (9th Cir. July 10, 1998); Goshtasby v. Board of Trustees, 141 F.3d 761, 770-772 (7th Cir. 1998); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 698-700 (1st Cir. 1983); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); see also Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 30 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992).

cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1036-1038 (5th Cir. 1983); see also Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997) (finding that animus against people with mental retardation constitutes "'class-based invidiously discriminatory' motivation" for purposes of 42 U.S.C. 1985(3)).

Like these statutes, the ADA is legislation to enforce the Equal Protection Clause. As Representative Dellums explained during the enactment of the ADA, "we are empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are 'able-bodied,' not just those who own property -- but every citizen shall enjoy the equal protection of the laws." 136 Cong. Rec. 11,467 (1990); see also id. at 11,468 (remarks of Rep. Hoyer).

B. The ADA Is Plainly Adapted To Enforcing The Equal Protection Clause

The defendants' central argument appears to be that the ADA is not validly enacted pursuant to the Fourteenth Amendment because it provides protection that is outside the scope of the Fourteenth Amendment. But the Supreme Court recently addressed the question of the permissible scope of a statute that is "plainly adapted" to enforcing the Fourteen Amendment and concluded that even statutes that prohibit more than the Equal Protection Clause itself prohibits can be "appropriate remedial measures" when there is "a congruence between the means used and the ends to be achieved." City of Boerne, 117 S. Ct. at 2169. As the Boerne Court stated, "[t]he appropriateness of remedial

measures must be considered in light of the evil presented." Ibid. Therefore, this Court must examine both the extent and nature of the discrimination faced by individuals with disabilities, and the appropriateness of the relief crafted by Congress when it enacted title II of the ADA. Although it was not required to do so, when Congress considered the ADA it created an extensive and detailed legislative record of the discrimination experienced by Americans with disabilities.

1. Congress Found That Discrimination Against People With Disabilities Was Severe And Extended To Every Aspect Of Society

In enacting the ADA, Congress made express findings about the status of people with disabilities in our society and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2).[7] Evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). Indeed, the

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[7/] See also Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991); Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-389 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities).

United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7).

The decades of ignorance, fear and misunderstanding created a tangled web of discrimination, resulting in and being reinforced by isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation,

communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3) (emphasis added). Evidence before Congress showed that government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated, and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. at 464; see also U.S. Commission on Civil Rights, supra, at 43-45. This evidence provided an ample basis for Congress to conclude that government discrimination was a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).

2. The ADA Is A Proportionate Response By Congress To Remedy And Prevent The Pervasive Discrimination It Discovered

Section 5 of the Fourteenth Amendment gives Congress broad power to address what it found to be the "continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity . . . to pursue those opportunities for which our free society is justifiably famous." See 42 U.S.C. 12101(a)(9). "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

After extensive investigation prior to enacting the ADA, Congress found that the exclusion of persons with disabilities from public facilities, programs, and benefits was a result of past and on-going discrimination. See 42 U.S.C. 12101. In the ADA, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander v. Choate, 469 U.S. 287, 301 (1985) (emphasis added).[8] Thus, title II of the ADA requires that "no qualified individual

[8/] Alexander dealt with Section 504 of the Rehabilitation Act. The Fourth Circuit, however, has held that the ADA imposes substantive requirements similar to Section 504. See, e.g., Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1264-1265 n.9 (4th Cir. 1995).

with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. And, in response to the widespread isolation and segregation identified by Congress and the consequent harm it discovered, regulations implementing title II of the ADA require that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d)(emphasis added). While this requirement imposes some burden on the States, that burden is not unlimited. For example, regulations implementing title II of the ADA do not require public entities to make reasonable modifications to policies, practices, or procedures if "the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

3. In Enacting The ADA, Congress Was Redressing Constitutionally Cognizable Injuries

In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court in cases such as City of Cleburne. As discussed above, the Equal Protection Clause prohibits invidious discrimination, that is, “a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational.” Cleburne, 473 U.S. at 446. In Cleburne, the

Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

While a majority of the Court declined to deem classifications based on disability as "suspect" or "quasi-suspect," it elected not to do so, in part, because it did not want to unduly limit legislative solutions to problems faced by the disabled. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." Id. at 442-443. It specifically noted with approval legislation such as Section 504 and IDEA, which aimed at protecting persons with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead

[governmental entities] to refrain from acting at all." Id. at 444.

Nevertheless, the Court did affirm that "there have been and there will continue to be instances of discrimination against [persons with mental retardation] that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," id. at 446, and found the actions at issue in that case unconstitutional. In doing so, it articulated several criteria for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others" did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine all conceivable rationales for the differential treatment of persons with mental retardation; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at 450 (stating that "this record does not clarify how * * * the characteristics of [people with mental retardation] rationally justify denying" to them what would be permitted to others). Third, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable * * * are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448. Thus, as the Court recognized, the Equal Protection Clause of its

own force proscribes treating persons with disabilities differently when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir. 1979), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2)(A). Thus, as to those life activities, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. While it is true that the "'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,'" Plyler v. Doe, 457 U.S. 202, 216 (1982), it is also true that "[s]ometimes the grossest discrimination can lie in treating

things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[9]

Thus, there is a basis in constitutional law for recognizing that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of

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[9/] In a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Court has held that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause in treating indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S. Ct. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires States to waive such fees in order to ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a State permits an indigent person to appeal without charge, but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)); see also Lewis v. Casey, 518 U.S. 343, 356-357 (1996) (holding that State has not met its obligation to provide illiterate prisoners access to courts simply by providing a law library).

Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974). Similarly, it is also a denial of equality when access to facilities, benefits and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

4. Unlike The Statute Found Unconstitutional In City Of Boerne, The ADA Is A Remedial And Preventive Scheme Proportional To The Injury

As the Supreme Court has stated, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." City of Boerne, 117 S. Ct. at 2163. Thus, there is no need for this Court to decide whether every requirement of the ADA could be ordered by a court under the authority of the Equal Protection Clause. It is sufficient that Congress found that the ADA was appropriate legislation to redress the rampant discrimination it discovered in its decades-long examination of the question.

Congress's decision to follow the teachings of Cleburne in enacting the ADA distinguishes this case from City of Boerne. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. (the statute at issue in City of Boerne), was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held

that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling State interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 117 S. Ct. at 2169. Rather, the Court found that Congress simply disagreed with the Court's decision about the substance of the Free Exercise Clause and was "attempt[ing] a substantive change in constitutional protections." Id. at 2170.

As such, the Court found RFRA an unconstitutional exercise of Section 5. It explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 2163, 2172. And it reaffirmed that Congress can prohibit activities that themselves were not unconstitutional in furtherance of its remedial scheme. Id. at 2163, 2167, 2169. It stressed, however, that Congress's power had to be linked to constitutional injuries, and that there must be a "congruence and

proportionality" between the identified harms and the statutory remedy. Id. at 2164.

In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. Id. at 2170. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 2171; see also id. at 2169 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling State interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many State laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, it could no longer be viewed as remedial or preventive. Id. at 2169-2170.

As we have shown above, despite the defendants' assertions (Defs.' Br. 9-10), none of the specific concerns articulated by the Court in Boerne apply to the ADA.[10] But the ADA differs from

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[10/] First, there was substantial evidence by which Congress could have determined that there was a "pattern or practice of unconstitutional conduct." Second, the statutory scheme imposed by Congress did not attempt to impose a compelling interest standard, but a more flexible test that requires "reasonable modifications." This finely-tuned balance between the interests of persons with disabilities and public entities plainly

RFRA in a more fundamental way. RFRA was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. The ADA, on the other hand, is simply seeking to make effective the right to be free from invidious discrimination by establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination. Moreover, unlike the background to RFRA -- which demonstrated that Congress acted out of displeasure with the Court's decision in Smith -- there is no evidence that Congress enacted the ADA because of its disagreement with any decision of the Court. "In the ADA, Congress included no language attempting to upset the balance of powers and usurp the Court's function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court." Coolbaugh, 136 F.3d at 438.

Viewed in light of the underlying Equal Protection principles, the ADA is appropriate preventive and remedial legislation. First, it is preventive in that it establishes a statutory scheme that attempts to detect government activities

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manifests a "congruence" between the "means used" and the "ends to be achieved." See City of Boerne, 117 S. Ct. at 2169. Moreover, there is no problem regarding judicially manageable standards, as the courts have regularly applied tests such as the "reasonable accommodation" test under Section 504, the predecessor to title II of the ADA, to recipients of Federal funds for the past 20 years.

likely tainted by discrimination. For example, the ADA regulations require States to conduct self-evaluations of policies, programs, and activities in order to determine that any distinctions they make based on disability, or refusals to provide meaningful or integrated access to facilities, programs, and services are based on legitimate governmental objectives. The ADA thus attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of State decisions. See Bangerter v. Orem City Corp., 46 F.3d 1503 & n.20 (10th Cir. 1995); cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-285 (1987). This approach is similar to the standards articulated by the Court in Cleburne.

Second, the ADA is remedial in that it attempts to ensure that the interests of people with disabilities are taken into account. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. 12101(a)(2), the needs of persons with disabilities were not considered when rules were promulgated, standards were set, and the built environment was designed. As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society. See 42 U.S.C. 12101(a)(5); see also U.S. Commission on Civil Rights, supra, at 99. When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress

may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove, 448 U.S. at 477-478.

The ADA thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Similarly, the courts of appeals have unanimously upheld the application of title VII's disparate impact standard to States as a valid exercise of Congress's Section 5 authority. See Grano v. Department of Dev., 637 F.2d 1073, 1080 n.6 (6th Cir. 1980) (collecting cases); see also City of Boerne, 117 S. Ct. at 2169 (agreeing that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause").

In sum, there can be no dispute that "well-cataloged instances of invidious discrimination against the handicapped do exist." Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985). In

exercising its broad power under Section 5 to remedy the ongoing effects of past discrimination and prevent present and future discrimination, Congress is afforded "wide latitude." City of Boerne, 117 S. Ct. at 2164. As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 2172 (quoting Katzenbach, 384 U.S. at 651).

Following this tradition, the Fifth Circuit recently held that "the ADA represents Congress's considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. * * * We cannot say * * *, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the Flores proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions." Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (Oct. 5, 1998). This holding is consistent with all the other courts of appeals that have considered the issue since Seminole Tribe. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) cert. denied, 118 S. Ct. 2340 (1998); Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir.

1998); Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998).[11] We urge this Court to follow these well-reasoned opinions.

II

TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS'S COMMERCE CLAUSE POWER

In enacting the ADA, Congress specifically invoked its authority under the Commerce Clause. 42 U.S.C. § 12101(b)(4). The defendants, however, make the narrow argument that Congress does not have the power under the Commerce Clause to require States to provide health-related services to persons with disabilities in the most integrated setting appropriate. Defendants argue that this activity does not have a substantial effect on interstate commerce, citing United States v. Lopez, 514 U.S. 549 (1995). They also argue that Congress's commerce power is constrained in this context by the Tenth Amendment. Because, as discussed in Section I above, application of the ADA in this context falls plainly within Congress's power to enforce the Fourteenth Amendment, this Court need not address these arguments. Cf. EEOC v. Wyoming, 460 U.S. 226, 243 (1983).

Nevertheless, as discussed below, the ADA is a permissible exercise of Congress's commerce power. Congress had a rational basis for concluding that discrimination on the basis of disability -- like the other forms of invidious discrimination it had previously proscribed -- has a substantial effect on interstate commerce, including such discrimination by public

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[11] But see cases cited in footnote 2, supra.

entities covered under title II.[12] That ends the Commerce Clause inquiry. Defendants' more narrow argument, focusing only on the application of the ADA to the "community placement of the traumatically brain injured from state mental hospitals" (Defs.' Br. at 5), is misplaced. If a general regulatory statute bears a substantial relation to commerce, it may be applied to individual instances arising under the statute notwithstanding their de minimis character. In any event, Congress could have also rationally concluded that the ADA's proscription of the unnecessary isolation and segregation of people with disabilities from the community has a substantial effect on interstate commerce.

A. Congress Had A Rational Basis For Concluding That Discrimination Against the Disabled, Including As Proscribed By Title II Of The ADA, Substantially Affects Interstate Commerce

1. Congress Possesses Broad Powers Under The Commerce Clause To Enact Civil Rights Legislation

Congress's power under the Commerce Clause is exceedingly broad, and therefore the "task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). The reviewing court must determine whether Congress had

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[12/] The Supreme Court in Wyoming held that the Commerce Clause affords Congress independent authority to prohibit discriminatory conduct by public entities. 460 U.S. at 243 (application of ADEA to State and local government employers is valid exercise of Congress's commerce powers and does not violate Tenth Amendment; no need to determine whether ADEA is also valid exercise of Congress's power under Section 5 of the Fourteenth Amendment).

a rational basis for finding that a regulated activity substantially affects interstate commerce and, if so, must defer to that finding. Ibid.; see generally Lopez, 514 U.S. at 558-560. "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." Hodel, 452 U.S. at 276.[13]

Congress, however, is not required to make formal findings "as to the substantial burdens that an activity has on interstate commerce." Lopez, 514 U.S. at 562. The evidence presented before Congress may "fully indicate the nature and effect of the burdens on interstate commerce which Congress meant to alleviate." Katzenbach v. McClung, 379 U.S. 294, 304 (1964). As the Seventh Circuit has explained, in addressing a challenge to Congress's commerce power, the court's task is "merely to determine whether Congress could have had a rational basis to support the exercise of its commerce power." United States v. Kenney, 91 F.3d 884, 886 (7th Cir. 1996)(emphasis added). Moreover, where Congress has repeatedly legislated in a particular area, and in such legislation has heard extensive

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[13/]It is well-established that Congress's Commerce Clause power is not limited to activities that themselves involve interstate commerce. "It is within Congressional authority to regulate activities that, although purely local and intrastate themselves, comprise a class of activities that, when aggregated, substantially affect interstate commerce." United States v. Bishop, 66 F.3d 569, 584 (3d Cir. 1995), cert. denied, 516 U.S. 1032 (1995); see generally Hodel, 452 U.S. at 324; Fry v. United States, 421 U.S. 542, 547 (1975); Wickard v. Filburn, 317 U.S. 111, 127-128 (1942). Nor is Congress's commerce power limited to the regulation of activities that are themselves commercial. See, e.g., United States v. Wilson, 73 F.3d 675, 684 (7th Cir. 1995), cert. denied, 117 S. Ct. 46 (1996).

evidence on the burdens of the targeted activity on interstate commerce, those findings may be treated as a reliable statement of Congress's authority to pass subsequent, related legislation. As Justice Powell explained in Fullilove v. Klutznick, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring), "information and expertise that Congress acquires in the consideration and enactment of earlier legislation" may be sufficient where "Congress has legislated repeatedly in an area of national concern."

Civil rights legislation is an example of such an area. As the Supreme Court has recognized, "[t]he power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." McClung, 379 U.S. at 305. Thus, through its passage of the Civil Rights Act of 1964,[14] as well as other Federal civil rights statutes, Congress was aware that invidious discrimination in a broad array of contexts, based on race as well as on other bases, directly affects interstate commerce.[15] See generally Heart of Atlanta

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[14/]The Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., outlawed discrimination in public accommodations (title II), public facilities (title III), public education (title IV), Federally assisted programs (title VI), and employment (title VII).

[15/]See, e.g., the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq.; Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 et seq.; see also Oxford House-C v. City of St. Louis, 77 F.3d 249, 251 (8th Cir.) (Congress had a rational basis for concluding that housing discrimination has a substantial effect

Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (in addressing the public accommodations provision of title II of the 1964 Act, Congress was presented with "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse"); McClung, 379 U.S. at 299-301 (addressing the application of title II of the 1964 Act to a restaurant).[16]

The Americans With Disabilities Act is Congress's most extensive piece of civil rights legislation since the Civil Rights Act of 1964. The purpose of the ADA "is to provide a

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on interstate commerce), cert. denied, 117 S. Ct. 65 (1996); Hearings on S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs, 90th Cong., 1st Sess. 8 (1967) (Fair Housing Act constitutional under the Fourteenth Amendment and the Commerce Clause) (statement of Ramsey Clark, Attorney General of the United States); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (ADEA enacted under Congress's Commerce Clause power).

[16/]As a general matter, the 1964 Act was based on Congress's Commerce Clause power and Section 5 of the Fourteenth Amendment. See generally Heart of Atlanta Motel, 379 U.S. at 249-250 (finding that "[t]he legislative history of the Act indicates that Congress based the Act on Section 5 and the Equal Protection Clause * * * as well as its power to regulate interstate commerce," but upholding title II under the Commerce Clause "since the commerce power is sufficient"); McClung, 379 U.S. at 304 (upholding title II under the Commerce Clause based on Congress's "finding[s] that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce"); United Steelworkers of America v. Weber, 443 U.S. 193, 206 n.6 (1979) (Title VII, prohibiting discrimination in employment, was based on the Commerce Clause); Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (upholding 1972 Amendments to title VII extending provisions to the States under Section 5 of the Fourteenth Amendment); id. at 458 (Brennan, J., concurring in the judgment) ("[c]ongressional authority to enact the provisions of title VII at issue in this case is found in the Commerce Clause * * * and in § 5 of the Fourteenth Amendment").

clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong, 1st Sess. 2. In fulfilling that mandate by enacting the ADA, Congress specifically provided that it was invoking "the sweep of [its] congressional authority, including [its] power * * * to regulate commerce." 42 U.S.C. 12101(b)(4). Since the subject matter of the ADA is directly related to the other civil rights legislation based on Congress's commerce power, the legislative findings underlying the prior legislation also provide a reliable statement of the basis for Congress's enactment of the ADA.[17] Thus, in enacting the ADA's comprehensive prohibitions against discrimination on the basis of disability -- whether in employment (title I), public services by States and cities (title II), or public accommodations (title III) -- Congress had a rational basis for concluding that such discrimination, like other forms of invidious discrimination

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[17/] Indeed, the employment and public accommodations provisions of the ADA (titles I and III, respectively), in effect, broaden the coverage of the protections contained in the similar provisions of the 1964 Act. The forms of discrimination prohibited under title II in the public services, program, or activities of State and local governments are, in turn, "comparable to those set out in the applicable provisions of titles I and III." S. Rep. No. 116, supra, at 44. Among other things, title II applies to discrimination in employment by public entities, e.g., Bledsoe v. Palm Beach Soil & Water Conserv. Dist., 133 F.3d 816 (11th Cir.), cert. denied, 119 S. Ct. 72 (1998), to the public's use of a public entity's facilities, 28 C.F.R. Pt. 35, App. A at 456 (1996) (e.g., a State must ensure that an inn owned and operated by a State park complies with title II), and to programs administered by State or local government that provide services or benefits.

against which it had previously legislated, substantially affects interstate commerce.[18]

2. The Statutory Findings And Legislative History Of The ADA Make Clear That Discrimination Against Persons With Disabilities Affects Interstate Commerce

In any event, in enacting the ADA Congress provided examples of the manner in which discrimination against persons with disabilities affects the national economy. The statutory "[f]indings" provide that Congress found that "studies [and other data] have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Congress further found that "the continuing existence of unfair and unnecessary discrimination * * * denie[d] people with disabilities the opportunity to compete on an equal basis * * * and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. 12101 (a)(9).

Congress based these findings on the extensive evidence and

[18/] Titles I and III of the ADA also contain a jurisdictional element that ensures that the statute reaches only those activities that substantially affect interstate commerce. See 42 U.S.C. 12111(5)(A), 12111(7) (title I); 42 U.S.C. 12181(7) (title III). Although title II does not, Congress need not include a jurisdictional element when it legislates under its commerce power. See, e.g., United States v. Wilson, 73 F.3d at 685 (while a jurisdictional element may ensure constitutionality, it is not a prerequisite of constitutionality). The inquiry remains whether Congress could have had a rational basis for concluding that discrimination against the disabled in public services substantially affects interstate commerce.

testimony it received during the hearings held to consider the ADA. For example, Attorney General Thornburgh stated that:

> We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country * * *. Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues.

S. Rep. No. 116, supra, at 17. Similarly, President Bush stated that:

> On the cost side, the National Council on the Handicapped states that current spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income revenues.

Ibid. Further, Congressman Steny Hoyer, after noting that Congress "has broad authority to pass antidiscrimination laws under the commerce clause," summarized that:

> [t]he extensive hearings on the ADA amply demonstrate how discrimination against people with disabilities has made it difficult for them to participate in the commercial life of this country. The Harris polls, cited in a number of the committee hearings, set forth clearly the myriad ways in which people with disabilities have been precluded, through various forms of discrimination, from public accommodations, from traveling, and from gaining employment.

136 Cong. Rec. 11,468 (1990). See also pages 11-13, supra. Thus, even apart from the findings underlying its prior, related, civil rights legislation, Congress had a rational basis for concluding that discrimination against persons with disabilities substantially affects interstate commerce.

3. Congress's Reliance On Its Commerce Clause Powers In Enacting Title II Of The ADA Is Consistent With The Lopez Decision

This conclusion is not inconsistent with the Supreme Court's decision in Lopez, which held that Congress exceeded its commerce power in enacting the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q)(1)(A). The Court concluded that possession of a firearm in a local school zone bore such an attenuated relationship to interstate commerce that it would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce. 514 U.S. at 567. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. Id. at 562-563. The Court further stated that Congress could not rely on its "accumulated institutional expertise regarding the regulation of firearms through previous enactments" because the prior Federal statutes and congressional findings do not speak to the subject matter of Section 922(q) or its relationship to interstate commerce. Id. at 563. The Court emphasized, the statute plowed "new ground" and represented a "sharp break with the long-standing pattern of federal firearms legislation." Ibid. (internal quotation marks omitted).

Unlike in Lopez, the link between the activities regulated by the ADA and interstate commerce is amply supported by both its legislative history and the express congressional findings

contained in the Act.[19] Moreover, the ADA does not represent a "sharp break" with prior civil rights legislation; indeed, as we have noted, it is directly related to other Federal civil rights legislation, and expands their protection.[20] Cf. Brzonkala v. Virginia Polytechnic Institute and State University, 132 F.3d 949, 971 (4th Cir. 1997) (the court followed Lopez in holding that Congress did not exceed the scope of its commerce power in enacting title III of the Violence Against Women Act (VAWA), 42 U.S.C. 13981 (1994); the court emphasized that "VAWA legislates in an area -- civil rights -- that has been a federal responsibility since shortly after the Civil War," and "a quintessential area of federal expertise"), vacated on rehearing

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[19/] Lopez does not alter prior precedent that Congress may prohibit conduct that is not itself "economic" or an essential part of a larger regulatory scheme. Rather, it reaffirms longstanding precedent that Congress has the power to regulate conduct that "substantially affect[s] interstate commerce" as well as prohibit interference with persons and things in interstate commerce. 514 U.S. at 558-559. As the Court explained in Lopez, the commerce power extends to activities that either "arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affects interstate commerce." 514 U.S. at 561 (emphasis added). The Court in Lopez also reaffirmed Congress's Commerce Clause power to regulate two other broad categories of conduct: first, "Congress may regulate the use of the channels of interstate commerce"; second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Id. at 558.

[20/] The Court in Lopez cited and left undisturbed the Court's Commerce Clause decisions addressing the Civil Rights Act of 1964. 514 U.S. at 559. As one court has stated, "the Supreme Court [in Lopez] reaffirmed, rather than overturned, the previous half century of Commerce Clause precedent." United States v. Wilson, 73 F.3d at 685.

en banc (Feb. 5, 1998).[21]

B. Congress Had A Rational Basis For Concluding That Unnecessarily Segregating Disabled Persons In Public Institutions, And Thereby Failing To Administer Services, Programs, And Activities For Such Persons In The Most Integrated Setting Appropriate, Substantially Affects Interstate Commerce

1. Once Congress Concludes That An Activity Substantially Affects Interstate Commerce, It Is Not Required To Establish An Interstate Nexus For Every Possible Application Of The Statute

Since Congress had ample basis to conclude that discrimination against the disabled, like other forms of invidious discrimination, substantially affects interstate commerce, that should end the inquiry. Congress is not required to establish an interstate commerce nexus in every conceivable application of the statute; rather, it is sufficient if the class of activities that is regulated, when aggregated, substantially affect interstate commerce. In Maryland v. Wirtz, 392 U.S. 183, 192-193 (1968), the Court explained that Congress has the power "to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is

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[21/] As the Second Circuit has stated, Lopez "has raised many false hopes. Defendants have used it as a basis for challenges to various statutes. Almost invariably those challenges fail." United States v. Trupin, 117 F.3d 678, 685 (2d Cir. 1977) (quoting United States v. Bell, 70 F.3d 495, 497 (7th Cir. 1995)), cert. denied, 118 S. Ct. 699 (1998). And the Sixth Circuit has stated that "[u]ntil the Supreme Court provides a clearer signal or cogent framework to handle this type of legislation, [it] is content to heed the concurrence of two Justices [in Lopez] that the history of Commerce Clause jurisprudence still 'counsels great restraint.'" United States v. Wall, 92 F.3d 1444, 1452 (6th Cir. 1996) (quoting Lopez, 514 U.S. at 568 (Kennedy, J., concurring)), cert. denied, 117 S. Ct. 690 (1977).

within the reach of the federal power." The Court further explained that "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Id. at 197 n.27.; see also McClung, 379 U.S. at 301; Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542, 547 (1975).

Thus, the fact that the ADA, like all anti-discrimination statutes, proscribes discrimination in generalized language is immaterial when application of the statute to a specific set of facts is challenged under the Commerce Clause.[22] For example, in Brzonkala the Fourth Circuit did not address whether, in enacting the VAWA, Congress had a rational basis to conclude that the gang rape of a college student in her dormitory by other college students (the underlying facts of the case) had the requisite effect on interstate commerce. Instead, the court focused on the regulated activity -- "violence against women" -- and examined whether Congress had a rational basis for concluding that such violence, discussed generally, substantially affected interstate commerce. 132 F.3d at 967-968. Thus, in this case, once the court finds that Congress had a rational basis to conclude that discrimination on the basis of disability by the covered entities

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[22/] Of course, it is characteristic of most civil rights legislation to proscribe certain conduct at a high level of generalization. See, e.g., 42 U.S.C. 2000e-2 (proscribing discrimination in employment); 42 U.S.C. 3604 (proscribing discrimination in housing); 29 U.S.C. 623 (proscribing age discrimination).

affects interstate commerce, it need not examine whether the specific discriminatory acts alleged in the complaint themselves substantially affect interstate commerce.[23]

2. Even If Congress Were Required To Establish That The ADA, As Applied In This Case, Affects Interstate Commerce, It Is Apparent That Congress Had A Rational Basis For Reaching That Conclusion

Even if the court were to examine the application of title II of the ADA in this case more narrowly, it is plain that Congress had a rational basis for concluding that unnecessarily segregating disabled persons from society, and failing to integrate them into more appropriate and less restrictive environments, substantially affects interstate commerce.[24] First, the congressional findings reflected in the ADA make clear that Congress viewed "institutionalization" as one of the

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[23/] In other contexts, courts have declined to narrowly characterize the class of activities involved in the case in determining whether Congress's commerce power may validly extend to the conduct at issue. For example, in Proyect v. United States, 101 F.3d 11, 13 (2d Cir. 1996), the court rejected defendant's argument that his conduct was the cultivation of marijuana for personal consumption, not the "manufacture of a controlled substance," and that the former was beyond Congress's commerce power. The court stated that any class of activities "could be defined so narrowly as to cover only those activities that do not have a substantial affect on interstate commerce," but to do so "would circumvent the mandate, reaffirmed in Lopez," that courts are not to carve out even de minimis individual instances of conduct that are covered by a general regulatory statute bearing a substantial relation to commerce. Id. at 14. Several cases have similarly rejected a narrow characterization of the class of activities covered by a Federal statute that addresses hazardous waste disposal in upholding application of the statute under Congress's commerce power. See, e.g., United States v. Olin Corp., 107 F.3d 1506, 1509-1510 (11th Cir. 1997); In re Pfohl Brothers Landfill Litigation, ___ F. Supp 2d ___, 1998 WL 765661 (W.D.N.Y. Oct. 27, 1998).

[24/] See footnote 5, supra.

"critical areas" in which discrimination against persons with disabilities persists. 42 U.S.C. 12101(a)(3). The same findings also make clear that Congress did not simply view disability-based discrimination that is manifested in the isolation and segregation of persons with disabilities as purely a social problem, but also as a sizable economic one. See 42 U.S.C. 12101(a)(9). Further, the legislative history of the ADA makes clear that in enacting the ADA Congress focused specifically on the "integration of persons with disabilities into the economic and social mainstream of American life." S. Rep. No. 116, supra, at 20; see also H. Rep. No. 485, Pt. 3, 101st Cong., 2nd Sess 49-50 (1990) (the purpose of title II "is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life"; the "integration of people with disabilities * * * will benefit society as a whole"). See generally Memorandum of the United States, supra n.5, at 10-12, 14-17 (summarizing ADA's focus on the problem of the institutionalization of persons with disabilities and need to integrate them into the economic and social mainstream).[25]

More particularly, Congress could have had a rational basis

[25/] See also Olmstead, 138 F.3d at 898-899 (discussing congressional findings underlying requirement that public services be provided in the most integrated setting appropriate); Kathleen S. v. Department of Public Welfare, 10 F. Supp. 2d 460, 467 (E.D. Pa. 1998) (emphasizing that "unnecessary segregation of the disabled in America continued to be a major form of discrimination against the disabled, and that through the ADA, Congress intended to ensure that the disabled be given the opportunity for more true and full integration into the mainstream of American life.").

for concluding that the conduct targeted by title II's integration requirement has a direct economic effect. First, as a result of moving disabled individuals from State institutions to community-based treatment, these individuals generally become eligible for State services designed to enhance their ability to live and work in the community. See Plaintiffs' Reply to Defendants' Supplemental Post-Trial Brief (Pls.' Br.) at III.C.1. In addition, as a result of integration disabled persons have a greater opportunity to purchase goods and services, including food, clothing, and other personal items. See Cook, supra at 450, 450 n. 385 (collecting studies); Pls.' Br. at III.C.2.; cf. McClung, 379 U.S. at 299 (decrease in spending resulting from racial discrimination by restaurant has a close connection to interstate commerce). Finally, since community placements are effectuated through contracts, these contracts are themselves economic transactions that substantially affect interstate commerce, and result in other transactions and purchases (e.g., the rental of homes or apartments) that, in the aggregate, affect interstate commerce. See Pls.' Br. at III C.3.

Defendants suggest, however, that the court must examine the application of title II even more narrowly, i.e., to whether the "community placement of the traumatically brain injured from state mental hospitals" substantially affects interstate commerce. As the above discussion makes clear, there is no basis for such an analysis. Since Congress could have rationally concluded that the mainstreaming of individuals with disabilities

would result in increased employment, consumer spending, and other activities that affect interstate commerce, it is unnecessary for this Court to examine how commerce is affected each time a person with a particular disability seeks a less restrictive community placement. Again, once a court "find[s] that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end." McClung, 379 U.S. at 303-304; Maryland v. Wirtz, 392 U.S. at 197 n.27; cf. United States v. Zorrilla, 93 F.3d 7, 9 (1st Cir. 1996) ("courts, when passing on the constitutionality of a statutory provision, must view it in the context of whole statutory scheme" (internal quotation marks omitted)).

C. Congress's Commerce Clause Power In Enacting Title II Of The ADA Is Not Constrained By The Tenth Amendment

Defendants argue (Defs.' Br. at 5) that "the inherent limitations of federalism and the Tenth Amendment" limit Congress's power under the Commerce Clause to regulate the State's provision of health-related services to individuals with disabilities. This argument is wrong. Because the ADA's integration requirement is a law of general applicability that applies to both private entities and State governments, Congress's commerce power in this context is not constrained by the Tenth Amendment.

In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court held that Congress acted within its commerce

power in applying the Fair Labor Standards Act to State and local governments. In so doing, the Court rejected an analysis of the scope of Congress's commerce power that turns on whether the legislation regulates a "traditional governmental function." Id. at 548, 554. Instead, the Court held that when Congress exercises its commerce power the State's sovereign interests are preserved by procedural safeguards inherent in the Federal political process. Id. at 552. The Court also emphasized that the transit authority "face[d] nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." Id. at 554.

As the Fourth Circuit has recently explained, under Garcia and its progeny Congress may "subject the States to legislation that is also applicable to private parties." Condon v. Reno, 155 F.3d 453, 459 (4th Cir. 1998), petition for rehearing and suggestion for rehearing en banc filed Oct. 16, 1998 (No. 97-2334). In other words, under Garcia Congress, in exercising its commerce power, may subject State governments to generally applicable laws. Id. at 461; see also ibid. (in Garcia "Congress was only allowed to regulate how much the States pay their hourly employees because Congress also regulates how much private parties pay their hourly employees" (emphasis omitted)); see generally EEOC v. Wyoming, 460 U.S. 226 (1983)(upholding application of the ADEA to State and local governments).

The ADA's anti-discrimination provisions -- including its

integration mandate -- fall plainly within this principle. As described above, Congress passed the ADA after extensive investigation had identified the pervasive and continuing existence of widespread discrimination against people with disabilities. Such discrimination was not limited to the activities of the State and local governments covered by title II. Instead, Congress identified and legislated against discrimination conducted by a wide variety of actors, both public and private: title I prohibits disability-based discrimination by private and public employers, 42 U.S.C. 12101-12117; title III prohibits such discrimination by privately-owned places of public accommodation and commercial facilities, 42 U.S.C. 12181-12189; and title IV regulates telecommunications services provided by both public and private entities, 47 U.S.C. 225, 611. Moreover, the regulations promulgated under title III contain the same requirement that individuals with disabilities receive services in the "most integrated setting appropriate" that is at issue here under title II. See 28 C.F.R. 36.203(b); Olmstead, 138 F.3d at 897-898 & n.5. Thus, the ADA, including its integration requirement, is precisely the kind of generally applicable law Congress may apply to the States under its commerce power.[26]

[26/] Defendants acknowledge (Defs.' Br. at 6) that the ADA " as applied to employment, building access, and many other facets of its regulatory scheme, * * * does indeed apply to private parties as well as governmental entities, and places the same general obligations on both." But, they argue (Defs.' Br. at 5), providing free "care for the impoverished and uninsured members of the population is a function performed by state and local

Finally, the Court's recent decision in Printz v. United States, 117 S. Ct. 2375 (1997) (striking down parts of the "Brady Bill"), also does not limits Congress's commerce power in this context. Title II does not require "the forced participation of the States' executive in the actual administration of a federal program." Id. at 2376. Rather, title II simply forbids States from discriminating against persons with disabilities in providing State services, just as it prohibits private employers and places of public accommodation from engaging in such discrimination. See West v. Anne Arundel County, 137 F.3d 752, 757-760 (4th Cir. 1998) (Printz does not overrule Garcia), pet. for cert. denied, 1998 WL 47977 (U.S. Dec. 7, 1998) (No.98-266).[27]

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governmental entities only." Defendants' focus is much too narrow. The ADA is a civil rights statute broadly addressing discrimination on the basis of disability by public and private entities alike. Thus, as one example, the nondiscrimination principle reflected in the ADA's integration mandate applies to mental health institutions and State-created and funded community placements as well as to their private counterparts. That is sufficient to satisfy Garcia. There is no basis for defendants' suggestion that a non-discrimination provision of the ADA that otherwise applies to both private and public entities cannot apply to a public entity if that entity does not charge the recipient for the particular service.

[27/] Defendants also rely on the Fourth Circuit's decision in Condon, which held that Congress's enactment of the Federal Driver's Privacy Protection Act (DPPA) under its commerce powers violated the Tenth Amendment. 155 F.3d 453. The court stated that "because the DPPA is not generally applicable, like the FLSA or ADEA, Congress did not have authority under our system of dual sovereignty." Id. at 463; see also id. at 461-462 ("rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies only to the States" (emphasis omitted)). Although we disagree with the decision in Condon, the instant case, as noted above, plainly involves application of a

CONCLUSION

For the reasons stated above, title II of the Americans with Disabilities Act is a constitutional exercise of Congress's power under both Section 5 of the Fourteenth Amendment and the Commerce Clause.

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regulatory scheme that applies to both private entities and the States.

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Respectfully submitted,

LYNNE A. BATTAGLIA
United States Attorney
District of Maryland

BILL LANN LEE
Acting Assistant Attorney
General for Civil Rights

JOHN L. WODATCH
Chief
Disability Rights Section

_____
PERRY F. SEKUS
Assistant U.S. Attorney
District of Maryland
Bar No. 07379

L. IRENE BOWEN
Deputy Chief
Disability Rights Section

_____
ANNE MARIE PECHT
THOMAS E. CHANDLER
Attorneys
Civil Rights Division
U.S. Department of Justice
P.O. Box 66400
Washington, D.C. 20035-6400
(202) 307-2891