No. 02-1667

IN THE
Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES,
and UNITED STATES OF AMERICA

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress validly abrogated states' Eleventh Amendment immunity to enable private individuals to bring damages suits to protect the exercise of fundamental constitutional rights by individuals with disabilities and to insure to these individuals the equal protection of the law under Title II of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002).

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), the National Asian Pacific American Legal Consortium ("NAPALC"), the National Association for the Advancement of Colored People ("NAACP"), the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), People For the American Way Foundation ("People For"), and the Anti-Defamation League ("ADL") submit this Brief as *amici curiae* with the consent of the Parties,[1] in support of Respondents' argument that 42 U.S.C. §§ 12131-12132, Title II of the Americans With Disabilities Act, was validly enacted pursuant to the power of Congress under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys in the effort to insure the civil rights of all Americans. The Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before the Court involving the scope of Congress' legislative power. *See*, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972 (2003); *Medical Bd. of California* v. *Hason*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003); *Adarand Constructors*, *Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999).

NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. NAPALC and its affiliates have a long-standing

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1. Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staff, or their counsel made monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

interest in addressing matters of discrimination that have an impact on the Asian American community, and this interest has resulted in NAPALC's participation in a number of amicus briefs before the courts.

The NAACP is a non-profit membership corporation that traces its roots to 1909 and was chartered by the State of New York. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress's power under § 5 of that Amendment to pass legislation that in certain circumstances abrogates the state sovereignty immunity.

PRLDEF is a national non-profit civil rights organization founded in 1972, dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

People For is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. People For has supported the Americans with Disabilities Act of 1990, and joins this brief to help vindicate Congress's power under § 5 of the Fourteenth Amendment and its ability to protect individuals with disabilities against discrimination by states and state agencies.

ADL was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. ADL has filed amicus briefs in this Court cases defending government enactments designed to prevent or punish discrimination and hate. ADL has supported Congress's broad authority under the

Fourteenth Amendment to remedy constitutional deprivations caused by States, and Congress's authority to abrogate state sovereign immunity in cases of clear civil rights violations.

The Court's interpretation of the scope of Congress's power to enforce the Fourteenth Amendment through its § 5 powers will directly impact the communities represented by this *amici*. Therefore, *amici* present their views on this extremely important issue.

STATEMENT OF THE CASE

George Lane and Beverly Jones are individuals with paraplegia. Both were unable to participate in court proceedings in the State of Tennessee because the State failed to make its courts accessible to individuals with disabilities. Pet. App. 13, 19. Respondent George Lane was denied access to the General Sessions Court of Polk County. After refusing to crawl up the stairs of the courthouse and declining to be carried by a Sheriff's deputy to reach the second floor courtroom where misdemeanor charges against him were pending, Lane was arrested for failure to appear and taken to jail. Pet. App. 15. Respondent Beverly Jones, a certified court reporter, also was denied access to courthouses in the State of Tennessee. Pet. App. 19-20. Jones' income is dependent on her ability to participate in court proceedings; however, Jones was unable to participate in court proceedings in several Tennessee counties because the courthouses in those counties were inaccessible to individuals with disabilities. *Id.*

Respondents filed separate actions for money damages that were consolidated into this action under Title II of the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. § 12131, *et seq*. ("Title II"). Petitioner moved to

dismiss on grounds of sovereign immunity under the Eleventh Amendment, but the District Court denied this motion. Pet. App. 6-7. The State of Tennessee subsequently filed an interlocutory appeal. While the appeal was pending, the Sixth Circuit issued its decision in *Popovich* v. *Cuyahoga County Court*, 276 F.3d 808 (CA6 2002), *cert. denied*, 537 U.S. 812 (2002). The *Popovich* court held that Congress validly abrogated states' sovereign immunity by enacting Title II to the extent due process violations were at issue. Applying *Popovich*, the appellate court affirmed the district court's denial of the State of Tennessee's motion to dismiss. On rehearing, the court of appeals affirmed the denial of the motion to dismiss. Pet. App. 5. Thereafter, this Court granted Petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

Pursuant to its power to enforce § 5 of the Fourteenth Amendment, Congress purposefully abrogated the states' Eleventh Amendment immunity when it enacted Title II. Congress recognized and sought to address the pervasive and widespread violations of the due process and equal protection rights of individuals with disabilities by the states, including their right to vote, to participate in judicial proceedings, and to access public buildings and facilities. Title II also operates to enable individuals with disabilities to exercise their right to travel, to protect them from cruel and unusual punishment, and to enable them to participate fully in educational and other government programs. Because these important constitutional rights were at stake, Congress had wide latitude to construct legislation to remedy existing state discrimination against individuals with disabilities and to prevent further discrimination.

Unlike state conduct affecting the rights protected by Title I of the ADA, state classifications and conduct affecting the exercise of the rights underlying Title II invoke heightened scrutiny. *See Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). When Congress acts to protect such fundamental rights as the right to vote or to access courthouses and other public buildings, the rational basis review applied in *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and the "congruence and proportionality" test employed in those cases are inappropriate tests of whether Congress has exceeded its constitutional authority. *Cf. Nevada Dep't of Human Resources* v. *Hibbs*, 123 S. Ct. 1972, 1982-83 (2003) (acknowledging that Congress has broad discretion to legislate to enforce constitutional principles that invoke a heightened level of scrutiny of state conduct). Instead, as it historically has done with legislation enacted to remedy the effects of discrimination invoking heightened scrutiny, the Court should apply the deferential rational means test first enunciated in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965).

Title II is a rational means of effectuating the protection of individuals' with disabilities constitutional rights under the Fourteenth Amendment. That alone requires rejection of Tennessee's claim of immunity.

Even if the Court were to apply the congruence and proportionality test implemented in *Garrett*, however, Title II's abrogation of the states' Eleventh Amendment immunity would survive. First, the legislative history behind Title II is compelling, well-defined, and explicit. It shows that Congress became

informed of a nationwide pattern of unconstitutional discrimination by the states against persons with disabilities in the provision of public services and access to public accommodations, including specifically access to courts. Indeed, as both the majority and dissenting opinions in *Garrett* noted, the bulk of the legislative history supporting the Act pertained to this type of discrimination against individuals with disabilities. *Garrett*, 531 U.S. at 360 n.1, 372 n.7. Not surprisingly given the testimony before Congress, Title II is aimed directly at preventing and remedying discrimination in the provision of public services and access to public accommodations.

Second, the scope of Title II is no broader than necessary to achieve its critical purposes. As the Court instructed in *City of Boerne*, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 521 U.S. at 530. Because the discrimination Congress addressed affects the exercise of fundamental rights and liberties and is subject to heightened review, the scope of the remedial measures permitted under § 5 is broad — broader than that permitted under § 5 when Congress acts to affect classifications invoking only rational basis review. Congress acted in response to a widespread pattern of discrimination by states against individuals with disabilities and tailored Title II to remedy these specific constitutional violations. Title II therefore meets the congruence and proportionality test laid down in *Garrett*.

Finally, although Title II meets the congruence and proportionality test set out in *Garrett*, *amici* do not wish to endorse this standard as proper for review of *any* legislation. For the reasons discussed in dissenting opinions in *Garrett* and *Kimel*, *amici* respectfully submit that this standard is premised on an unworkable view of the legislative process, effectively requires Congress to dramatically alter the way in which it

legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress's legislative procedure. *Amici*, therefore, respectfully urge the Court to return to its prior rational means standard enunciated in *M'Culloch*.

ARGUMENT

I. TITLE II OF THE ADA GUARANTEES THE FUNDAMENTAL RIGHTS AND LIBERTIES OF INDIVIDUALS WITH DISABILITIES.

Congress enacted Title II of the ADA to protect individuals with disabilities from violations of their fundamental rights and liberties by state and local governments. 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 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 (2003). Congress sought in Title II to address its explicit finding that "discrimination against individuals with disabilities persists in such critical areas 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). Within these areas, individuals with disabilities have constitutional rights arising under the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause incorporates most of the guarantees of the Bill of Rights and encompasses state conduct subject to constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Eighth Amendments. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). Where fundamental rights and liberties such as the ones guaranteed by these Amendments are involved, state

discrimination is subjected to strict scrutiny, *see Harper*, 383 U.S. at 670, and must be justified with a compelling state interest. *See Olmstead* v. *Zimring*, 527 U.S. 581 (1999) (right to be free from unreasonable confinement); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper*, 383 U.S. at 663 (voting); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *cf. Garrett* 531 U.S. at 373 (describing the Voting Rights Act of 1965 as a valid exercise of Congress's power under § 2 of the Fifteenth Amendment). Congress's power to legislate to protect citizens from such state discrimination is at the core of § 5.

The legislative record confirms that Congress was concerned with due process violations, such as inaccessible courthouses and the infringement of individuals' with disabilities right to participate in judicial proceedings, when it enacted Title II. Congress heard an abundance of testimony and reviewed a number of reports concerning the inability of individuals with disabilities to participate in judicial proceedings in courthouses throughout the nation. 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No.* 101-336: *The Americans with Disabilities Act*, 100th Cong., 2d Sess. 936 (Comm. Print 1990) (Sen. Harkin) (*Leg. Hist.*). One individual shared the following illustrative account:

> I went to the courtroom one day . . . I could not get into the building because there were about 500 steps to get in there. [T]he security guard . . . told me there was an entrance at the back door for the handicapped. . . . I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that

> somebody would come and open the door and maybe let me in. . . . This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. . . .

Oversight Hearing on H.R. 4498, *Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. On Educ. & Labor*, 100th Cong., 2d Sess. 40 (1988) (Emeka Mwojke).

Other disturbing examples of discrimination brought to Congress's attention through the Task Force on Rights and Empowerment of Americans with Disabilities highlighted a multitude of instances where courts were not accessible or did not have services needed by individuals with disabilities. *Garrett*, 531 U.S. at 391-424 (App. C to opinion of Breyer, J., dissenting). The summaries repeatedly referenced individuals with disabilities who faced "inaccessible public buildings," "inaccessible state buildings," and "inaccessible government buildings." *Id*.

Many courts, including this Court, have held that the Due Process Clause guarantees access to judicial proceedings. Inaccessible courtrooms and courtrooms closed to the public potentially violate the rights of both individuals with disabilities and the general public. Pursuant to the Sixth Amendment and the Due Process Clause, a criminal defendant has "a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). Mr. Lane's exclusion from the courtroom plainly compromised the fairness of the proceedings against him. Criminal defendants also have the right to have their trials open to the public. *See Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). Likewise, civil litigants have a due process right to be present

in the courtroom unless their exclusion furthers important government interests. *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (CA6 1985). Even non-parties have a First Amendment right to view public proceedings in court. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986); *Newspapers*, *Inc.* v. *Virginia*, 448 U.S. 555, 574 (1980); *Brown & Williamson* v. *F.T.C.*, 710 F.2d 1165, 1179 (CA6 1983). Title II serves to prevent these constitutional violations.

Concern about the exercise of other fundamental rights by individuals with disabilities also motivated Title II's enactment. For example, Congress was concerned with the ability of individuals with disabilities to exercise their right to vote. This Court has acknowledged several times that the right to vote is a fundamental right guaranteed by the Constitution. *See*, *e.g.*, *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Evidence abounds throughout the legislative record of the ADA that Congress sought to address violations of this fundamental right by enacting Title II. Recounting testimony from Neil Hartigan, then Attorney General from Illinois, the Senate Report specifically mentions the need to ensure access to polling places. S. REP. NO. 101-116, at 12 (1989). Hartigan testified: "'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'" *Id.* Congress was likewise aware that some individuals with disabilities had been forced to vote by absentee ballot before the candidates had participated in key debates. *Id*. Furthermore, like inaccessible courthouses, examples of inaccessible polling places and other procedural deficiencies related to voting flooded the report submitted to Congress by the Task Force on Rights and Empowerment of Americans with Disabilities. *Garrett*, 531 U.S. at 391-424 (App. C to opinion of Breyer, J., dissenting).

Given Congress's recognition of and intent to remedy longstanding state discrimination infringing on individuals' with disabilities due process rights, Congress was constitutionally authorized to use great latitude in enacting Title II. Unlike Title I of the ADA, which was enacted to enforce persons' with disabilities equal protection rights to employment only, Title II was drafted to enable individuals with disabilities to exercise fundamental rights and liberties guaranteed by the Constitution. In that respect, Title II is less similar to Title I and more like the Family and Medical Leave Act ("FMLA"), which was reviewed by this Court in *Hibbs*. State classifications affecting fundamental rights and state gender discrimination both trigger a heightened level of scrutiny. Furthermore, like Congress's previous efforts to remedy the gender discrimination targeted by the FMLA, previous efforts to remedy discrimination against individuals with disabilities in exercising fundamental rights were also unsuccessful. There is an explicit acknowledgement in the ADA's legislative history that "Federal and State laws [were] inadequate to address the discrimination faced by people with disabilities." S. REP. 101-116, at 6 (1989). As recognized by the *Hibbs* Court, "[s]uch problems may justify added prophylactic measures in response." 123 S. Ct. at 1982. While *amici* respectfully disagree with the application of the "congruence and proportionality" test, which was applied in *Hibbs*, the ultimate conclusion reached by the *Hibbs* Court is similarly justified in this case. Because fundamental rights and liberties were at stake when Congress enacted Title II, there should be no doubt that Congress validly abrogated states' Eleventh Amendment immunity to enforce the Fourteenth Amendment.

II. FOR LEGISLATION INTENDED TO PROTECT AGAINST CONSTITUTIONAL VIOLATIONS INVOKING HEIGHTENED SCRUTINY, COURTS SHOULD APPLY THE RATIONAL MEANS TEST ENUNCIATED IN *M'CULLOCH v. MARYLAND.*

Where fundamental rights and liberties are at issue, this Court has not held that the congruence and proportionality test is appropriate. Indeed, prior to *City of Boerne*, when reviewing § 5 legislation the Court applied the rational means test enunciated in *M'Culloch* v. *Maryland*.[2]

The *M'Culloch* standard requires only a rational relationship between the ends of the legislation and Congress's chosen means. In the words of Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.

M'Culloch, 17 U.S. (4 Wheat.) 316, 421. Under this test, the desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, is beyond the scope of the Court's review. All that the Court need determine is whether the legislation is a rational means of enforcing the Fourteenth Amendment's substantive guarantees.

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2. Although the Court, in *dicta*, used the words "congruence" and "proportional" in reviewing the Violence Against Women Act, *see United States* v. *Morrison*, 529 U.S. 598 (2000), the holding in *Morrison* was that the VAWA was unconstitutional because it was directed not "at any State or state actor, but at individuals who . . . committed criminal acts motivated by gender bias." *Id*. at 626.

Title II is a rational means of addressing the documented pattern of discrimination by the states against individuals with disabilities. When Congress passed Title II, it was well aware that individuals with disabilities like George Lane and Beverly Jones were, among other things, burdened by inaccessible courthouses, inaccessible polling places, inaccessible public transportation, and inaccessible government buildings and agencies. Responding to this problem of limited access, Congress enacted Title II to ensure that individuals with disabilities would not continue to be shut out of polling places, public buildings, schoolhouses, and other vital public facilities. In doing so, Congress took steps to mediate the impact on states. For example, rather than mandating that public entities overhaul their buildings and facilities completely, Congress structured Title II to require states to make only "reasonable modifications" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). In addition, states are required to make these modifications only for "qualified individual[s] with a disability." *See* 42 U.S.C. § 12132.

Although, as discussed below, Title II is also a congruent and proportional means of addressing discrimination against individuals with disabilities, the Court need not conduct that more exacting analysis. In the context of fundamental rights, state discrimination is presumptively unconstitutional and Congress's chosen means of addressing that discrimination need only be rational. Title II serves a legitimate end, is consistent with the letter and spirit of the constitution, and brings to bear means that are plainly and rationally adapted to achieve its purposes. Congress acted well within the scope of its constitutional powers when it enacted Title II.

III. EVEN UNDER THE ANALYSIS SET FORTH IN *GARRETT*, TITLE II IS APPROPRIATE LEGISLATION UNDER § 5 OF THE FOURTEENTH AMENDMENT.

Assuming the Court departs from the well-established standards in *M'Culloch*, Title II is nevertheless a congruent and proportional response to the states' documented history of discrimination against individuals with disabilities. Under the framework set out in *Garrett*, after determining that Congress unequivocally expressed its intent to abrogate the states' immunity, a court turns to whether Congress properly exercised its power to abrogate.[3] First, the Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, the Court must ask "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the states." *Id*. at 368. Last, the Court must determine whether the legislation is congruent and proportional to the identified wrong.

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3. The first step of this analysis questions whether Congress explicitly expressed its intent to abrogate the states' Eleventh Amendment immunity. *See Kimel*, 528 U.S. at 73; *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) There is no dispute in this case that this criterion has been met. Pet'r Br. at 12; 42 U.S.C. § 12202. There is also no dispute that § 5 of the Fourteenth Amendment is a valid source for this power to abrogate. Pet'r Br. at 12.

A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties.

The majority in *Garrett* instructed that a court must "identify with some precision the scope of the constitutional right at issue" and define the "metes and bounds" of that right. *Garrett*, 531 U.S. at 365-68. As discussed in Parts I and II above, Title II is intended to prohibit and remedy violations of the Due Process Clause and the infringement by the government of the fundamental rights and liberties of individuals with disabilities. These fundamental rights and liberties, which frequently overlap with the right to equal protection, include the right to vote, to access the courts and the government process, to bear children, to have custody of one's children, to marry, and to be free from unreasonable confinement. Discrimination such as a state's refusal to provide reasonable access to the courts for individuals with disabilities is presumptively unconstitutional under the Due Process Clause and the Equal Protection Clause.

Title II also helps insure that individuals with disabilities have the same equal access to their government as all other citizens, a fundamental principal embodied by the equal protection clause: "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Thus, while Congress's power to enact Title II and to abrogate the states' Eleventh Amendment Immunity was rooted in its authority to enforce the Due Process Clause of the Fourteenth Amendment, Congress recognized that Title II would also inevitably protect the Equal Protection rights of individuals with disabilities.

B. Congress Supported Title II With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services.

Congress enacted Title II in light of a history and pattern of unconstitutional discrimination by the states against people with disabilities. *Garrett*, 531 U.S. at 368. The legislative history of the ADA shows that the vast majority of unconstitutional discrimination by the states related to the states in their role as public entities and providers of government services. In *Garrett*, the Court acknowledged that the "overwhelming majority of these accounts [of discrimination in the legislative history] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Garrett*, 531 U.S. at 371-72 & n.7. The strength of this legislative history is evidenced by Congress's specific findings of persistent discrimination in the provision of public services and accommodations. 42 U.S.C. § 12101(a)(3), (5)–(9). The legislative history of the ADA fully supports valid abrogation of Eleventh Amendment immunity under Title II.

In enacting the ADA, Congress made explicit findings of persistent discrimination by the states in the provision of public services and accommodations. 42 U.S.C. § 12101(a)(3) ("discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"); *see also* 42 U.S.C. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion; the discriminatory effects of architectural, transportation, and communication barriers,

overprotective rules and policies, failure to make modifications to existing facilities and practices"); *id.* § 12101(a)(6) ("census data, national polls, and other studies 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"); *id.* § 12101(a)(7) ("individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations . . . and relegated to a position of political powerlessness in our society"); *id.* § 12101(a)(8) ("the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency"); *id.* § 12101(a)(9) ("the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous").

Congress insured that its legislative response to the invidious and widespread discrimination by the states against individuals with disabilities in the provision of public services and public accommodations was appropriate.[4]

4. Congress held thirteen hearings and mobilized a special task force to examine whether the ADA would be appropriate legislation. *See Garrett*, 531 U.S. at 377 (Breyer, J., dissenting). Moreover, both the House and Senate cited seven substantive studies or reports to support its conclusion that discrimination against individuals with disabilities is a serious, widespread problem. S. REP. NO. 101-116, at 6 (1989); H.R. REP. NO. 101-485 a, pt. 2 at 28, U.S.C.C.A.N. 1990, 267, 309-310 (1990). The legislative record demonstrates that Congress identified numerous findings of unconstitutional discrimination by states falling under the ambit of Title II. *See* 42 U.S.C. § 12101(a)(2)-(a)(3), (a)(5)-(a)(6); H.R. REP. NO. 101-485, pt. 2, at 22, 30, 42 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 310, 311-12, 324. This legislative record goes

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The Congressional Committee Reports conclude that state discrimination in the areas of public accommodations and public services reveals a "compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of . . . public accommodations [and] public services." H.R. REP. NO. 101-485, pt. 2, at 28 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 310; *see also* S. REP. NO. 101-116, at 6 (1989). Particularly notable because of the facts of this case, one study conducted in 1980 found that 76% of state-owned buildings available to the general public were physically inaccessible and unusable for providing services to individuals with disabilities. *See* 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coehlo discussing U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 38-39 (1983)); 100th Cong., 2d Sess. 40-41 (1988) (testimony of Emeka Nwojke discussing courthouse access).

In addition, Appendix C of *Garrett* cites hundreds of allegations of discrimination against individuals with disabilities falling under the ambit of Title II. *Garrett*, 531 U.S. at 372 n.7. These submissions enabled Congress to identify an overwhelming number of instances of discriminatory conduct by *state* actors, ranging from inaccessible courthouses and polling places to an inaccessible "office of handicapped services" at the University of Georgia, which was located on the second floor. *Id.* at 401. Moreover, these findings evidence a history and pattern of widespread discrimination, as many states were cited numerous times for continually committing similar violations and a substantial number of these violations occurred

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far beyond the "unexamined, anecdotal accounts" of discrimination criticized by this Court in *Garrett*. 531 U.S. at 370. *Cf. City of Boerne*, 521 U.S. at 530-31 (relying on testimony in congressional hearings to demonstrate valid abrogation).

nationwide. The concern expressed by the Court in *Garrett* about what it found to be a lack of legislative evidence directly supporting Title I is met in the context of Title II. Ample congressional evidence, compiled "after extensive review and analysis over a number of Congressional sessions," H.R. REP. NO. 101-485, pt. 2, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310, reveals a pattern of state discrimination against individuals with disabilities in the area of public services and public accommodations.

Petitioners contend that Congress' legislative record acknowledged the states as leaders in "safeguarding the rights of the disabled." Pet'r Br. at 22. While it is true that states such as Tennessee enacted various laws protecting the rights of individuals with disabilities, *see*, *e.g.*, Tenn. Code Ann. § 8-50-103, when Congress enacted the ADA, Congress recognized that then "[c]urrent Federal and State laws [were] inadequate to address the discrimination faced by people with disabilities in these critical areas." S. REP. 101-116, at 6 (1989). Even with the enactment of the ADA, as shown by this case, many states still failed to meaningfully address discrimination against individuals with disabilities. As Justice Rehnquist noted in *Hibbs*, 123 S. Ct. at 1980, the Court should not ignore states' shortcomings by referencing their efforts to remedy discrimination. Although Tennessee put a formal guarantee of access on its law books, George Lane still had to crawl up stairs to appear at a judicial proceeding that required his presence. It was not until this lawsuit was brought that an elevator was added to the courthouse building. Without the threat of damages suits for ADA violations, states may continue to take a lackadaisical approach to addressing discrimination against individuals with disabilities.

C. The Substantive and Remedial Provisions of Title II are Proportional and Congruent to the Rights Protected by the Legislation.

Because Congress has "wide latitude" in defining the bounds of § 5 through prophylactic and remedial legislation, *City of Boerne*, 521 U.S. at 520, the congruence and proportionality analysis does not require an exact match between legislative and constitutional prohibitions. Rather, as noted in *Kimel*, the affirmative grant of legislative power contained in § 5 of the Fourteenth Amendment permits Congress to "remedy and deter" unconstitutional acts that violate § 5, as well as "prohibit[ ] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518). The *Court* recently affirmed this principle in *Hibbs*, 123 S. Ct. 1972 (holding that the abrogation of states' Eleventh Amendment immunity by the FMLA was a valid act of Congress under § 5 of the Fourteenth Amendment). As the Court noted in *Hibbs*, as long as Congress does not attempt to redefine the obligations of the states, Congress may exercise its § 5 power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct." *Id*. at 1973. "[L]egislation which 'deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.'" *Id.* at 1992 (quoting *City of Boerne*, 521 U.S. at 518).

The appropriateness of Title II should be examined in light of the injuries that Congress was seeking to remedy and prevent. *City of Boerne*, 521 U.S. at 530. These injuries included violations of persons' with disabilities right to access courts, to vote, to travel, and to have custody of one's children. Thus, the

evils before Congress involved the infringement of fundamental rights and liberties guaranteed by the United States Constitution.

Title II is congruent and proportional to the evils identified by Congress because it is tailored to remedy these constitutional violations while placing the least burden possible on states. First, the requirements under Title II are narrowly tailored and sensitive to financial and other burdens the requirements may place on the states. For example, Title II only requires a public entity to ensure that "when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). It also does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(2). Moreover, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3); *see also* 28 C.F.R. §§ 35.130(b)(7), 35.164; *Olmstead* v. *Zimring*, 527 U.S. 581, 606 n.16 (1999).

Second, states retain discretion to exclude persons from programs, services, or benefits for any lawful reasons unrelated to disability. A state is required only to make "reasonable modifications in policies, practices, and procedures" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services") (emphasis added). Title II permits discrimination based on disability if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. § 12131(2). *See also Popovich v. Cuyahoga County*

Court, 276 F.3d 808, 820 (CA 6 2002) ("Title II requires reasonable modifications only when a disabled individual is otherwise eligible. . . . The states therefore maintain their discretion over the provision of public services so long as they do not arbitrarily discriminate against the disabled.")

The availability of a damages remedy is critical to the protection of the fundamental rights and liberties of individuals with disabilities. The availability of damages enables Title II plaintiffs to obtain representation more easily from private attorneys and accelerates state compliance. States facing exposure to liability for damages and attorneys' fees are more likely to comply with the law in advance of litigation. *See* NAT'L COUNCIL ON DISABILITY, *TENNESSEE V. LANE*: THE LEGAL ISSUES AND THE IMPLICATIONS FOR PEOPLE WITH DISABILITIES (2003), *at* http://www.ncd.gov/newsroom/publications/legalissues.html. Injunctive relief alone fails to afford these incentives. Moreover, injunctive relief only prevents future misconduct. It does nothing to make whole individuals who have been injured by violation of their fundamental rights. *Id*.

Title II is proportional and congruent. It is targeted to protect the fundamental rights and liberties of individuals with disabilities. The obligations imposed on the states are limited and sensitive to the financial and other burdens imposed on the states. The private right of action for damages is essential to the effectiveness of Title II. Therefore, Congress acted within its power to abrogate the Eleventh Amendment immunity of the states.

IV. THE RIGOROUS STANDARD OF REVIEW RECENTLY APPLIED TO § 5 LEGISLATION UNDULY COMPROMISES CONGRESSIONAL POWER.

Although Title II meets the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett*, *amici* respectfully urge the Court to return to the traditional, deferential standard used in evaluating the validity of all legislation enacted pursuant to Congress's § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress's judgments because "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the congruence and proportionality standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, has insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and has questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, we submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress's legislative function. The Court has noted that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle . . . is it

> possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. *Beach Communications*, 508 U.S. 307, 308, 315 (1993) (citations omitted). Yet, in determining congruence and proportionality in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, the Court held that substantial evidence of society-wide stereotypes concerning individuals with disabilities, and even discrimination by government officials, did not provide a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of individuals with disabilities. *See id.* at 377-78. And the requirement of a record showing a pattern of discriminatory state action also implies that Congress's power "to enforce" the Fourteenth Amendment is limited to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, we believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress's legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review*, *The Congressional Process*, *and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to the type of deliberation engaged in by judicial and administrative bodies. Accordingly, in many, if not most, cases, no single, identifiable rationale exists. *See id*. at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that all the information Congress draws upon in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rasa* until it conducts on-the-record proceedings," but rather, "grounds its claim to legitimacy on

knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, *inter alia*, communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside of its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measure of the basis for Congress's judgments. More significantly, however, it appears that if Congress were to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress's legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide, respectively, that "[e]ach House may determine the rules of its proceedings" and "shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." U.S. Const. art. I, § 5,

cls. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See*, *e.g.*, *United States* v. *Ballin*, 144 U.S. 1 (1892); *Field* v. *Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Gravel* v. *United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

The Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, reflects two concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or may be adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the states against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. We respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress's determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. 356, 382-85 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *M'Culloch*, its judgments that there exists arbitrary and purposeful state discrimination requiring legislation, and what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

Concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress's legislative judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments

effected "the expansion of Congress' powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Moreover, the states are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in particular, the states' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the states' sovereignty. *See Kimel*, 528 U.S. at 93-94 (opinion of Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means [to be] adopted and the end to be attained." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934). This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their rights against a dominant majority. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard

of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

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