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 THE STATES OF MINNESOTA, CONNECTICUT, ILLINOIS, MISSOURI, NEW MEXICO, NEW YORK, WASHINGTON AND WISCONSIN *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MIKE HATCH
Attorney General
State of Minnesota
Counsel of Record

GARY R. CUNNINGHAM
KRISTYN ANDERSON
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5700

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

LISA MADIGAN
Attorney General
State of Illinois

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

PATRICIA A. MADRID
Attorney General
State of New Mexico

ELIOT SPITZER
Attorney General
State of New York

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

PEGGY A. LAUTENSCHLAGER
Attorney General
State of Wisconsin

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of ____ (__) states: Minnesota, Connecticut, Illinois, Missouri, New Mexico, New York, Washington and Wisconsin. The *amici curiae* States strongly support a finding in favor of Respondents in this case and the resulting use of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 ("ADA"), by state citizens without limitation. Although the states more typically advocate the application of Eleventh Amendment immunity, this case is different. Because of the vital public policy underlying the landmark ADA legislation, in particular Title II, and because of the central role of the states in providing the public services, programs and activities subject to Title II, the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 power under the Fourteenth Amendment, the states have a compelling interest in the full implementation of the law. The states should support every effort to eradicate the effects of the documented long-term, pervasive and invidious discrimination against people with disabilities in the provision of public services. Citizens should not have to depend upon a waiver of immunity from the state to pursue the important rights protected by Title II. Rather, Title II's equal protection and due process-based purposes, and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities, mandate that citizens be empowered to enforce their Title II rights without restriction.

SUMMARY OF ARGUMENT

This Court has recognized that people with disabilities suffer discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287

(1985); *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). In considering Title II, Congress had before it substantial and uncontroverted evidence of state-sponsored invidious discrimination against individuals with disabilities in the provision of public services, programs and activities. Indeed, states engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. Although this Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), found that Title I of the ADA was not a valid exercise of Congress's Section 5 power, the *Garrett* Court's analysis was limited to conduct which is accorded only rational basis review under the Equal Protection Clause. In contrast, Title II implicates fundamental rights protected by the Equal Protection and Due Process Clauses, which are subject to heightened scrutiny, including voting and access to the courts. As it relates to Title II, the legislative record identified violations of these and other constitutionally protected rights.

In Title II, Congress provided for a congruent and proportional remedy for widespread constitutional violations by the states. As authorized by Section 5 of the Fourteenth Amendment, Title II not only proscribes unconstitutional discrimination, but also seeks to deter such discrimination. In accordance with *City of Cleburne*, 473 U.S. at 442-43, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress, in enacting Title II, tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities with respect to government-provided services.

The important limitations on Title II's remedial scheme provide further evidence of Congress's congruent and proportionate response to the endemic problem of disability discrimination by the states. By imposing significant restrictions on Title II's applicability,

Congress appropriately balanced the needs of the states with meaningful protection against disability discrimination in public services, programs and activities. Accordingly, Title II is a valid exercise of Congress's Section 5 power.

ARGUMENT

I. THIS COURT'S DECISION IN *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT* IS NOT DETERMINATIVE OF THE ISSUE PRESENTLY BEFORE THE COURT.

Unlike Title I of the ADA, Title II is a valid exercise of Congress's Section 5 power. This Court determined in *Garrett* that Congress failed to abrogate state sovereign immunity in Title I of the ADA because the record did not reflect a pattern of disability discrimination in state employment sufficient to justify application of the Title to the states, and because Congress failed to create a statutory remedy that was congruent and proportional to the targeted violation. *Board of Trs. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 368, 374 (2001). The Court did not extend this holding, however, to Title II of the ADA, governing the provision of public services, programs and activities. In footnote 1 of the *Garrett* opinion, this Court, recognizing Title II's distinct remedial scheme, expressly declined to decide whether Title II could survive constitutional challenge. *Id.* at 360 n.1. Moreover, while this Court found the legislative record lacking with respect to evidence of disability discrimination in state *employment*, it explicitly noted that the "overwhelming majority" of accounts of disability discrimination in the legislative record "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." *Id.* at 371 n.7. Unlike Title I, Title II passes muster under the *Garrett* analysis.

II. CONGRESS VALIDLY ABROGATED THE STATES' SOVEREIGN IMMUNITY WHEN IT ENACTED TITLE II OF THE ADA.

Congress validly abrogated state sovereign immunity in Title II. Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000) (citations omitted). Second, Congress must act in accordance with its enforcement power under Section 5 of the Fourteenth Amendment. *Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 59 (1996).

In adopting Title II, Congress clearly stated its intention to abrogate the states' Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

Thus, the remaining issue before the Court is whether Title II of the ADA constitutes a valid exercise of Congress's Section 5 power. To be valid under Section 5, Congressional enactments "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett,* 531 U.S. at 365 (quoting *City of Boerne v. Flores,* 521 U.S. 507, 520 (1997)). In contrast to *Garrett*, and in accord with *Nevada Human Resources v. Hibbs*, __ U.S. __, 123 S. Ct. 1972 (2003), the legislative record supporting Title II sufficiently documents constitutional injuries by the states. Congress made explicit findings to that end. Moreover, shortcomings in existing laws justified Title II's enactment.

A. Congress Identified Substantial Evidence Of Irrational State Conduct Supporting Its Finding Of A History And Pattern Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

The legislative record supporting Title II sufficiently documents state actions that were based on irrational stereotypes against people with disabilities and which, even under rational basis scrutiny, violate the Equal Protection Clause. *See City of Cleburne,* 473 U.S. at 450. Reports in the Congressional Record detail a long history of states sterilizing people with disabilities and restricting the rights of people with disabilities to marry, enter into contracts, retain custody of their children and obtain state-issued drivers' licenses. *See Towards Independence* (Nat'l Council on the Handicapped, 1986); *On the Threshold of Independence* (Nat'l Council on the Handicapped, 1988); *Accommodating the Spectrum of Individual Abilities* (Report by U.S. Civil Rights Commission, 1983). For example, the record before Congress included the United States Commission on Civil Rights' report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of state institutionalization and other policies that were applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These state practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities. *See City of Cleburne*, 473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of *state-mandated* segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462 (emphasis added).

The legislative record includes various examples of state conduct devoid of any rational basis: Congress heard that a blind voter with cerebral palsy was arbitrarily refused the right to register to vote in state elections; it heard that state mental hospitals misused medications to punish and restrain their disabled, institutionalized patients; it heard that such hospitals subjected their patients to abusive treatment and inhumane conditions; it also heard that a blind woman

was refused instructions on how to use her state's voting machines. *See* Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., 2 *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act* 1220, 100th Cong., 2d Sess. at 1203, 1262-63 (Comm. Print 1990)[1]; Task Force on the Rights and Empowerment of Americans with Disabilities, *Alabama Submissions* 16.[2]

Bonnie O'Day, of the Independent Center of Hampton, testified to Congress that a wheelchair user plunged fifty feet to his death because he was using a makeshift path at the University of Virginia, which was physically inaccessible, lacking a barrier-free accessible route on which to travel. *Legis. Hist.* at 1076. Greg Hlibok, then president of the Student Body Government at Gallaudet University, testified that he and others who are deaf and hard of hearing had been denied medical treatment at hospitals because they could not be understood and the hospital refused to hire a qualified sign language interpreter. *Id*. at 1006. Judy Heumann, of the World Institute on Disability, was denied entry to her dorm house because of her wheelchair. After college, she was denied her teaching credential because of "paralysis." *Id.* at 1002. The record also included a statement of a mother whose deaf son was charged with speeding. The judge chose to dismiss the charges because it was "cheaper" than to provide an interpreter for the court appearance. *Task Force*, *Georgia Submissions* 374.

The Congressional Record shows evidence of state action that would not satisfy even rational basis review, justifying application of Title II to the states.

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[1] Hereinafter referred to as "*Legis. Hist.*"

[2] This task force was appointed by the select chairman of the House Committee on Education and the final report was printed by the Government Printing Office at the behest of the Committee. The Report will be hereinafter referred to as "*Task Force*."

B. In Adopting Title II, Congress Identified State Discrimination That Violated The Fundamental Constitutional Rights Of People With Disabilities.

More than showing equal protection violations subject to rational basis review, the record supporting Title II shows that discrimination by the states in public services impinged upon fundamental constitutional rights of people with disabilities, including such rights as parental rights, voting rights, access to the courts and prisoners' rights to humane conditions of confinement. Since a higher standard of scrutiny applies to these rights, Congress was justified in concluding that the record documented constitutional violations by the states.

In *Garrett*, the Court held that the record of state conduct was insufficient to justify abrogation of sovereign immunity, in part, because of the standard of review applicable to state treatment of people with disabilities, namely the rational basis test under the Equal Protection Clause.[3] The Court determined that the respondents failed to demonstrate that the identified state conduct could never have a rational basis. In contrast to Title I's regulation of employment, Title II, which governs the provision of public services, programs and activities, addresses state conduct that impinges upon fundamental constitutional rights embodied in the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. In such a case, a higher standard of scrutiny applies. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that right to vote can be restricted only when purpose of restriction and overriding interests served thereby meet close constitutional scrutiny); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that due process requires state to provide meaningful access to courts absent showing of countervailing state interest of overriding significance); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670

[3] Because state employment is not a fundamental right and not subject to heightened scrutiny, in evaluating evidence of unconstitutional state action supporting abrogation under Title I, the *Garrett* court was able to consider only the limitations placed by rational basis review under the Equal Protection Clause on state conduct concerning people with disabilities.

(1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

In *Hibbs*, this Court recognized that where Congress directs its attention to categories that trigger a heightened level of scrutiny, it is "easier for Congress to show a pattern of state constitutional violations." 123 S. Ct at 1982.[4] Congress succeeded in showing a pattern of state constitutional violations in support of Title II.

The record for Title II shows that people with disabilities were denied access to public facilities, including courthouses, legislative assemblies, and voting places. *See* U.S. Comm'n on Civil Rights*, supra,* at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong., 662-64 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process, including the ability to exercise their right to vote[5] and to utilize the state judicial system.[6]

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[4] The *Hibbs* Court even found significant the record before Congress of private sector leave policies as evidence supporting a pattern of constitutional violations on the part of states in the area of family leave. 123 S. Ct. at 1979 & n.3.

[5] *See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[6] *See, e.g., Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to courts).

Congress heard that a disabled man, called to testify in court, had to get out of his wheelchair and pull himself up three flights of stairs to reach the courtroom. Task Force, *Alabama Submissions* 15. A disabled man who was to appear as a witness in a criminal trial had to be carried by state troopers up two flights of stairs because he had no other means to access the courtroom. *Id*., *West Virginia Submissions* 1745. A disabled woman, to reach the polls to vote in a general election, had to leave her wheelchair, walk with two canes up a flight of steps (taking 30 minutes), walk with her canes to the voting machine (taking 25 minutes), and hold on to the machine and beat on the levers with her cane to move them to cast her vote. *Id*., *Delaware Submissions* 307. Dozens of people with disabilities from across the country offered statements describing the ways in which they were denied access to polling places or were otherwise hampered in their ability to cast their votes.

The facts in the present case are an example of just the sort of unconstitutional conduct presented to Congress which prompted the passage of Title II. Here, Mr. Lane, a person with paraplegia, was denied his fundamental right of access to the courts because of the courthouse's inaccessible courtrooms. Mr. Lane was required to crawl up two flights of stairs in order to satisfy the requirement to appear at his criminal arraignment. At a second court date, when Mr. Lane refused the humiliation of crawling or being carried by officers to the courtroom, he was arrested and jailed.

Like the legislative record supporting the FMLA in *Hibbs*, the legislative record supporting Title II, including evidence of violations of fundamental constitutional rights by the states, which trigger a heightened level of scrutiny, justifies Congress's judgment to apply Title II to the states.

C. Congress Made Explicit Findings Of State Discrimination Against People With Disabilities In The Provision Of Public Services, Programs And Activities.

Unlike Title I,[7] Title II is supported by express legislative findings of disability discrimination by the states. In the text of the statute itself, as well as in the Senate and House Committee Reports,[8] Congress made explicit findings of a history and pattern of state-sponsored discrimination in the provision of public services, programs and activities.[9] The statute expressly identifies persistent discrimination against people with disabilities in such areas of traditional state involvement as education, transportation, institutionalization,[10] health services, voting and access to public services, as well as "outright intentional exclusion, . . . segregation, and relegation to lesser *services, programs, activities* . . . ." 42 U.S.C. §§ 12101(a)(3), (5) (emphasis added).[11]

Congress's finding of a pattern of state discrimination is entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by

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[7] *See Garrett,* 531 U.S. at 370-72.

[8] The House and Senate Committee reports both make explicit conclusions with respect to discrimination in "public services." S. Rep. No. 101-16, p. 6 (1989); H. R. Rep. No. 101-485, pt. 2, p. 28 (1990).

[9] "The congressional findings in 42 U.S.C. §12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned." *Olmstead v. Zimring*, 527 U.S. 581, 613 (1999) (Kennedy and Breyer, JJ., concurring).

[10] *See, e.g., Olmstead*, 527 U.S. at 608 (Kennedy and Breyer, JJ., concurring) ("[T]he States have acknowledged that the care of the mentally disabled is their special obligation.").

[11] *See Olmstead*, 527 U.S. at 614 (Kennedy & Breyer, JJ., concurring) (stating that the findings in the ADA "underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory").

the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court does "not lightly second-guess such legislative judgments." *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990).

D. Shortcomings In Existing Law Justified The Enactment of Title II.

The *Hibbs* Court recognized that Congress is justified in enacting added prophylactic measures where previous legislative attempts have failed to resolve discrimination. 123 S. Ct. at 1980-81. Congress received substantial evidence showing that the existing body of laws regarding the rights of people with disabilities to access programs and activities of state governments had failed to redress pervasive discrimination.

For example, in a written statement to Congress, former Illinois Attorney General Neil Hartigan stated: "As Attorney General I have had innumerable complaints regarding lack of access to public services–people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building." *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example, public transportation, public services, public parks, publicly owned facilities, special education and elections. *Id*. He testified that "people with disabilities should not have to fight these battles in every state," urging passage of a uniform national standard to free people with disabilities from having to win their

rights on a state-by-state basis. *Id.* at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *Id.* at 80-81.

The patchwork of state laws and confusion that resulted from the limited application of federal law militated in favor of the federal government acting to "establish uniform minimum requirements for accessibility." Sen. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources, *Hearings on S. 933 To Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability*, 101st Cong., 2d Sess. 75-78 (May 10, 1989). At the time that Congress was debating the ADA, federal law provided people with disabilities only the Architectural Barriers Act and the Rehabilitation Act of 1973 on which to rely for the physical and programmatic access that they required to live independently. However, both of these laws apply exclusively to buildings, programs and activities receiving federal financial assistance. Additionally, the onus was on the individual to distinguish between state, federal and private funding in every instance. Likewise, where state laws exist, they were and are limited in scope and application.[12] Even in Illinois, where Attorney General Hartigan boasted the most

[12] The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many provided little meaningful protection against disability discrimination. *See*, *e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-37 (1989) (statement of Arlene Mayerson) (describing limitations and ineffectiveness of existing state statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."); *see also* H. Rep. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 329 ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . 'Too many States, for whatever reason, still perpetuate confusion.'") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

progressive of state physical accessibility statutes at the time of the hearings on the ADA, the law had no private right of action. Therefore, a person with a disability was and remains wholly dependent upon the state, with its limited staff and resources, to enforce his or her legal rights. The result is inequity and confusion for individuals with disabilities.

Scholarly research confirms that, as recently as 2002, "only twenty-four of fifty-one states have disability discrimination statutes that appear comparable to ADA Title II," with respect to prohibiting discrimination in access to both facilities *and* services, providing a private right of action, and making available compensatory damages and attorneys' fees. *See* Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1112 (2002). In addition, the authors found that "another sixteen states offer moderate protection from state disability discrimination." *Id*. at 1112. Eleven states were determined to have very limited protection against Title II-covered discrimination, with nine of those states having "no enforcement mechanism at all against the state for public access discrimination." *Id*. at 1114.

Significantly, while Attorney General Hartigan was a vocal proponent of Title II, the congressional testimony contains no opposition by the states to abrogation of their Eleventh Amendment immunity. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General. *See* 135 Cong. Rec. 19,799 (1989).

Based on the foregoing, Congress had compelling and uncontroverted evidence of widespread state discrimination against people with disabilities in the provision of public services, programs and activities, supporting its determination to abrogate state sovereign immunity in Title II.

III. GIVEN THE SUBSTANTIAL EVIDENCE OF STATE-SPONSORED DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES, TITLE II IS A MEASURED AND BALANCED

RESPONSE TO REMEDY AND DETER STATE-PERPETUATED DISABILITY DISCRIMINATION.

Title II is both congruent and proportional to the evils found by Congress. This Court has acknowledged that "[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,' and its conclusions are entitled to much deference." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 536). This deference reflects the often complex problems facing the legislative branch. Because "difficult and intractable problems often require powerful remedies," Section 5 does not preclude Congress from creating congruent and proportional remedies around a core of documented constitutional shortcomings. *Id.* at 88.

In the exercise of its Section 5 power, Congress may do more than simply proscribe conduct that this Court has held unconstitutional. *Hibbs*, 123 S. Ct. at 1977. Thus, legislation that deters or remedies constitutional violations may fall within the sweep of Congress's enforcement power even if, in the process, it prohibits conduct that is not itself unconstitutional. *City of Boerne*, 521 U.S. at 518. Congress is not confined to enacting legislation that merely parrots this Court's constitutional jurisprudence, but rather possesses the power under Section 5 "'both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Garrett,* 531 U.S. at 365 (quoting *Kimel,* 528 U.S. at 81).

Title II's application to education is a ready example of the wisdom of allowing a degree of latitude to Congress in fashioning appropriate remedies for unconstitutional state conduct.[13]

[13] Because of the states' pivotal role in the provision of educational services, it was reasonable for Congress to conclude that Title II must include the states within its ambit for its remedial educational goals to be effectuated. The pivotal role of the
(Footnote Continued on Next Page)

Congressional testimony demonstrated that individuals with disabilities were systematically denied basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[14] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived of an appropriate education. *See* U.S. Comm'n on Civil Rights*, supra,* at 28. Many children with disabilities simply were segregated in separate public educational facilities. *Id.* at 29. Other children with disabilities were excluded altogether from public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, or had cerebral palsy.[15] *Id.* at 27. These widespread practices necessarily had a tremendous adverse impact on the victims of the discrimination and justify remedies that extend beyond the core of unconstitutional conduct. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[16]

Title II represents a valid abrogation of sovereign immunity. First, Title II appropriately proscribes unconstitutional state conduct. Second, Title II's reasonable modification provision is

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states in the provision of educational services is demonstrated in the Individuals with Disabilities in Education Act, 20 U.S.C. § 1440, *et seq.*

[14] *See* 20 U.S.C. §§ 1400-1491 (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[15] *See* S. Rep. No. 101-16, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of House Comm. on Educ. and Labor*, 100th Cong. 132-33 (1988) (testimony of Barbara Waters).

[16] As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." *Id*. at 222.

consistent with states' constitutional responsibilities. Finally, the limitations Congress designed ensure that constitutional state conduct is not disproportionately proscribed.

A. Title II Reasonably Proscribes Unconstitutional State Conduct.

Title II is a valid exercise of Congress's Section 5 power because it directly targets unconstitutional state conduct. Members of this Court have recognized that Title II was designed to address unconstitutional discrimination under the Equal Protection Clause:

> Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities.

Olmstead, 527 U.S. at 611, 613 (Kennedy and Breyer, JJ., concurring); *see also Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001) (holding that "a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability").

Moreover, while the Title I analysis in *Garrett* was limited to rational basis scrutiny under the Equal Protection Clause, Title II protects constitutional rights subject to heightened review under the Equal Protection and Due Process Clauses, such as the right of people with disabilities to meaningful access to the states' courts,[17] the right of people with disabilities to vote on an equal basis with other state citizens,[18] and the right of prisoners and other

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[17] *See Bounds v. Smith,* 430 U.S. 817 (1977); *Boddie v. Connecticut,* 401 U.S. 371 (1971).

[18] *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (denying citizens the right to vote deprives them of a "fundamental political right, . . . preservative of all rights.").

involuntarily institutionalized persons with disabilities to humane conditions of confinement.[19] State discrimination against people with disabilities with respect to these fundamental rights is subject to heightened review, and thus rational state conduct nevertheless could be unconstitutional. This fact was dispositive in this Court's determination that the FMLA was a valid exercise of Congress's Section 5 power. *Hibbs*, 123 S. Ct. at 1982.

Indeed, the *Garrett* Court's determination that Title I was disproportionate was premised on the limited reach of rational basis review under the Equal Protection Clause. For example, the Court noted that Title I would require an employer to modify existing facilities to accommodate a disabled employee although it would be entirely reasonable, and therefore constitutional, for the employer to instead choose to avoid the costs of providing accommodation by hiring employees who are able to use existing facilities. 531 U.S. at 372. In contrast, although it may be reasonable for a state to desire to avoid the cost of providing an interpreter at the trial of a hearing-impaired criminal defendant, as would be required under Title II, this choice would violate the Due Process Clause. *See, e.g., Amadon v. Immigration & Naturalization Serv.*, 226 F.3d 724 (6th Cir. 2000) (holding that incompetent interpreter at deportation hearing deprived asylum applicant of due process right to full and fair hearing). The fundamental nature of the rights at stake justifies the breadth of Title II.

Accordingly, unlike Title I, Title II serves to protect fundamental rights to which heightened scrutiny applies. Title II is therefore a proportional response to unconstitutional state conduct.

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[19] *See Youngberg v. Romeo*, 457 U.S. 307 (1982) (civil commitment); *Estelle v. Gamble*, 429 U.S. 1066 (1976) (medical care for prisoners).

B. Title II's Reasonable Modification Provision Is Consistent With States' Responsibilities Under The Constitution.

Given the pervasiveness of past prejudices and inequitable actions by states toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough merely to prohibit future unconstitutional discriminatory conduct. Rather, to remedy and deter state discrimination against people with disabilities and further implement its Section 5 power, Congress required "reasonable modifications"[20] for qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne,* 473 U.S. at 454, 464-65, demands a solution that affirmatively prevents state-sponsored disability discrimination, provides meaningful access to public services, programs and activities, and thus integrates individuals with disabilities into public life.

In contrast to the overbreadth of the reasonable accommodation standard of Title I, which was a central part of the *Garrett* Court's analysis, Title II's analogue, reasonable modification, appropriately effectuates the states' constitutional responsibilities. The protection of fundamental rights often requires a state to do more than simply refrain from discriminating against its citizens. This and other courts have found that states are constitutionally required "to shoulder affirmative obligations" to ensure meaningful access to public services, as well as abolish barriers preventing such meaningful access.[21] *Bounds v. Smith*, 430 U.S. 817, 824-25

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[20] 42 U.S.C. §12131(2) requires reasonable modifications to rules, policies or practices, the removal of architectural, transportation and communication barriers, and the provision of auxiliary aids and services. The entirety of this provision will be referred to herein as the "reasonable modification provision." Regulations impose significant limitations on these requirements. *See, e.g.,* 28 C.F.R. § 35.130(b)(7).

[21] This Court, in *Plyler v. Doe*, recognized that one of the goals of the Equal Protection Clause is "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." 457 U.S. at 221-22. The reasonable modification provision of Title II directly serves this important goal.

(1977) (holding that fundamental right of access to courts required state to provide inmates with adequate law libraries or adequate assistance from persons trained in the law; while economic factors may be considered in choosing method to provide meaningful access, "the cost of protecting a constitutional right cannot justify its total denial"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act ban on voting literacy tests although literacy tests themselves do not violate the Equal Protection Clause; destruction of this barrier enabled individuals to better "obtain 'perfect equality of civil rights and the equal protection of the laws'") (citations omitted); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 72 (2002) (finding that state could be required to provide accommodation to hearing-impaired father in child custody proceedings both under Title II and as a matter of due process); *Amadon v. Immigration & Naturalization Serv.*, 226 F.3d 724 (6th Cir. 2000) (holding that due process right to full and fair deportation hearing required government to provide competent foreign-language interpreter).

In the same fashion as the cases cited above, Title II's "reasonable modification" provision enables people with disabilities to obtain their constitutionally guaranteed rights. Therefore, this provision is consistent with states' constitutional responsibilities.

This Court recently forcefully reiterated the importance of effectuating Congress's remedial purpose when analyzing congruence. *See Hibbs*, __ U.S. __, 123 S. Ct. 1972. The *Hibbs* Court upheld the FMLA despite its inclusion of a mandatory twelve-week leave provision. The Court recognized that without the mandatory leave, an employer could treat males and females equally by providing for no leave whatsoever, a result "which would not have achieved Congress's remedial object." *Id.* at 1983. Similarly, a simple mandate of equal treatment of the disabled and non-disabled would fail to achieve Congress' remedial goals here. Thus, just as the

twelve-week leave provision in the FMLA met the congruence factor in *Hibbs,* the reasonable modification requirement in Title II meets the congruence factor here.

C. Congress Imposed Important Limitations In Title II Which Produce A Congruent And Proportional Remedy.

This Court has found that limiting provisions in legislation "tend to ensure Congress's means are appropriate to ends legitimate under Section 5." *City of Boerne,* 521 U.S. at 533. For example, in *Hibbs*, this Court found significant the limitations Congress placed on the FMLA, including its definition of covered employee and its limitation of back pay damages to two years. 123 S. Ct. at 1983-84.

Similarly, in crafting Title II, Congress carefully considered the needs of state governments and included important limitations in the law. Title II requires only reasonable modifications that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service.[22] In addition, Title II does not apply to all individuals with physical or mental impairments, but, rather, only to those whose impairments substantially limit their major life activities.[23] Also, similar to the FMLA, Title II limits back pay awards to two years.[24]

Title II's regulations also serve to shorten the statute's reach into constitutional conduct. For example, regulations provide that when existing facilities are inaccessible, states are not

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[22] 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7).

[23] 42 U.S.C. § 12102(2). *See, e.g., Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999) (holding that mitigating measures must be taken into account in determining ADA's coverage); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (construing ADA's definition of "disability" and noting "[t]hat these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act").

[24] 42 U.S.C. § 12133 (citing 29 U.S.C. § 794a, citing 42 U.S.C. § 2000e-5(g)).

required to make structural changes so long as the programs are made available to people with disabilities in some other manner. 28 C.F.R. § 35.150(b)(1).

Moreover, this Court's interpretation of Title II reinforces the limitations Congress has designed. For example, in *Olmstead v. Zimring*, this Court recognized that Title II permits the states to rely on the reasonable assessments of their own professionals in determining whether the essential eligibility requirements for habilitation in a community-based program are met. 527 U.S. at 602. In addition, this Court has recognized that Title II's reasonable modification provision does not impose "boundless" responsibility upon the states. *Id.* at 603. For example, in the context of deinstitutionalization, this Court has construed the provision to permit states to take into account available resources and the needs of other mentally disabled persons. *Id.* at 607.

Thus, because Title II's intrusion into constitutional state conduct is minimal and states maintain substantial discretion over their provision of public services, programs and activities, Title II provides a congruent and proportional response to disability discrimination by the states.

CONCLUSION

Faced with well-documented incidents of state discrimination against people with disabilities in public services, Congress designed a comprehensive and integrated response that recognized the states' central role in the provision of such services. Unlike Title I, Title II of the ADA involves an area of regulation for which people with disabilities have no options. That is, in contrast to employment, governments are the sole suppliers of public services. Because of the states' central role in the provision of public services, a limitation on the ability of people with disabilities to enforce Title II against the states may substantially diminish Title II's

effectiveness. In this situation, the Court should grant Congress reasonable latitude in crafting remedies that people with disabilities can use without restriction.

For the foregoing reasons, this Court should find in favor of the Respondents and hold that Congress, in enacting Title II of the ADA, validly abrogated the states' sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

Dated: _____

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota
Counsel of Record

GARY R. CUNNINGHAM
KRISTYN M. ANDERSON
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5705 (Voice)
(651) 296-1410 (TTY)

Attorneys for Amici Curiae States

AG: #945851-v1