For Opinion See 391 F.3d 676 , 381 F.3d 407

United States Court of Appeals,

Fifth Circuit.

Christy MCCARTHY, by and Through her Next Friend Jamie Travis; Todd Gordon, by and Through his Next Friend Trisha Gordon; Allison Pratt, by and Through her Next Friend Paula Pratt; Gail Truman, by and Through her Next Friend Ken Truman; Jim Floyd, Jr., by and Through his Next Friend Jim Floyd, Sr.; Sam Lindsay, by and Through his Next Friend Betty Lindsay; Oshea Brooks; Joe Ray Comacho; Micha Chastain, by and Through his Next Friend Lori Lchastain; Al, by and Through his Next Friend Ll; Arc of Texas, on Behalf of its Members and for those Similarly Situated; Sue Ann Ortiz; Patrick Sostack, by and Through their Parents and Next Friends Gary and Lisa Sostack; Scott Sostack, by and Through their Parents and Next Friends Gary and Lisa Sostack; Shyan Forough, by and Through his Parents and Next Friends Reza and Arzu Forough; David Zweifel, by and Through his Parents and Next Friends Linda and Leroy Zweifel; Ashton Bowlen, by and Through her Motion and Next Friend Partricia Bowlen; Tyler Blanichard, by and Through his Mother and Next Friend Faith Blanchard; Garrett Gillard, by and Through his Mother and Next Friend Keeya Gillard; Kameron Lane, by and Through his Mother and Next Friend Angie Lanea; Madison Polk, by and Through her Father and Next Friend John Friend John Polk; Paige Smith, by and Through her Mother and Next Friend Gretta Smith, Plaintiff-Appellees,

v.

Karen F. HALE, in her Official Capacity as Commissioner of the Texas Department of Mental Health & Mental Retardation; James R. Hine, Inhis Official Capacity as Commissioner of the Texas Department of Human Services; Albert Hawkins, in his Official Capactiy as Commissioner of the Texas Health and Human Services Commission, Defendants-Appellants.

No. 03-50608.

November 10, 2003.

On Appeal from the United States District Court For The Western District of Texas Austin Division

Brief of Amici Curiae Supporting Appellees

On Behalf of Amici Curiae, Adapt, American Association of People with Disabilities, the are of the United States, the Brain Injury Association of America, Disability Rights Education and Defense Fund, the Epilepsy Foundation, National Association of Rights Protection, and Advocacy, National Spinal Cord Injury Association, the Nation's Voice on Mental Illness, the Training and Advocacy Support, Center of the National Association of, Protection and Advocacy Systems, Counsel for Amici CuriaeKaren M. Lockwood, Jeffrey Frey, Rachel A. Adams, Howrey Simon Arnold & White, LLP, 1299 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 783-0800Counsel for Amici Curiae

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***1 SUMMARY OF ARGUMENT**

Amid support the position of plaintiffs-appellees and urge affirmance and remand for proceedings on the merits. The validity of Title II of The Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA") is of profound importance to *amid* and their members.[FN1] In this brief, *amid* address defendants-appellants' arguments regarding the Commerce Clause authority for Title II of the ADA.[FN2]

FN1. *See* statement of the identity and interest of amici curiae, Addendum A hereto.

FN2. U.S. const. Art. I. § S, cl. 3. -

The issue of the constitutionality of the substantive provisions of Title II under the Commerce Clause is beyond this Court's scope of review on interlocutory appeal. Under *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.* 506 U.S. 139 (1993), only the issue of whether there is an Eleventh Amendment bar against suing the state can be appealed before judgment. In this suit, falling as it does under *Ex pane Young*, Eleventh Amendment immunity is inapplicable and there is no question about any abrogation of the immunity. Further, issues about whether the substantive provisions of the ADA are a valid exercise of Congress's power are not part of an Eleventh Amendment interlocutory appeal in an *Exparte Young case.*

***2** Were the Court to reach the question, application of the Supreme Court's four reference points for analysis of the substantial effect on interstate commerce in *United States* v. *Lopez*, 514 U.S. 549 (1996) and *United States v. Morrison*, 529 U.S. 598 (2000) makes clear that Congress validly enacted Title II of the ADA. First, the activity regulated is an economic endeavor, whose character is transactional and non-criminal, and whose magnitude is significant. The Texas Medicaid waiver programs that plaintiffs challenge drive hundreds of millions of dollars in benefits and cost hundreds of millions to operate, transactions that are in or directly affect interstate commerce. The state waiver programs are closely integrated with nationwide healthcare and benefits programs. All told, the state Medicaid waiver programs have both a substantial relationship with and a substantial effect on interstate commerce. Second, no express jurisdictional element is required in light of the statutory findings of effect on interstate commerce, and the broad interstate commerce links. Third, while it is not essential that Congress make legislative findings on interstate commerce, it did so here. The court is to defer to them, as they have a rational basis. Fourth, the link with interstate commerce clearly is not attenuated. Congress validly invoked the sweep of congressional authority, including the power to regulate commerce, in order to address the major areas

of discrimination faced day-to-day be people with disabilities.

***3 ARGUMENT**

Appellants' Commerce Clause attack on Title II of The Americans With Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA") fails because: (1) whether the substantive provisions of the ADA are a valid exercise of Congress's power is not subject to review in this interlocutory appeal of an *Ex parte Young* case; and (2) in any event, the Commerce Clause provides the congressional power to validly enact Title II of the ADA, which is enforceable through *Ex parte Young* suits, to prohibit discrimination in public services, programming and activities.

I. Appellants' Commerce Clause Defense Against the Enforcement of the ADA Exceeds the Scope of Review On This Interlocutory Appeal of an *Ex parte Young* Suit

This interlocutory appeal from the district court's denial of defendants' motion to dismiss is lodged pursuant to the narrow collateral order doctrine, which permits appeals to establish Eleventh Amendment immunity as a bar to suit. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf &. Eddy, Inc.*, 506 U.S. 139, 146 (1993); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[FN3] But this is an *Ex parte Young* suit. By attempting to attack the constitutionality of the substantive provisions of Title II of the ADA, appellants exceed the interlocutory appeal rule of *Puerto Rico Aqueduct.*

FN3. Record 1R, *passim* (no motion or order for certification of interlocutory appeal on any issues).

***4** The Supreme Court held in *Puerto Rico Aqueduct* that states may take advantage of the *Cohen* collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity. 506 U.S. at 144-46. The Court's holding sharply distinguished between suits against the state and *Ex parte Young* suits against state officials. It stated:

Rather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment *wholly inapplicable* to a certain class of suits.

506 U.S. at 146 (emphasis added).

This case is one of that class of suits, and the district court correctly analyzed the point. (6R. 1118.) The Supreme Court has explained:

In determining whether.... *Ex parie Young* voids an Eleventh amendment bar to suit, a court need only conduct a 'straightforward inquiry' whether it alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.

Verizon Maryland. Inc. v. *Public Service Comm'n of Maryland*, 535 U.S. 635 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 196 (1997) (O'Connor, J, concurring).[FN4] Plaintiffs sued officials of the state in their official ***5** capacity, not against the state entity or its agencies. (2 R. 222.) Their ADA claims seek prospective relief. *(Id.* at 272.) Arid the suit alleges that the state officials violate federal law - the ADA - in their administration of the Medicaid services, programs and activities. (2 R. 222 *et seq.)* Appellants agree that it is so pleaded. (Appellants' Brief at 23, *passim.)*[FN5] *Ex parte Young* applies, and the Eleventh Amendment immunity is thus found to be wholly inapplicable.

FN4. *See also Green v. Mansour*, 474 U.S. 64, 68 (1985) (Eleventh Amendment does not prevent feder-

al courts from granting prospective injunctive relief to prevent a continuing violation of federal law'1); *Cox v. City of Dallas*, 256 F.3d 281, 307 (5lh Cir. 2001) (homeowners sued director of Texas state agency alleging violations of RCRA); *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 643 (5th Cir. 2001) (the Supreme Court has for nearly a century allowed suits against state officials; prospective injunctive relief sought under Telecommunications Act of 1996); *Aguilar v. Texas Dep't ofCrim. Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998).

FN5. The Brief of Plaintiffs-Appellees (Appellees' Brief) at 15-20 demonstrates the invalidity of appellants' contention that an *Ex Parte Young* suit does not lie under Title D.

Issues about whether the substantive provisions of the ADA are a valid exercise of Congress's power are *not* part of an Eleventh Amendment interlocutory appeal to which *Ex parte Young* applies.[FN6] Whether Congress has acted "pursuant to a valid exercise of power" is an Eleventh Amendment issue only when the court must address whether Congress has validly abrogated state sovereign immunity. *Nelson v. Miller*, 170 F.3d 641, 647-48 (6th Cir. 1999) (quoting *Seminole Tribe*, 517 U.S. at 55). Appellees "confiate[] two distinct arguments here," *id.* at 648, when they confuse whether Congress had the power to ***6** abrogate the states' immunity, with whether the substantive provision of the ADA are a valid exercise of Congress's power. *Nelson*, 170 F.3d at 64S. As to the first, in this suit the "abrogation issue does not arise because *Ex parte Young* applies to give the federal courts jurisdiction in this case." *See Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (standards of Title II of the ADA can be enforced through *Ex parte Young* suits even though Court held that Congress has not constitutionally abrogated Eleventh Amendment immunity). As to the second, the issue is a putative defense appellants would raise, if at all, in the district court proceedings against enforcement of the ADA on the merits. No case has been found that prevented an action from proceeding under Title II of the ADA in an *Ex parte Young* suit, and appellants cite none.

FN6. Issues that are not "completely separate from the merits of the action" are outside the collateral order doctrine. *Verizon Md., Inc.*, 535 U.S. at 645 ("The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim.") (quoting *Coopers &Lybrandv. Livesay*, 437 U.S. 463, 468 (1978) (listing the three factors that satisfy the collateral order doctrine of *CohenJ); Puerto Rico Aqueduct*, 508 U.S. at 144 (holding that the collateral order doctrine applies to a claim of immunity from suit, "rather than a mere defense to liability"). Defenses questioning the constitutionality of the substantive statute that gives rise to the cause of action are such merits Jssues.

Because this Court's scope of review is limited to a determination of whether an Eleventh Amendment bar exists, this present appeal is concluded as soon as the court finds the case is properly brought under *Ex parte Young*.

II. ADA Title II Is Valid Commerce Clause Legislation That Can Be Enforced Under the *Ex parteYoung* Doctrine.

Were this Court nevertheless to examine the constitutionality of Title II on this appeal, appellants cannot wrest away the substantial Commerce Clause authority for enacting that provision. They fashion their argument from an overbroad reading of ***7***Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 72-73 (1996),[FN7] and a cursory treatment of the *Lopez* and *Morrison* criteria for determining whether a regulation substantially affects interstate commerce.[FN8] Their arguments are inadequate.

FN7. Appellants' Brief at 23.

FN8. Mat 24-25.

Appellants start their Commerce Clause arguments still suffering from the conflation of the issue of abrogation of state immunity from suit on the one hand, and the constitutionality of defenses to enforcement of the substantive ADA on the other. Thus, their statement that under *Seminole Tribe* the Fourteenth Amendment is the only constitutional power through which Congress can abrogate states' sovereign immunity (Appellants' Brief at 23), ignores the fact that this suit seeks only prospective injunctive relief from state officials in their official capacity, pursuant to the doctrine of *Ex parte Young*. Sovereign immunity is simply inapplicable. While the Supreme Court ruled in *Seminole Tribe* that Congress cannot use its Article I powers to abrogate Eleventh Amendment immunity, that decision expressly preserved *Ex parte Young* suits to remedy a state official's ongoing violation of federal law when sovereign immunity otherwise barred a suit against the state.[FN9] 517 U.S. at 73; *see also Garrett*, 531 U.S. at 374 n.9 (while ***8** Congress did not validly abrogate immunity in Title I of the ADA, *Ex-parte Young* suits could still be brought by individuals seeking to enforce Title I against state officials). Appellants'Brief at 23.

FN9. *Seminole Tribe* based its dismissal of the *Ex parte Young* suit against the governor on an inapposite merits point - that the statute provided for an intricate remedial scheme, including procedures leading to a mediation, followed by a appeal to the Secretary of the Interior. *Id.* at 73-74. The remedial scheme of Title II of the ADA is markedly different. 42 TJ.S.C. § 12133.

Appellants' Commerce Clause defense against enforcement has no merit. Title II is clearly a valid use of Congress's power to regulate interstate commerce. The scope of Interstate Commerce power is “broad indeed,” and the Supreme Court has recognized that the “modem-era precedents” that “greatly expand the previously defined authority of Congress under the Clause” were in part “a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope.” *Lopez*, 514 at 556. Summarizing its Commerce Clause jurisprudence, the Supreme Court reiterated in *Lopez* that it had identified three broad categories of activity that may be reached under the Commerce Clause. Congress may regulate the use of channels of interstate commerce, regulate or protect the instrumentalities of interstate commerce even though the threat may come only from intrastate activities, and regulate activities that have a substantial relation to or substantially affect interstate commerce. 514 U.S. at 558-59.
The Court has described the limits of the power as follows: ***9** [T]he scope of the interstate commerce power... may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Lopez, 514 U.S. at 556-57 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1935)). At the same time, the Court emphasized that “where a *general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.” *Id.* at 558 (emphasis in original)(quoting *Maryland v. Wirtz*, 392 U.S. 183 (1968).)

Title II of the ADA falls well within the Commerce Clause power based on the substantial relationship/substantial effect category of analysis.[FN10] In *Lopez* and *Morrison*, the Supreme Court discussed and applied four considerations for addressing the substantial effects test. *Lopez*, 514 U.S. at 559-63; *Morrison*, 529 U.S. at 610-12. A challenged regulation need not fulfill all four; rather, the factors ***10** are “reference points.” *Morrison*, 529 U.S. at 613. Using these reference points, the proper resolution of appellants' challenge to the constitutional-

ity of Title II of the ADA as applied to Texas' Medicaid waiver programs is clear.

FN10. It may be that the Medicaid program also represents “channel” and an “instrumentality” of interstate commerce. *Lopez*, 514 U.S. at 637. Broad and deep interstate commerce has grown up entirely around the enactment and enforcement of the many Medicaid/Medicare programs and their, rubric. For example, diagnosis and service codes, developed under the auspices of the government for the uniform coding and reimbursement of treatments and services, are used broadly by private insurers as well. Services and products in this channel include software to automate coding of diagnoses and services; providers who set rates based upon Medicaid/Medicare reimbursable levels; products intended to assist in rendering reimbursable health care services; systems to make electronic payments and transfer of funds for reimbursement under the Acts; provider chains such as hospitals, nursing homes, group homes, and others that routinely count on Medicaid/Medicare programs as their secure source of revenue, and who in fact handle the reimbursement requests of their patients, even publications, trade shows, training courses, and conferences that are tailored to the needs of those who must deal'with the Medicaid programs and waiver services in their business every day.

(1) The first reference point, “whether the activity in question [is] some sort of economic endeavor,” easily demonstrates the validity of Congress's use of the Commerce power for Title II.[FN11] *See Morrison*, 529 U.S. at 612 (citing *Lopez*, 514 U.S. at 559-60). This point emphasizes the economic character of the activity, and the magnitude of the economic activity particularly as that speaks to its relationship with interstate commerce.

FN11. Appellants do little more than merely assert otherwise. (Appellants' Brief at 24-25.)

As to the character of the regulated activity, the Supreme Court observed, “a fair reading of *Lopez* shows that the non-economic, criminal nature of the conduct at issue was central to our decision.”[FN12] *Id.* An activity-is economic in nature if it arises out of or is connected with a commercial transaction. *See Groome Resources Ltd. v. United States*, 234 F.3d 192, 205 (5th Cir. 2000) (citing ***11***Lopez*, 514 U.S. at 561). Many state activities of course relate to or involve commercial transactions and other economic activity; indeed some services and programs are entirely about distribution of monetary benefits or services in kind. Medicaid is a prime example. It is a joint federal-state fundsharing program, administered by the states, and providing health benefits and services in kind. Clearly the ADA's regulation against discrimination in state Medicaid waiver program services and other programs of the state is neither non-economic nor criminal. Any of the few instances that may arise in other scenarios wherein the interstate nexus of a program may be characterized as *de minimus* do not render the statute unconstitutional given its substantial relationship to interstate commerce. *Lopez*, 514 U.S. at 558; *see* page 9, *supra*. Appellants' attempted juxtaposition between “economic activity” or “commercial transactions” on the one hand and “public” programs or activities on the other is entirely unwarranted (Appellants' Brief at 24), and their assertion that these public services and programs are “non-economic activity” is both preposterous and unsupported. (Appellants' Brief at 25.)

FN12. hi circumstances where courts have found the required link to be lacking, the challenged statutes were non-economic in character, distinctly local, or focused on regulating criminal conduct or violence. *E.g.*, *Lopez*, 514 U.S. at 567 (holding that a federal statute preventing possession of guns within 1000 feet of a public school was invalid under Commerce Clause); *Morrison*, 529 U.S. at 613 (holding that a federal statute providing right to be free from crimes of violence motivated by gender was invalid under Commerce Clause).

As to the magnitude of the economic endeavor, both the size of the Texas Medicaid waiver program benefits and their impact on interstate commerce can be understood by reference to facts drawn from public documents created by Texas ***12** and other government agencies, and available on websites owned by the state and other reliable authorities.[FN13]

> FN13. *Amid* focus in the text on the Texas Medicaid waiver programs, and particularly the programs under § 1915(c) of the Social Security Act, 42 U.S.C. § 1396a. The Home Community-based Waiver Services ("HCBS") and Community Living Assistant and Support Services ("CLASS") that are the subject of plaintiffs' claims and section 1915(c) waiver programs.
>
> In the footnotes, *amid* also provide figures pertinent to the broader impact of the result in this case on the Medicaid program in general, and the state waiver programs in particular, nationally and in Texas.

The Texas Medicaid waiver programs under section 1915(c) of the Social Security Act, known as "home and community-based services" (hereafter "HCBS"), drive hundreds of millions of dollars in interstate commerce. *See* Addendum B, *infra.*[FN14] The FY2002 expenditure by Texas for these HCBS waiver programs was 5765,013,032.[FN15]

> FN14. Addendum B is Texas' table of Medicaid waiver programs *Texas Medicaid in Perspective ("The Pink Book"), Appendix A: Texas Medicaid Waivers* (4th ed. 2002), available at www.hhsc.st3te.tx.iis/medicaid/reports/pb/2002pinkbook.html (last visited Oct. 22, 2003). The programs under section 1915(c) appear on page two. Of these, the three listed on rows 2, 3, and 4 on page 2 appear to match the HCBS and CLASS programs that are challenged by plaintiffs in this suit.
>
> FN15. Home and Community-Based Services Resource Network, Medical State Expenditures, FY2002, spreadsheet available at w Oct. 22, 2003).
>
> These programs are growing. First established in 1990, the programs were fully established by all 50 states in 1997. From 1997, there has been a 17.1% annual compounded rate of growth in the 1915(c) programs. *Id.*
>
> Nationwide, the total FY2002 expenditure for § I915(c) waiver programs alone exceeded $16 billion. Home and Community-Based Services Resource Network, *Medicaid Stats Expenditures, FY2002. Table 2*, available at hup:// wwv.ta/HCBSwai vers-Table2.xls (last visited Oct. 22, 2003).

***13** The logic behind the appellants' arguments in this case, of course, would • reach also the other Texas Medicaid waiver programs. Quantifying all waiver programs together speaks to their size and their necessary interstate effect. For example, 782,653 enrollees received Texas Medicaid waiver benefits and services in FY2001. *See* Addendum B, last column. The services they received necessitated significant interstate transactions. According to Texas' Health and Human Services own budget for FY2004-2005, historically prescription drugs have represented 37% of the state expenditures on all optional services for Medicaid; intermediate care facilities for the mentally retarded comprised 31% of the expenditures for Medicaid optional services; and waiver services for HCBS (of which the CLASS and DHS programs are a significant part) comprised 20% of the expenditures.[FN16] These types of services necessarily directly involve transactions in interstate commerce: for example, major pharmaceutical companies are outside Texas, as are suppliers of other equipment, goods, and services in the waiver program.

FN16. Texas Health and Human Service, Consolidated Budget for Fiscal Years 2004-2005, App. D: Medicaid (Oct. 15, 2002), available at www.hhsc.state.tx.us/about hhsc/finance/reports (last visited Oct. *22*, 2003), at 14 of 1 7.

***14** Of course, the state Medicaid waiver programs are integrated into the larger national Medicaid system.[FN17] The Commerce Clause analysis should give due recognition to that integration. For example, it is to be expected that the mandatory and optional (waiver) Medicaid programs operate synergistically in the state's administration of them, such as by having common administrative staff and software, using common purchasing, and answering to many common rules and regulations that pertain to the transactional aspects of the reimbursement and funding systems. This imparts to the state waiver programs a national component which should be sufficient in itself to sustain the finding that the waiver programs have a "substantial relationship" with interstate commerce, regardless of their. effect.[FN18]

FN17. The appellants concede that the Medicaid program is a joint federal-state program. (Appellants'Brief at 6.) They also concede that the state's participation is voluntary. *(Id.)* Further, they explain that Texas accepted the option provided by the Medicaid laws of applying to the Secretary of Health and Human Services ("HHS") for approval of programs which would continue Medicaid funding for home- and community-based programs outside hospitals, nursing facilities, or intermediate care facilities. *(Id.* at 7-S.) Thus, the entire set of services and programs at issue in this suit are part and parcel of a comprehensive national health benefits program.

FN18. Nationally, total Medicaid benefits distributed in FY 2001 were 5215 billion. *2003 CMS Statistics*, Table 32, available at http:// cms.hhs.gov/researchesr/pubs/03cmsstats.Ddf. In Texas alone, Medicaid expenditures were projected to be $26.6 billion in FY2002-03. Texas Health and Human Services, Consolidated Buget for Fiscal Years 2004-2005, App. D: Medicaid (Oct. 15, 2002), available at hhsc/ finance/rerjgrts (last visited Oct. 22, 2003), all.

Appellants cannot insulate this large volume of interstate commerce involved in their state Medicaid waiver programs, or the interstate effects of the ***15** intrastate portion of this commerce, on grounds that Texas is a state, or that the commerce is part of a state-administered program. Those Texas waiver programs are not incidental, small, or purely intrastate. And of course they are not non-economic.

Publicly available data on expenditures by the State to carry out its waiver programs further underscore the interstate effect of the state programs. The Texas agencies purchase substantial amounts of products and services in interstate commerce. A report published by the Texas Legislative Budget Board lists reported contracts between Texas agencies and private entities that were effective during the year 2002.[FN19] The listed contracts cover the four categories of construction, information services, professional services, and "other," and the report lists them by agency and category. For each contract, the report specifies the contractor's name, a description of the service contracted, and the contract value.[FN20] By consulting the list of contracts reported for the three agencies whose ***16** officials are defendants in this suit,[FN21] one can easily identify a large group of contractors that are interstate companies.[FN22] In addition, the description of services rendered provides evidence that they include services to the waiver programs directly, or that they apply to agency administration procedures that include the waiver programs.[FN23]

FN19. *Contracts Reported to Texas State Agencies and Institutes of Higher Education* (Dec. 2002), published by Texas at www.lbfa.state.tx.us/contracts/TDocuments.hUn (last visited Oct. 22, 2003)

("Contracts Report"). The state required agencies to report all contracts of $14,000 or more, and all that were reported are listed. *See id.* at. 1, for a description of the universe of contracts listed.

FN20. *Id.*

FN21. The contracts relevant to the three agencies were identified largely from pages 75-81 of the *Contracts Report,* which address contracts with the Texas Health &. Human Services Commission, Texas Department of Mental Health and Mental Retardation, and the Texas Department of Human Services. A second source for identifying contractors active in the waiver programs of the three agencies was the Private Providers Association in Texas ("PPAT"), which identified several additional companies that are involved in the Texas section 1915(c) waiver program. *See* www.ppat.com/member listing.htm (last visited Oct. 22, 2003). Contract values for those companies as well were found in other sections of *Contracts Report,* at pages 109, 113 and 124.

FN22. Internet search engines and corporate web sites were consulted to determine which of the contractors located according to the method of footnote 17 were interstate. The services provided by a contractor were deemed to be in interstate commerce if: (1) the contractor's headquarters were located in a state other than Texas; or (2) the contractor had headquarters in Texas and also had offices outside of Texas; or (3) the contractor had headquarters in Texas and did business outside of Texas.

FN23. The services listed for these contractors cover, for example, case management, habitation, respite care, psychological services, speech, occupational, physical and other specialized therapy, adaptive aids and supplies, home modifications, dietary assistance, pre-vocational training, communications services, emergency response services, and home-delivered meals, as well as computer systems and services for operating the agencies programs.

Initially counting only the contracts held by interstate contractors, and only for the three agencies, the value of contracted services that is in interstate commerce exceeded $782 million. *See* Addendum C, *infra.*[FN24] This figure is salient evidence of the substantial amount of interstate commerce conducted in ***17** conjunction with state services and programs just for the three agencies.[FN25] When the entirety of the service contracts reported for the three agencies is considered, including intrastate companies whose activities impact interstate commerce, the figure is $933.1 million.[FN26]

FN24. Addendum C lists the contractors determined to be in interstate business as described in the foregoing discussion, the state's description of their service, and their total contract values.

FN25. Moreover, of the $7S2 million, $384 million is business done with contractors that are actually headquartered outside Texas. Addendum C.

FN26. *Contracts Reported to Texas State Agencies and Institutes of Higher Education* (Dec. 2002).

Congress acted well within its Commerce Clause authority to impose on the state's administration of this (and other) services, programs, and activities the right of persons with disabilities to be free from discrimination in the administration of those programs.[FN27] This case is not even close to the outer limit of the power: in the words of *Lopez,* Title II applied to the Texas administration of Medicaid and Medicaid waiver services and programs poses no threat of any "obliteration" of local as distinct from national concerns. *Lopez,* 514 U.S. at 556-57.

FN27. See *Burns-Vidlak by Burns v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996) (.ADA applied to state waiver regardless of whether the waiver agreement recited the ADA as a condition).

(2) The second reference point in *Morrison* was whether the firearms statute at issue there had an express jurisdictional element limiting its reach to a subject that has an explicit connection with or effect on interstate commerce. ***18**529 U.S. at 612. The Court explained that this element "may establish that the enactment is in pursuance of Congress's regulation of interstate commerce." *Id.*

No such express jurisdictional element is needed for that purpose with respect to Title II - Congress wrote right into the statute itself that the enactment was pursuant to its regulation of interstate commerce. 42 U.S.C. § 12101(b)(4) ("to invoke the sweep of congressional authority, including the power... to regulate commerce, in order to address the major areas of discrimination faced day-to-day be people with disabilities").

Further, no such limitation is required for the purpose of expressly narrowing the statute to the group of services or programs that may have an exp+licit connection with interstate commerce, and appellants' "wider net" point is unavailing. The Court foreclosed such a novel position in *Maryland v. Wirtz*, 392 U.S. 183 (1968), and reiterated the point *in italics* in *Lopez. See* page 9, *supra.* Congress is obviously not required to write into general regulatory statutes a catalogue of every circumstance to which the statute may be found to apply at the time of enactment or in the future.

(3) As a third reference point, the Court considers legislative findings and congressional committee findings regarding the effect on interstate commerce. *Lopez*, 514 U.S. at 639; *Morrison*, 529 U.S. at 612 (noting that in *Lopez*, legislative history did not contain express congressional findings regarding the ***19** effect upon interstate commerce of gun possession in a school zone). In both *Lopez* and *Morrison*, the Court emphasized that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Lopez*, 514 U.S. at 562-563 (citing *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964); *Pere: v. United States*, 402 U.S. 146, 156 (1971) (stating that "Congress need [not] make particularized findings in order to legislate")). Once such findings are made, however, the Supreme Court has held that it "must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.' "*Preseauh v. ICC*, 494 U.S. 1, 17 (1990) (quoting *Model v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981)). In fact, deference to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993).

The ADA language and legislative history are replete with references to the substantial relationship between interstate commerce and the discrimination against persons with disabilities that Congress intended to eliminate from programs, services, and activities regulated by the ADA. Appellants do not make any case otherwise.

Congressional findings related to the ADA demonstrate a rational basis for the conclusion that the ADA-bears a substantial relation to interstate commerce. ***20** Relating Title 11 to interstate commerce through the effects of discrimination against persons with disabilities on interstate enterprises, the labor market, and the national economy, Congress made statutory findings that relate the ADA to interstate commerce, including the following:
(3) 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;
(5) individuals with disabilities continually encounter various forms of discrimination, including... exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits,

jobs, or other opportunities;
(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, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42U.S.C. § 12101.

The legislative history sets forth additional congressional findings in support of the interstate commerce nexus. The Senate Committee on Labor and Human Resources repeatedly addressed the importance of equality for persons ***21** with disabilities to the economic mainstream of the nation. *E.g.*, S. rep. No. 101-116, at 2 (1989) ("the purpose of the ADA is to provide a clear and comprehensive national mandate... to bring persons with disabilities into the economic and social mainstream of American life..."); *id.* at 16-17 ("it is contrary to sound principles of fiscal responsibility to spend billions of Federal tax dollars to relegate people with disabilities to positions of dependency upon public support") (considering the testimony of chairperson of National Council on Disability); *id.* ("[T]he National Council on the Handicapped states that current spending on disability benefits and programs exceeds $60 billion annually.") (considering a statement received from former President Bush).

The Senate recognized the broad impact on commerce of discrimination in its many forms on the basis of disability. "Discrimination [against persons with disabilities] still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and. telecommunications." *Id.* at 6. Similarly, the House of Representatives recognized that discrimination against persons with disabilities affected commerce not only on a national, but on an international level. H. rep. No. 101-485, pt. 4, at 116-17 (1990). These and ***22** other findings demonstrate that Congress had firmly in mind rational bases to employ the Commerce power when enacting the ADA.[FN28]

FN28. Congress held eighteen hearings, during the 100th and 101st Congresses. *See* S. Rep. No. 101-116, at 4-5 (1989) (listing 4 committee and subcommittee hearings in 101st Cong., and a joint committee hearing in 100th Cong.); H.R. Rep. No. 101-485, pt. 2, at 24-28 (1990) (listing 4 committee and subcommittee hearings in 101st Cong., and a subcommittee hearing and a joint committee hearing in 100th Cong.); H.R. Rep. No. 101-4S5.pt. 3, at 24 (1990) (listing 4 committee and subcommittee hearings in 101st Cong.); H.R. Rep. No. 101-4S5, pt. 4, at 28-29 (1990) (Iisting2 subcommittee hearings in 101st Cong.); *Americans with Disabilities Ace Hearings on H.R. 2273 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation.* 101st Cong. (1990).

Congress also considered the conclusions of several specialized investigatory and advisory bodies, including the White House Conference on Handicapped Individuals; the National Council on Disability (established by Congress in 1984); the U.S. Commission on Civil Rights; the Advisory Commission on Intergovernmental Relations; the General Accounting Office; and the Task Force on the Rights and Empowerment of Americans with Disabilities. These bodies studied the effects of discrimination on the basis of disability. The Congressional Research Service also was asked to provide numerous reports *See, e.g.*, Nancy Lee Jones, *Judicial Decisions Discussing "Program or Activity Receiving Federal Funds" Under Section 504 of the Rehabilitation Act Before and After Grove City College v. Bell.* Congressional Research Service, The Library of Congress (19S5); Nancy Lee Jones, *Overview of Major Issues Under Section 504 of the Rehabilitation Act*, Congressional Research, The Library of Congress Nancy Lee Jones, Proposed Coverage of Handicapped Persons By Title VI! of the Civil Rights Act: An

Analysis of H.R. 370, Congressional Research Service, The Library of Congress (1985).

The national economic implications of these findings provoked Congress to act. 42 U.S.C. § 12101(b)(4). There can be no doubt that the congressional findings were rational, and that the Commerce Clause power is sufficient to address these concerns.

(4) On the fourth reference point - whether the link is "attenuated" - appellants offer no argument. Of course, the foregoing discussion of the programs ***23** at issue here cements the fact that the link of Title II to interstate commerce is far from attenuated.

CONCLUSION

This suit is proper under *Ex parte Young*. Even were the appellate court to examine the challenge to the constitutionality of the ADA in this narrow Eleventh Amendment appeal, it should find that Congress had clear and ample Commerce Clause authority to require in the ADA that persons with disabilities not be discriminated against in the provision of services and programs by the state officials who administer them.

Christy MCCARTHY, by and Through her Next Friend Jamie Travis; Todd Gordon, by and Through his Next Friend Trisha Gordon; Allison Pratt, by and Through her Next Friend Paula Pratt; Gail Truman, by and Through her Next Friend Ken Truman; Jim Floyd, Jr., by and Through his Next Friend Jim Floyd, Sr.; Sam Lindsay, by and Through his Next Friend Betty Lindsay; Oshea Brooks; Joe Ray Comacho; Micha Chastain, by and Through his Next Friend Lori Lchastain; Al, by and Through his
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