No. 02-1099

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MATTHEW KIMAN,

Plaintiff-Appellant

UNITED STATES OF AMERICA,

Intervenor

v.

NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR

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SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR

The United States files this supplemental brief pursuant to this Court's order granting rehearing en banc.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the State's invocation of a sovereign immunity defense under the Eleventh Amendment may or should be analyzed as a facial challenge to the

entire statute at issue rather than as applied to the facts at issue in the case at bar.

2. Whether the Eleventh Amendment constrains Congress, in addition to any relief it may provide under other statutes such as 42 U.S.C. 1983, from acting under Title II of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (Disabilities Act), to: (a) provide a separate cause of action; (b) provide remedies, including damages, for such conduct, and; (c) define the standards of proof and defenses.

3. Whether Congress validly abrogated the State's Eleventh Amendment immunity to suits under 42 U.S.C. 12132, the substantive provision of Part A of Title II of the Disabilities Act.

SUMMARY OF ARGUMENT

The nature of the congruence and proportionality test, and the Supreme Court's application of that test in prior cases, best supports the view that the facial validity of Title II's prohibition against disability discrimination in public services must be assessed in view of its application to a range of cases, not just this one. In applying this test, however, courts examine the substantive provisions of the Act (including its establishment of standards of proof and defenses, but not its enforcement and remedial provisions), because the purpose of the congruence and proportionality analysis is to ensure that Congress has not attempted to redefine

the substantive restrictions of the Fourteenth Amendment. See *Wessel* v. *Glendening*, 306 F.3d 203, 207 (4th Cir. 2002). Title II is valid Fourteenth Amendment legislation under this standard. The substantive requirements of 42 U.S.C. 12132 are proportional and congruent to a history and present risk of unconstitutional disability discrimination in public services.

ARGUMENT

I. THE CONGRUENCE AND PROPORTIONALITY ANALYSIS IS PROPERLY APPLIED TO PART A OF TITLE II AS A WHOLE, RATHER THAN AS APPLIED TO THIS CASE

As the panel observed, the proper unit of analysis for the congruence and proportionality test has not received significant attention in the cases of the Supreme Court or the courts of appeals. The alternatives range from an analysis that focuses on the statute as applied to the facts of a particular case to the entirety of a statute. In our view, the most appropriate test examines the relevant substantive provision of the statute at issue in the case but does not focus on that provision's application to the particular facts in the case at bar. In this case, the relevant provision is 42 U.S.C. 12132, which contains the substantive requirements of Part A of Title II of the Disabilities Act.[1]

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[1] At oral argument before the panel, counsel for the United States suggested that if the panel were to disagree that this provision is valid Fourteenth Amendment

(continued...)

The panel correctly observed that "[g]enerally, a court will not strike down a statute as unconstitutional unless it is convinced that the statute is unconstitutional on the facts of a specific case, that is, as applied to the party that argues for unconstitutionality." 301 F.3d 13, 20 (2002) (citing *United States* v. *Raines*, 362 U.S. 17, 21 (1960)). In this case, however, the State has argued that the abrogation provision of the Disabilities Act is unconstitutional as applied to this case because it is, in fact, unconstitutional as applied to all Title II cases.[2] This ordinarily would be a difficult claim to prove. When the constitutionality of a statute is challenged, courts are generally asked to look at the statute as applied, and focus on factors specific to individual applications of the law. See, *e.g.*,

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[1](...continued)
legislation in its entirety, it should leave open that the provision could constitutionally apply to some categories of cases. While we continue to believe that this is a more appropriate result than holding that Title II is invalid Fourteenth Amendment legislation as a whole, we believe that the most appropriate method of review is that set forth above.

[2] Although the parties and the panel sometimes refer to the State's challenge as one to Title II generally, we do not take the State to be arguing that the substantive provisions of Title II are unconstitutional, or that the abrogation provision is unconstitutional as applied to claims under Part B of Title II, which concerns public transportation systems and has no bearing on this case. Accordingly, our references to the State's constitutional challenge should be understood to refer to its argument that the abrogation provision of the Disabilities Act, 42 U.S.C. 12202, cannot be constitutionally applied to claims under 42 U.S.C. 12132, which contains the substantive prohibition of Part A of Title II.

United States v. *Salerno*, 481 U.S. 739, 745 (1987); see also generally R. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1338-1339, 1343-1347 (2000). As the panel recognized, however, some constitutional challenges require a court to examine a range of applications of the statute to decide if the statute is constitutional as applied to any cases at all. See, *e.g.*, *City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (plurality opinion) (discussing facial challenges generally); *id.* at 74-83 (Scalia, J., dissenting) (same); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-615 (1973) (First Amendment overbreadth).

The question, then, is which approach applies to an Eleventh Amendment challenge to an abrogation provision. While not directly addressing the question, the Supreme Court's cases support the conclusion that in determining the validity of an abrogation provision, a court should examine the applicable portion of a statute as it applies to a range of cases, rather than as applied to a particular case.

On its face, the congruence and proportionality test applicable to Fourteenth Amendment legislation requires comparing the "the injury to be prevented or remedied" with the "the means adopted to that end." *City of Boerne* v. *Flores,* 521 U.S. 507, 520 (1996). Both sides of this comparison imply a broad review, one that examines the operation of a legal requirement over a range of cases and

measures its general scope against the predicate for congressional action.

The Court's implementation of the congruence and proportionality test supports this conclusion as well. As the panel noted, the Court in *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), declined to apply the congruence and proportionality test to the Disabilities Act as a whole and looked instead only at the requirements of Title I. See 531 U.S. at 360 n.1. On the other hand, the Court considered the entirety of the substantive obligations imposed by Title I, rather than those immediately applicable to the cases before it. See 531 U.S. at 372-373. The Court has similarly applied congruence and proportionality review to a statute as a whole, see *Flores*, 528 U.S. at 529, a specific title of a statute, see *Garrett*, 531 U.S. at 374 n.9, or specific provisions of a statute, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 316-317 (1966),[3] but never to a particular application of a statutory provision. Instead, the Court has considered the general operation of the relevant portion of the statute and ignored the factual circumstances and particular legal claims of the parties before it. See, *e.g.*, *Kimel* v. *Florida Bd. of*

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[3] The Court recently granted certiorari to consider a challenge to a particular subparagraph of a provision of a statute. See *Nevada Dep't of Human Res.* v. *Hibbs*, No. 01-1368 (considering family leave provision of the Family Medical Leave Act, 29 U.S.C. 2612(a)(1)(C)).

Regents, 528 U.S. 62, 86-88 (2000); *Flores*, 521 U.S. at 532-535.[4] And in several cases, the Court has held that the relevant provisions were invalid Fourteenth Amendment legislation even though it was clear that the statute prohibited at least some unconstitutional conduct, *i.e.*, irrational discrimination on the basis of disability, age, or religion. See, *e.g., Garrett*, 531 U.S. at 369-370; *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000); *Flores*, 521 U.S. at 535. Compare also *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 648 (1999) (holding abrogation provision of Patent Remedy Act invalid on its face) with *id*. at 653-654 (Steven, J., dissenting) (arguing that plaintiff stated a constitutional claim in the case before the Court).

The panel recognized that this type of broad review is sometimes required under the First Amendment, but concluded that the reasons underlying such review do not apply to Eleventh Amendment cases. See 301 F.3d at 21-22. However, there are other reasons to conduct a facial review in the Eleventh Amendment context. A broad review of a statute's application is necessary to provide Congress the discretion to which it is constitutionally entitled when it

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[4] In *Garrett,* for example, the Court discussed a provision of Title I that required employers to make facilities physically accessible to individuals, even though neither plaintiff brought claims under that provision. See 531 U.S. at 362, 372-373.

decides how to enforce the requirements of the Fourteenth Amendment. In the recently dismissed *California Medical Board* v. *Hason*, for example, the State argued that Title II was invalid legislation to enforce the Fourteenth Amendment as applied to disability discrimination in professional licensing. See Petitioner's Brief on the Merits at 24, *California Med. Bd.* v. *Hason*, No. 02-479 (2003). The State suggested that unless Congress made specific findings of unconstitutional state discrimination in this field, supported by the legislative record, Title II should fail the congruence and proportionality test as applied to that case. See *ibid*. Such an as-applied approach is inconsistent with the deference owed to Congress's discretion in determining how to enforce the Fourteenth Amendment, inviting unwarranted judicial micromanagement of every potential application of legislation enacted pursuant to Section 5 of the Fourteenth Amendment.

Rejecting a traditional as-applied approach, however, does not determine how much of the statute should be analyzed in this case. Again, the Court's cases may be read to suggest an answer. When Congress has enacted a single broadly applicable provision, as it did in passing the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1*et seq*., the Court has reviewed that provision as a whole, examining it in all its potential applications. See *Flores*, 521 U.S. at 532-533. And when Congress has legislated with more particularity, the Court has engaged

in a more limited review of the provisions related to the case before it. See *Kimel*, 528 U.S. at 85-88 (reviewing statutory prohibition against age discrimination in employment, 29 U.S.C. 623); *Garrett*, 531 U.S. at 372-373 (reviewing prohibitions against disability discrimination in employment, 42 U.S.C. 12112); cf. *Hibbs*, No. 01-1368 (granting certiorari limited to review of 29 U.S.C. 2612 (a)(1)(C), which requires provision of family medical leave for certain employees).[5] As was true in *Flores*, Plaintiff in this case alleges a violation of a statutory provision that applies broadly to all the activities of state and local governments. Accordingly, in our view, this Court should inquire whether the substantive requirements of 42 U.S.C. 12132 are a valid exercise of Congress's power to enforce the Fourteenth Amendment.

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[5] It is clear from these cases that the Court has not chosen an artificial unit of review, such as a statute as a whole, a title, or a single provision. Both *Kimel* and *Garrett*, for example, reviewed a set of provisions prohibiting discrimination in employment, even though those provisions formed the bulk of an entire statute in *Kimel*, but only a title of the larger Disabilities Act in *Garrett*. See *Garrett*, 531 U.S. at 360 n.1; *Kimel*, 528 U.S. at 85-88.

II. CONGRUENCE AND PROPORTIONALITY REVIEW CONSIDERS THE SUBSTANTIVE REQUIREMENTS OF THE STATUTE, NOT ITS ENFORCEMENT AND REMEDIAL PROVISIONS

We understand the Court's second question to ask whether congruence and proportionality review applies not only to the substantive requirements of a statute, but also to Congress's decision to create a private cause of action, provide for remedies, and define defenses and standards of proof. We believe that the Supreme Court's cases may be read to suggest that the congruence and proportionality review appropriately takes into account only the substantive prohibitions of the Act (including its standards of proof and defenses), not its enforcement or remedial provisions. If the substantive requirements of a statute are congruent and proportional to the unconstitutional conduct targeted by the act, and if Congress "unequivocally intends to do so," Congress may, consistent with the Eleventh Amendment, authorize private suits for damages against a State to enforce those requirements. See *Board of Trustees* v. *Garrett*, 531 U.S. 356, 363-365 (2001).

The congruence and proportionality test was developed in *City of Boerne* v. *Flores,* 521 U.S. 507, 519-520 (1996), to determine whether Congress has exceeded its constitutional power "to enforce" the Fourteenth Amendment. U.S. Const. Amend. XIV § 5. Congress, the Court explained, "has been given the

power to 'enforce,' not the power to determine what constitutes a constitutional violation." Rather, "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." See, *e.g.*, *Garrett*, 531 U.S. at 365. To defend this constitutional separation of powers, the Court required that legislation enacted under Section 5 of the Fourteenth Amendment must have "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Flores*, 521 U.S. at 520.

Determining whether a statute amounts to an unconstitutional attempt to "define the substance of constitutional guarantees," *Garrett*, 531 U.S. at 365, therefore, requires an examination of its substantive requirements. Part of the substance of the Fourteenth Amendment is its establishment of standards of proof and defenses. See, *e.g.*, *Garrett*, 531 U.S. at 367 (describing allocation of burdens of proof under the Equal Protection Clause). Accordingly, in applying the congruence and proportionality test, the Supreme Court has consistently considered any statutory deviations from the constitutional standards of proof and available defenses. See, *e.g.*, *Flores*, 521 U.S. at 533-534; *Kimel*, 528 U.S. at 86-88; *Garrett*, 531 U.S. at 367, 372.

On the other hand, we are not aware of any cases in which the Court has examined a statute's enforcement provisions in applying the congruence and proportionality test. While the Court has required that the "remedy imposed by Congress must be congruent and proportional," it has used the term "remedy" to refer to substantive legal obligations imposed on states in order to eliminate the effects of, or prevent, constitutional violations. See, *e.g.*, *Flores*, 521 U.S. at 519-520. Thus, to our knowledge, in conducting its congruence and proportionality review, the Court has never looked at the statute's enforcement provisions, but instead has compared the substantive restrictions the statute places on a State's conduct with the limitations on state action imposed by the Constitution itself.[6] The congruence and proportionality analysis focuses on the substantive prohibitions of a statute, rather than its enforcement mechanisms, because it is the substantive requirements that create the risk that Congress may usurp the judicial

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[6] See, *e.g.*, *Flores*, 521 U.S. at 533 ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence."); *Kimel*, 528 U.S. at 83 ("Initially, the *substantive* requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.") (emphasis added); *id*. at 86 (the ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional"); *id*. at 88 ("[T]he ADEA prohibits very little conduct likely to be held unconstitutional"); *Garrett*, 531 U.S. at 372-373 (under Title I of the Disabilities Act, "the accommodation duty far exceeds what is constitutionally required").

role of "determin[ing] the Fourteenth Amendment's *substantive* meaning." *Kimel*, 528 U.S. at 81 (emphasis added).

While Title II clearly prohibits more conduct than the Constitution, a statute or provision that prohibits no more than the Constitution itself necessarily falls within Congress's authority under Section 5 of the Fourteenth Amendment. See *Garrett*, 531 U.S. at 365 (stating that "§ 5 legislation *reaching beyond the scope of § 1's actual guarantees* must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end'") (emphasis added) (quoting *Flores*, 521 U.S. at 520); *Okruhlik* v. *University of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001) ("The question here is whether the Title VII prohibitions * * * place greater limits on states than the Constitution. *If so* then there must be a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'") (emphasis added, citations omitted).

In particular, when Congress simply provides a cause of action and a remedy for constitutional violations, Congress need not demonstrate that its choice of remedies is necessary to respond to a pattern of unconstitutional conduct by state actors.[7] Thus, for example, the Supreme Court has twice held that Congress

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[7] See, *e.g.*, *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 935-936 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001); *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806,

(continued...)

acted within its authority under Section 5 of the Fourteenth Amendment in passing 18 U.S.C. 242, a criminal statute punishing violations of constitutional rights under color of law, without asking whether Congress established a pattern of such violations sufficient to justify a criminal remedy. See *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945); cf. *Ex parte Virginia*, 100 U.S. 339 (1879) (upholding criminal statute prohibiting exclusion of blacks from juries as valid Fourteenth Amendment legislation). Nor has any court ever asked whether Congress made a record of state actors violating the Fourteenth Amendment to justify creating a civil cause of action for such violations under 42 U.S.C. 1983. This is because Congress's authority to "enforce" the Fourteenth Amendment includes the power to enforce its prohibitions whenever they are violated, even in times or places where violations are rare. And because legislation enforcing a constitutional prohibition is valid Fourteenth Amendment legislation, the Eleventh Amendment imposes no restriction on Congress's decision to permit private suits against States under that statute, so long as it makes its intention to abrogate the State's sovereign immunity clear. See *Garrett*, 531 U.S. at 364.

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[7](...continued)
820 n.6 (6th Cir. 2000); *Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998), rev'd in part on other grounds, 528 U.S. 18 (1999).

III. SECTION 12132 OF THE DISABILITIES ACT IS VALID LEGISLATION TO ENFORCE THE FOURTEENTH AMENDMENT

Our prior brief to the panel explains, in some detail, why Congress was enforcing, rather than attempting to change the meaning of, the Fourteenth Amendment when it prohibited certain forms of disability discrimination by public entities under Title II. We will not repeat all of these arguments here. However, several points bear emphasis and supplementation.

A. The Type And Scope Of Conduct Covered By Title II Is Substantially Different From The Employment Discrimination At Issue In Garrett

In *Board of Trustees* v. *Garrett*, 531 U.S. 356, 366-368 (2001), the Court considered limitations on a single area of government activity – employment – where the State has uniquely important proprietary interests and where the Equal Protection Clause provides only rational basis scrutiny to disability discrimination. By contrast, Title II protects individuals with disabilities from discrimination in the provision of a broad range of important services provided to the public in a State's governmental, non-proprietary capacity. This difference is significant. Being denied an employment opportunity by the government is not the same as being denied access to government services upon which all citizens must rely for basic opportunities (and sometimes necessities) of modern life. While a disappointed job applicant can turn to the private sector for alternative

employment opportunities, there may be no recourse for individuals denied some of the basic government services at issue under Title II. Persons with disabilities cannot look elsewhere to cast a ballot, file a lawsuit, secure the protection of the police or seek enactment of legislation. Moreover, while Title I applied to the loss of a benefit (an opportunity for employment), Title II also applies when state governments intervene in and regulate the activities of private citizens, or deprive them of their liberty or property rights.

As discussed in our prior brief, these practical differences between discrimination in state employment and in government services are reflected in the level of constitutional scrutiny that may be applied to disability discrimination in these very different contexts. In many applications, Title II prohibits discrimination that infringes on fundamental rights, the protections of the Due Process Clause, and the affirmative obligations imposed upon States in their treatment of incarcerated or institutionalized individuals. In these contexts, States may be required in certain circumstances to make individualized determinations and accommodations, sometimes at significant state expense, to comply with their constitutional obligations (see Panel Br. 11, 20, 24, 28-29).

Based on the record before it, Congress could reasonably conclude that the aggregate effect of consistently excluding individuals with disabilities from a

broad range of important government services caused a constitutional problem that is greater than the sum of its parts. The consistent distribution of benefits and services in a way that maintains a permanent subclass of citizens is inimical to the core purposes of the Equal Protection Clause. See *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982). States cannot balance their budgets or allocate their resources in a manner that "divide citizens into * * * permanent classes" and appropriates "rights, benefits and services according to" their class. *Zobel* v. *Williams*, 457 U.S. 55, 64 (1982). See also *Shapiro* v. *Thompson*, 394 U.S. 618, 632-633 (1969). Congress was aware that similar risks to the core values of the Equal Protection Clause were posed by the broad denial of access to important government services faced by individuals with disabilities.

B. The Legislative And Historical Record Supports Congress's Decision To Enact Prophylactic And Remedial Measures To Address Unconstitutional Disability Discrimination In Public Services

We discussed the predicate for Title II in detail in our brief before the panel (see Panel Br. 12-31). We supplement that discussion here with two points.

1. *Judicial Decisions And Federal Enforcement Activities.* We have attached to this brief two appendices provided to the Supreme Court in our brief in *California Medical Board* v. *Hason*, No. 02-479. Appendix A provides a non-

exhaustive list of cases in which courts have found discrimination and the deprivation of fundamental rights on the basis of disability. Cf. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) (suggesting that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations"). Many of the cases specifically found constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question.

Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312 (1966) (considering evidence collected in Department of Justice investigations). Appendix B contains excerpts from findings letters issued by the Department of Justice under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997b(a)(1), in the course of investigations that have found unconstitutional treatment of individuals with disabilities in government-run institutions in more than 30 States. In addition, in public reports, the Department of Justice has litigated or settled dozens of cases to ensure access to the courts and other government buildings, reasonable treatment by law enforcement officials, and protection against other forms of discrimination implicating important

constitutional rights.[8]

2. *Local Government Conduct.* In reviewing the predicate for Title II, this Court may properly consider all state action, not simply the history of unconstitutional conduct by state governments and agencies. In *Garrett,* the Court declined to consider evidence of unconstitutional action by local governments in a context where the relationship between local employment decisions and state governments is attenuated. In those circumstances, the prevalence of local unconstitutional employment discrimination does little to support the need for federal restrictions on employment decisions by state agencies. However, the operations of state and local governments are often inextricably intertwined in the context of providing government services, such as voting, education, welfare

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[8] Many of these reports, all entitled "Enforcing the ADA: A Status Report from the Department of Justice," are available at *www.usdoj.gov/crt/ada.* See, *e.g.*, Oct.-Dec. 2001 Report 9 (candidate for city council who uses a wheelchair unable to access a city council platform to address constituents); Apr.-June 1998 Report 8-10 (absence of communication assistance results in longer pre-trial detention for detainees with disabilities and denial of medical treatment and communication with family members); July-Sept. 1997 Report 7-9 (State general assembly inaccessible for lobbyists with mobility impairments; lack of effective participation in court proceedings); Apr.-June 1997 Report 5-7 (blind voters; inaccessible courts; unreasonable treatment during traffic stop of deaf motorist); Oct.-Dec. 1994 Report 4-6 (access to town hall; effective participation in court proceedings; inaccessible polling places); "Enforcing the ADA: Looking Back on a Decade of Progress" 4-8 (July 2000) (access to public meetings and public offices, to courts and court proceedings; fair treatment by law enforcement).

benefits, zoning and licensing, and the administration of justice.[9] As described in our prior brief, the complexity of the relationship between state and local governments in the administration of public services often raises difficult state-by-state questions regarding whether a particular entity is operating as an "arm of the state" entitled to Eleventh Amendment immunity (see Panel Br. 38-40).

Moreover, unlike *Garrett*, this case potentially implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both *Kimel* and *Garrett* targeted *employment* discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States under Congress's Commerce Clause power and can be enforced against state officials under *Ex parte Young*, 209 U.S. 123 (1908). See *Garrett*, 531 U.S. at 374 n.9; *EEOC* v. *Wyoming*, 460 U.S. 226, 235-243 (1983). However, a number of States have argued that the substantive requirements of Title II are beyond Congress's powers to enforce the Fourteenth Amendment *or* the Commerce Clause, emphasizing Title II's coverage of public services and operations regardless of their nexus to

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[9] Many of these activities, such as conducting state and federal elections, are essentially state programs in which local governments play a partial administrative role. In other areas, such as education, the State plays a substantial role in directing, supervising and limiting the discretion of local agencies, either by administrative supervision or by statutory direction.

commerce, and its direct regulation of the government *qua* government.[10] Accordingly, unless Title II is appropriate Commerce Clause legislation, this case may decide whether the substantive provisions of Title II are binding on the States at all.

Under similar circumstances, the Supreme Court has recognized the relevance of local governmental conduct in assessing the validity of Fourteenth Amendment legislation as applied to the States. See *South Carolina*, 383 U.S. at 312-314 & nn.12-15 (upholding Voting Rights Act as valid Fourteenth Amendment legislation where record involved primarily history of discrimination by local officials); see also *City of Boerne* v. *Flores,* 521 U.S. 507, 530-531 (1996) (in analyzing Section 5 as a source of power for substantive provisions of a law, the Court did not distinguish between evidence of state and local governmental conduct).

C. Title II Is A Proportional And Congruent Response To The Constitutional Injuries Identified By Congress

The requirements of Title II satisfy the congruence and proportionality test. In many applications, including this case, Title II simply applies to prohibit

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[10] See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 122 S. Ct. 1960 (2002); *Florida* v. *Rendon*, 832 So.2d 141, 146 n.5 (Fla. Dist. Ct. App. 3 2002); *Meyers* v. *Texas*, No. 02-50452 (5th Cir.) (pending).

unconstitutional discrimination. Even in those cases where Title II prohibits more than the Constitution itself, its requirements are reasonably tailored toward prohibiting, detecting, preventing and remedying unconstitutional state conduct.

1. *Prohibiting Unconstitutional Discrimination*. Title II often requires little more than the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, civil judicial proceedings, and other areas implicating fundamental rights, Title II closely tracks the heightened protections afforded by the Equal Protection and Due Process Clauses. In such cases, Title II, like the Constitution itself, prohibits a State from refusing to provide access to these important areas of government services for irrational or insubstantial reasons, and may require a State to alter its methods of operation when necessary to afford individuals fundamental rights (see Panel Br. 11, 20, 24, 28-29).

In other applications, Title II operates to enforce the Equal Protection Clause's prohibition against irrational discrimination.[11] For example, Congress

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[11] See *Garrett*, 531 U.S. at 367; *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534-538 (1973); see also *Hunter* v. *Underwood*, 471 U.S. 222, 228 (1985) (facially neutral enactments are unconstitutional when enacted with invidious

(continued...)

could reasonably conclude that Title II would enforce the Equal Protection requirement of rationality when it applies to prohibit infliction of corporal punishment against a deaf student for failure to follow spoken instructions, or refusal to allow a paralyzed veteran to use a public swimming pool.[12] Congress could reasonably determine that the Constitution, like Title II, would not permit a police officer to refuse to take a rape complaint because the victim is blind, a public zoo to deny admission to children with Down Syndrome on the grounds that "they would upset the chimpanzees," or a state college to deny admission to a disabled student because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability."[13] Congress could further reasonably conclude that Title II would enforce the constitutional protection against state action based on irrational stereotypes, such as denying admission to state

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[11](...continued)
motive).

[12] See *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. 384, 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); 3 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* 1872 (Comm. Print 1990) (*Leg. Hist.*) (testimony of Peter Addesso).

[13] See N.M. 1081; S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989); Wash. 1733; see also Panel Br. 19 n.8 (explaining citation form and sources).

universities or training programs based on the assumption that blind people cannot teach in public schools, be competent rehabilitation counselors, or succeed in a music course. See S.D. 1476; 2 Leg. Hist. 1224-1225.

2. *Preventing Unconstitutional Discrimination Escaping Detection And Remedy.* In other applications, Title II often operates prophylactically to detect unconstitutional discrimination that could otherwise evade judicial remedy. Congress found that much of the discrimination against individuals with disabilities "results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 30 (1990). But such irrational motives are easily concealed and often difficult, if not impossible, to prove in court. Congress knew that the inability of an individual with a disability to meet a non-essential program requirement, or her need for a reasonable accommodation, often provides a convenient excuse to justify unconstitutional action. Title II serves to root out such discrimination by prohibiting denial of services in limited circumstances that often give rise to an inference of irrational discrimination.

For example, when a State denies a benefit to someone simply because she has a disability, and even though she meets all the eligibility criteria imposed on the public at large, there is a strong basis for inferring an unconstitutional motive.

The same inference may also arise when the individual is denied a reasonable modification needed to access a government service or benefit. In such cases, Title II is violated only if the State refuses to provide a modification that (a) is reasonable; (b) would not fundamentally alter the nature of the government service; and (c) would not impose an undue financial or administrative burden. See 28 C.F.R. 35.130(b)(7); *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999). Congress could reasonably conclude that the failure to provide a qualified individual with a disability a service or benefit given to everyone else simply because doing so would impose a relatively minor administrative or financial burden would often be based on hidden irrational motives. See *Flores*, 521 U.S. at 529 (noting that in appropriate circumstances, "Congress can prohibit laws with discriminatory effects" to enforce constitutional prohibition against invidious intentional discrimination).

3. *Preventing Future, And Remedying The Legacy Of Past, Unconstitutional Discrimination.* Even when Title II applies to prohibit constitutional conduct, its requirements are still valid measures "to remedy and to deter violations of rights guaranteed" by the Fourteenth Amendment. *Kimel*, 528 U.S. at 81.

Title II seeks to prevent constitutional violations in areas where the risks of violation are significant and the injuries caused are irremediable. Often, the line between constitutional and unconstitutional conduct is difficult to discern, particularly by the ordinary government workers who administer government programs in the unusual cases presented by the special needs of individuals with disabilities. Congress was also aware that when that constitutional line is crossed, there is often no adequate remedy.[14] Title II serves to prevent such irremediable violations by providing "clear, strong, [and] consistent * * * standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2).[15]

Title II also serves an important remedial purpose by promoting the integration of individuals with disabilities into the social, economic and political mainstream. As discussed in our prior brief (see Panel Br. 12-31), Congress acted in response to a long history of state action that assisted in the isolation of

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[14] For example, no court can meaningfully remedy the denial of the right to cast a vote in an election that will be long decided before any lawsuit can even begin. Nor can courts fully repair the harm of isolation, restraint and seclusion suffered under unconstitutional conditions in a state institution.

[15] In furtherance of this purpose, Congress required the Attorney General to develop regulations to elaborate the requirements of Title II and charged the Architectural and Transportation Barriers Compliance Board with developing architectural standards that provide a "safe harbor" for complying with the Act's physical accessibility requirements for new construction. See 42 U.S.C. 12134, 12204(a).

individuals with disabilities from all aspects of social, economic, political, and community life. Congress determined that providing individuals with disabilities access to basic government services like education, training, voting, social welfare programs, the courts and public transportation systems was essential to removing a legacy of government-assisted isolation that "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." 42 U.S.C. 12101(a)(9).

These same measures also serve an important prophylactic purpose. Congress found that individuals with disabilities continue to suffer from discrimination, in part, because they have been "relegated to a position of political powerlessness" through "restrictions and limitations" that "isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2) & (7). Removing barriers to full social, economic, and political participation reduces this isolation and, thereby, makes further discrimination less likely. See *Flores*, 521 U.S. at 528 (congressional ban on English literacy tests as a prerequisite to voting "could be justified as a remedial measure to deal with 'discrimination in governmental services'" because it gave "Puerto Ricans 'enhanced political power' that would be 'helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community'") (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-

653 (1966)). Congress also knew that Title II would reduce unconstitutional discrimination based in ignorance and "want of careful reflection" by providing government officials "an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective" of the capabilities and value of people with disabilities. *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). Although some unconstitutional discrimination against individuals with disabilities is imposed through legislation, regulation or other high-level collective decisionmaking, Congress found that many constitutional violations are committed by individual government officials exercising state power through the distorting lens of personal prejudice. See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 30. Title II acts to reduce that prejudice by relieving the social and political isolation that "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 600.

These objects are not beyond Congress's authority under Section 5 of the Fourteenth Amendment. "Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88. Indeed, since the enactment of the Fourteenth Amendment, the Supreme Court has

recognized that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws * * * is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879). Title II falls squarely within that domain.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Supplemental En Banc Brief for the United States as Intervenor were sent by overnight mail this 5th day of May, 2003, to the following counsel of record:

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