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April 17, 2001

Re: **Garcia Amicus Brief**

Mary Giliberti
Judge David L. Bazelon Center for Mental Health Law
1101 15th Street, N.W., Suite 1212
Washington, D.C. 20005-5002

Dear Mary:

Please find enclosed a copy of the amicus brief filed with the Second Circuit in Garcia v. S.U.N.Y. Health Sciences Center at Brooklyn et al.

Thank you for your valuable comments and suggestions throughout the brief drafting process. If you have any questions, please feel free to call me at 212-450-4855.

Sincerely,

Andrew Tannenbaum

Enclosure

00-9223

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 00-9223

FRANCISCO GARCIA,

Plaintiff-Appellant,

—against—

S.U.N.Y. HEALTH SCIENCES CENTER AT BROOKLYN, STEPHEN E. FOX, PH.D., individually and in official capacity, JACQUELINE S. JAKWAY, individually and in official capacity, LORRAINE TERRACINA, PH.D., individually and as Dean of Academic Affairs or her successor, IRWIN M. WEINER, M.D., individually and as Dean of the College of Medicine or his successor, and RUSSELL MILLER, M.D., individually and as President of the State University of New York Health Sciences Center or his successor,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE*
ACCESS NOW, THE CENTER FOR INDEPENDENCE OF THE DISABLED IN NEW YORK, DISABILITY ADVOCATES, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, LEAGUE FOR THE HARD OF HEARING, MOOD DISORDERS SUPPORT GROUP, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE NATIONAL MULTIPLE SCLEROSIS SOCIETY—NEW YORK CITY CHAPTER, NEW YORK ASSOCIATION OF PSYCHIATRIC REHABILITATION SERVICES, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, NEW YORK STATE INDEPENDENT LIVING COUNCIL, AND THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES IN SUPPORT OF PLAINTIFF-APPELLANT

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INTERESTS OF THE AMICI CURIAE

The Amici Curiae are thirteen groups that advocate on behalf of people with disabilities and have strong interests in ensuring that the States do not discriminate against people with disabilities as mandated by Title II of The Americans with Disabilities Act of 1990 ("ADA"). Appendix A contains further information about the individual amicus parties. All parties have consented to the filing of this Amici Curiae Brief.

SUMMARY ARGUMENT

Defendants-appellees New York et al. are not entitled to sovereign immunity with respect to plaintiff-appellant Francisco Garcia's claim for damages under Title II of the ADA, 42 U.S.C. § 12131 et seq.[1] Congress effectively abrogated that immunity because, as required by Board of Trustees of University of Alabama v. Garrett, 121 S. Ct. 955 (2001), Title II was a valid exercise of Congress's authority under § 5 of the Fourteenth Amendment in that Congress identified a specific pattern of unconstitutional State discrimination and enacted a remedy congruent and proportional to that harm.

Defendants also are not entitled to sovereign immunity under Section 504 of the Rehabilitation Act because they waived that defense upon accepting federal funds for their programs.

ARGUMENT

I. TITLE II OF THE AMERICANS WITH DISABILITIES ACT VALIDLY ABROGATES DEFENDANTS' ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. While the text of the Amendment

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[1] Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

limits its applicability to suits against a State by citizens of another State, the Supreme Court has applied the Amendment equally to suits against a State by its own citizens. See Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996).

Congress may abrogate this immunity "when it both unequivocally intends to do so and 'acts pursuant to a valid grant of constitutional authority.'" Garrett, 121 S. Ct. at 962 (quoting Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000)). It is undisputed that the ADA satisfies the first part of this test. See 42 U.S.C. § 12202. Congress satisfies the second part if it acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. See Garrett, 121 S. Ct. at 962; Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 637 (1999).

In essence, a statute is "appropriate legislation" to enforce the Equal Protection clause if it survives a two-prong inquiry. First, Congress must "identify conduct transgressing the Fourteenth Amendment's substantive provisions." Florida Prepaid, 527 U.S. at 639. To this end, the legislative record must support "the concerns that supposedly animated the law." Id. at 639. Second, once Congress has identified that unconstitutional State transgression, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

A. Congress Effectively Identified a Pattern of Unconstitutional State Discrimination Against People with Disabilities in the Provision of Public Services, Programs, and Activities

For Title II, Congress satisfied the identity prong requirement as recently elucidated in Garrett. There, the Supreme Court held that the legislative record must show a "pattern of unconstitutional discrimination" by the States and that the remedy Congress fashions must pertain to the area of this unconstitutional discrimination. 121 S. Ct. at 965. Congress's extensive findings of unconstitutional

State discrimination in public services satisfy these requirements.

1. The Supreme Court in Garrett Recognized that Congress's Findings in Support of Title II Are More Extensive than the Findings Deemed Insufficient for Purposes of Title I

The Court in Garrett specifically limited its holding to Title I of the ADA, which prohibits discrimination in employment, 42 U.S.C. § 12112, and declined to reach the question whether States may be sued for damages under Title II. See 121 S. Ct. at 960 n.1. In fact, the Court suggested that Title II presents a starkly different sovereign immunity case than does Title I. This interpretation would be consistent with the rulings of a number of circuit courts, which have found that Title II properly abrogates State sovereign immunity.[2]

In Garrett, the Court emphasized that the legislative findings of the ADA did not identify discrimination in public employment, and it relied on that omission as "strong evidence" that Congress did not find a pattern of unconstitutional State discrimination in employment. See id. at 966. These same findings expressly identified a need to prohibit discrimination in "public services," however, providing equally "strong evidence" that Congress did find unconstitutional discrimination by the States in that context. See id. ("'Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications.'" (quoting S. Rep. No. 101-116, at 6 (1989)) (emphasis altered)); id. (noting the same language in H.R. Rep. No. 101-485, pt. 2, at 28 (1990)).

The Garrett Court also noted that although "[o]nly a small fraction" of the examples in Appendix C to Justice Breyer's dissent

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[2] See, e.g., Dare v. California, 191 F.3d 1167, 1173-75 (9th Cir. 1999), cert. denied, 121 S. Ct. 1187 (2001); Coolbaugh v. Louisiana, 136 F.3d 430, 432-38 (5th Cir. 1998). This Court has never specifically addressed the Title II question. In its leading ADA sovereign immunity decision, Muller v. Costello, 187 F.3d 298 (2d Cir. 1999), this Court expressly limited its holding to the employment discrimination provisions of the ADA. See id. at 308 n.2.

related to State discrimination against people with disabilities in employment, "[t]he overwhelming majority of these accounts 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 966 n.7.

By making these distinctions, the Court recognized the core of Amici's argument: While Congress may not have identified a pattern of unconstitutional discrimination against people with disabilities in the narrow context of State employment, Congress did identify substantial unconstitutional discrimination by the States in the much broader areas of public services, programs, and activities.

2. The ADA's Legislative Record Evidences a Historical Pattern of Pervasive and Widespread Unconstitutional State Discrimination

Before enacting the ADA, Congress compiled a vast body of evidence of unconstitutional State discrimination against people with disabilities in the provision of public services, programs, and activities, including public education. Congress developed the record of State discrimination over decades of methodical and extensive legislative investigation and documentation. The ADA was the culmination of that large-scale congressional effort.[3]

As discussed below, this evidence included (a) congressionally commissioned studies, (b) testimony and other evidence presented at congressional hearings, and (c) judicial case law and information in connection with other legislation.

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[3] The State of New York, along with a number of other States, expressly acknowledged the substantial evidence of State discrimination relied on by Congress in passing the ADA. See Brief of Amici Curiae the States of Minnesota et al., at 9, Board of Trustees of Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001) (No. 99-1240), available at 1999 U.S. Briefs 1240 (LEXIS) ("Congress also had substantial and credible evidence from which it reasonably concluded that the States had been part of the widespread pattern of societal discrimination against people with disabilities.").

(a) Congressionally Commissioned Studies

From 1965-1990, Congress sought and obtained from several congressionally created bodies information regarding discrimination on the basis of disability. When considering the ADA, Congress explicitly found that seven studies issued by those bodies "all reach[ed] the same fundamental conclusions: . . . Discrimination still persists in such critical areas as . . . public accommodations, public services, [and] transportation . . . ; [and] [c]urrent Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas." S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (emphasis added). These studies, upon which Congress expressly relied, indeed contained evidence of widespread unconstitutional discrimination by the States against people with disabilities in the provision of public services, programs, and activities. See, e.g., National Council on Disability, On the Threshold of Independence (1988) [hereinafter Threshold]; National Council on Disability, Towards Independence (1986) [hereinafter Towards]; U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983) [hereinafter Spectrum].

The U.S. Commission on Civil Rights, for instance, found extensive discrimination by the States against people with disabilities in the context of public education. See Spectrum, supra, at 27 ("Public education systems . . . have consistently underserved and undereducated handicapped persons."). The report concluded that "a great many handicapped children continue to be excluded from the public schools, and others are placed in inappropriate programs," despite the enactment of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1461, which was designed to address those concerns. Spectrum, supra, at 28; see also Threshold, supra, at 82 (finding that the "least restrictive environment mandate[,] . . . a

major component of the right to a free appropriate public education for children with disabilities[,] has not . . . always been appropriately applied by State . . . education agencies," and that as a result "children with disabilities continue to be unnecessarily segregated"). The Commission also found serious disparities in higher education. See id. at 28.

The Commission's report included findings of the following specific examples of arbitrary and irrational State discrimination: (1) "[p]ublic education agencies have engaged in administrative buck-passing as each ascribes to other agencies the duty of providing a particular child with an educational program"; (2) many school districts "have used funding problems as an excuse for delaying or refusing to provide programs" for students with disabilities; (3) "the goal of 'mainstreaming' handicapped pupils has . . . been misused as an excuse to dump them into the regular classroom environment without adequate support services and personnel"; and (4) school systems have "unnecessarily isolated and segregated handicapped children." Id. at 28-29; cf. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (pretextual denial of zoning permit to home for people with mental disabilities failed to satisfy even rational basis scrutiny).

The Commission also found a pattern of unconstitutional State discrimination against people with disabilities in such fundamental areas as voting, family-related rights, and jury service. For example, the Commission reported that people with disabilities are "frequently denied . . . the right to vote" and face obstacles such as "state laws restricting voting rights of mentally handicapped persons," the "denial of opportunity for institution residents to vote," "architectural barriers at polling places," the "absence of assistance in ballot marking," the "inequity of absentee ballots," and "restrictions on rights of handicapped persons to hold public office." See id. at 40, app. a.

In the area of family-related rights, the Commission concluded that "[m]any states restrict the rights of physically and mentally handicapped people to marry" and reported that because of irrational stereotypes, parents with disabilities "have had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce." Spectrum, supra, at 40 (citing Moye v. Moye, 627 P.2d 799 (Idaho 1981); In re Marriage of Carney, 598 P.2d 36 (Cal. 1979)). The Commission further documented the States' sordid history of sterilizing people with disabilities without their consent, a history which continued through the date of the report. See id. at 36-37 ("Currently 15 States have statutes authorizing compulsory sterilization of mentally ill or mentally retarded individuals, and at least 4 authorize the sterilization of persons with epilepsy."). The Commission also listed the "denial of access to contraception," the "refusal to permit cohabitation of married couples in residential institutions," and the "denial of adoption rights" as "major" types of discrimination that exist against people with disabilities. Id. app. a.

Additionally, the Commission documented that many people with disabilities are excluded from jury service. See id. app a; cf. J.E.B. v. Alabama, 511 U.S. 127, 141 (1994) ("All persons . . . have the right not to be excluded summarily [from jury service] because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.").

The Commission also set forth evidence of significant State discrimination against people with disabilities in the following areas: (1) State institutionalization, see Spectrum, supra, at 33, 32-35 (recounting the "systemic placement of handicapped people in substandard residential facilities"), (2) access to public buildings, see id. at 38-39 (finding 76% of State-owned buildings that house services and programs to be inaccessible), (3) public transportation,

see Spectrum, supra, at 39; see also Towards, supra, at 22-23 (finding three-fourths of the urban rail stations and buses to be wheelchair inaccessible), (4) public housing, see Spectrum, supra, app. a, and (5) other State sponsored activities, see id. at 40, app a.

(b) Congressional Hearings and Testimony

Congress spent hundreds of hours in hearings considering the ADA, and both chambers held lengthy floor debates. See Timothy Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temple L. Rev. 393, 393, 414 (1991). In those hearings, Congress gathered extensive evidence that demonstrated a pattern of unconstitutional State discrimination against people with disabilities in the provision of public services, programs, and activities.

For instance, Justin Dart, Chair of the Task Force on the Rights and Empowerment of Americans with Disabilities, testified to Congress that "[we] have produced overwhelming verbal and written evidence that . . . people with disabilities . . . are not fully eligible for the opportunities, services and support systems which are available to other people as a matter of right. . . . [They] are often unreasonably excluded from . . . public and private facilities, education, employment, housing, transportation, communications and recreation." 2 Staff of House Comm. on Educ. & Labor, 101st Cong., Legislative History of Public Law 101-336: The Americans with Disabilities Act 1329-31 (Comm. Print 1990) [hereinafter Leg. Hist.].[4] Dart also described some of the specific evidence of State discrimination gathered by the Task Force, including statements by an Illinois service provider to the hearing impaired who had "clients whose

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[4] The congressionally designated Task Force conducted sixty-three public forums nationwide, submitted twelve reports to Congress, and provided testimony at hearings on the ADA in both the House and Senate. See, e.g., S. Rep. No. 101-116, at 4, 6, 8-9, 16-17 (1989); see also 2 Leg. Hist., supra, at 1324-25 (indicating in the record that the Task Force submitted to Congress "several thousand documents," which provided "overwhelming evidence of massive discrimination and segregation in all aspects of life").

children [were] taken away from them and told to get parent information, but [had] no place to go because the services [were] not accessible." 2 id. at 1331.

In addition, Congress heard volumes of other testimony regarding unconstitutional State discrimination against people with disabilities in the area public services. See, e.g., 2 id. at 1219-20 (recounting how "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent"); Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Hum. Res., 101st Cong. 488 (1989) (statement of Hon. Neil Hartigan, Attorney General of Illinois) (describing "innumerable complaints regarding lack of access to public services"); 132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) (statement of Sen. Kerry) (investigation revealed that State-run mental health facilities "were appalling," and "[t]he extent of neglect and abuse uncovered in their facilities was beyond belief"). Congress relied on this testimony in reaching its decision to enact Title II.

(c) Case Law and Other Evidence Before Congress

In considering the ADA, Congress also had before it a broad body of case law documenting unconstitutional State discrimination against people with disabilities in the provision of public services, programs, and activities. See, e.g., Youngberg v. Romeo, 457 U.S. 307 (1982) (finding unconstitutional conditions of involuntary confinement at State institution for people with mental disabilities); Panitch v. Wisconsin, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (finding that State officials intentionally and unconstitutionally discriminated against students with disabilities by delaying implementation of statutes which otherwise would have provided the students with an adequate education); Mills v. Board of Educ., 348 F. Supp. 866, 870 (D.D.C. 1972) (finding that the D.C. Board of Education "entirely excluded

from all publicly supported education" children with mental disabilities and other behavioral problems, in violation of the Constitution); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 297, 294-97 (E.D. Pa. 1972) (finding that evidence raises "serious doubts (and hence a colorable [constitutional] claim) as to the existence of a rational basis" for Pennsylvania's statutory exclusion of about 50,000 children with mental retardation from any public education); see also Spectrum, supra, at 62-66, 131-33, 141 (citing additional cases).[5] Indeed, both Mills and Pennsylvania Association were cited in the legislative record. See 2 Leg. Hist., supra, at 1643 n.3. In any event, courts should presume that Congress is aware of relevant legal precedents. See Conroy v. Aniskoff, 507 U.S. 511, 516 & n.10 (1993). Court findings of unconstitutional discrimination, such as these, are persuasive support for remedial legislation. See Garrett, 121 S. Ct. at 968-69 (Kennedy, J., concurring).

Congress had at its disposal a wealth of other information that demonstrated widespread State discrimination. For example, Congress learned of violations of Section 504 of the Rehabilitation Act by colleges and universities, school districts, and government agencies. Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 95th Cong., 290-368 (1977) (statement of David Tatel, Director, Office for Civil Rights, Dep't of Health, Education and Welfare). The

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[5] State discrimination against people with disabilities still persists. See, e.g., Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) (noting that Georgia unnecessarily institutionalizes people with mental disabilities); New York v. County of Delaware, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (noting that most polling places in two counties were inaccessible to people with disabilities); The New York State Assembly Task Force on People with Disabilities, Access Denied: New Yorkers with Disabilities Barred from Accessing Government Buildings and Services 2 (2000) (finding an "outrageously high number of barriers to accessing government services"); Debra Auspitz, Disabled Votes, Philadelphia City Paper, Mar. 9-16, 2000 (finding in a March 2000 survey that only 27% of Philadelphia's 1681 polling places were accessible to people with disabilities).

Governor's Committees of all fifty States had reported to Congress that State laws were inadequate to counter discrimination faced by persons with disabilities. See S. Rep. No. 101-485, pt. 2, at 38 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 320. Additionally, while Congress was considering the ADA, the California Justice Department issued a report which found that agencies of the California government "effectively exclude people with disabilities from full participation in community life," and reported many "disturbing accounts of discrimination in community and State Colleges and Universities." Attorney General's Commission on Disability, California Dep't of Justice, Final Report, at 57, 138 (1989).

Finally, Congress relied on decades of documentation and testimony from other remedial legislation it considered for people with disabilities. See, e.g., The Education of All Handicapped Children Act of 1975, 20 U.S.C. § 1400(b) (finding that of the "handicapped children in the United States," "more than half . . . do not receive appropriate educational services," and "one million . . . are excluded entirely from the public school system"); Senate Report on Amendments to the Rehabilitation Act of 1973, S. Rep. No. 93-1297, at 28 (1974) ("Individuals with handicaps are all too often excluded from schools . . . denied access to transportation, buildings and housing because of architectural barriers . . . and are discriminated against by public laws."); see also Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temple L. Rev. 387 (1991) (recounting history of other disability rights acts passed prior to the ADA). It was appropriate for Congress to rely on the "information and expertise that [it] acquire[d] in the consideration . . . of earlier legislation." See Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

B. Title II's Remedy Is Both Congruent and Proportional to the Unconstitutional Discrimination Congress Identified

A remedial scheme under § 5 of the Fourteenth Amendment must "be understood as responsive to, or designed to prevent, unconstitutional behavior." City of Boerne, 521 U.S. at 520, 532. This "congruence and proportionality" inquiry is tailored to the specific circumstances of each case; after all, "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." Id. at 530. Because of the breadth of Congress's remedial authority, the Supreme Court has a longstanding tradition of deferring to Congress when engaging in congruence and proportionality review. See Kimel, 528 U.S. at 81 (noting the Court has afforded Congress "wide latitude" under § 5); City of Boerne, 521 U.S. at 518 (directing courts to defer to Congress on congruence and proportionality); cf. Cleburne Living Ctr., 473 U.S. at 442-43 (noting that courts should defer to Congress when analyzing legislation relating to people with disabilities). When the unconstitutional conduct of the States extends to many facets of public life, a more comprehensive remedy is required to prevent that conduct.

Unlike the remedial scheme of Title I, which the Supreme Court reviewed in Garrett, see id. at 966-67, Title II's remedial provisions meet the City of Boerne criteria. As an initial matter, Title II remedies a much broader area of discrimination than does Title I. Title I aims to eliminate the discrimination people with disabilities have faced in the limited area of employment; in contrast, Title II attempts to remedy unconstitutional discrimination in the widespread area of public services, programs, and activities. As such, Congress constitutionally may construct a Title II remedy that is more comprehensive than the remedy for Title I. See Kimel, 528 U.S. at 81.

In the narrow area of State employment, the Garrett Court found little evidence of unconstitutional discrimination. 121 S. Ct. at

965-66. As a result, Title I's remedial scheme "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional" under the applicable standard. Kimel, 528 U.S. at 86; see also Garrett, 121 S. Ct. at 967. In contrast, for Title II Congress found pervasive unconstitutional State discrimination, see Part I.A, supra, which justifies a more far-reaching remedial scheme than is proper for Title I. See Kimel, 528 U.S. at 91 (noting that if Congress uncovers a "significant pattern of unconstitutional discrimination," Congress would have "reason to believe that broad prophylactic legislation [could be] necessary"). And, to the limited extent that Title II might address behavior that is not unconstitutional, it remains congruent and proportional because § 5 authorizes a substantial legislative scheme "to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Id. at 81.

Even though Congress had more leeway in designing its remedial scheme for public services, Title II's remedial scheme is narrower than Title I's.[6] In contrast to Title I, which requires employers to accommodate their workplaces to the needs of each individual employee, Title II's scheme for ensuring accessibility to public services takes a holistic approach. See, e.g., 28 C.F.R. § 35.150(a) ("A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is" available to individuals with disabilities (emphasis added)). "Title II's emphasis on 'program accessibility' rather than 'facilities accessibility' was intended to ensure broad access to public services,

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[6] Defendants argue that because the term "reasonable modification" in Title II is undefined, it is broader than the "reasonable accommodation" language of Title I (Defendants' Brief at 7). While it is true that the statute does not define "reasonable modification," the implementing regulations provide the contours of that term. See, e.g., 28 C.F.R. § 35.150 (describing some of the modifications necessary to comply with Title II).

while, at the same time, providing public entities with the flexibility to choose how best to make access available." Parker v. Universidad de Puerto Rico, 225 F.3d 1, 6 (1st Cir. 2000).

In Garrett, the Court considered Title I not to be congruent and proportional because its "accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer." 121 S. Ct. at 967. Title II is not susceptible to the same criticism, however, because its implementing regulations provide that "[a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." 28 C.F.R. § 35.150(b)(1) (emphasis added); see also Parker, 225 F.3d at 6 ("If one facility is inaccessible, for example, a public entity can achieve compliance with the ADA by moving its services, programs, or activities to another facility that is accessible."). Moreover, a public entity is not required to make modifications to its policies, practices, or procedures if "the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Id. § 35.130(b)(7). Finally, Title II's remedial scheme is further limited because State respondents cannot be sued for punitive damages. See 42 U.S.C. § 1981a(b)(1).

II. DEFENDANTS WAIVED THEIR SOVEREIGN IMMUNITY FOR SUITS UNDER SECTION 504 OF THE REHABILITATION ACT WHEN THEY ACCEPTED FEDERAL FUNDS

States "may waive at pleasure" their Eleventh Amendment immunity. Clark v. Barnard, 108 U.S. 436, 447 (1883). Pursuant to its spending power, Congress may condition its grant of funds on the States' waving their sovereign immunity. See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999). Every circuit court to have considered the question agrees that 42 U.S.C. § 2000d-7 is an unambiguous indication that Congress conditions its

distribution of funds upon the States' waiving their sovereign immunity for violations of Section 504. See Jim C. v. United States, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000); Litman v. George Mason Univ., 186 F.3d 544, 554 (4th Cir.1999), cert. denied, 528 U.S. 1181 (2000); Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997). Moreover, that defendants would have to forego eleven percent of their annual budget if they refused to waive their immunity does not render the conditional disbursement coercive. See, e.g., Jim C., 235 F.3d at 1082 (holding no compulsion when the agency would forego twelve percent).[7]

CONCLUSION

For the foregoing reasons, this Court should hold that defendants are not entitled to sovereign immunity under either Title II of the ADA or Section 504 of the Rehabilitation Act.

Dated New York, New York
April 13, 2001

Respectfully submitted,

DAVIS POLK & WARDWELL

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[7] It is the Amici Curiae's equally strong contention that defendants are not entitled to sovereign immunity from the Section 504 claim, but this position has not been articulated fully in deference to this Court's length requirements. In its stead, the Amici simply support wholeheartedly the arguments plaintiff's brief puts forth.

APPENDIX A

Access Now, Inc.

Access Now is a national non-profit advocacy organization committed to bringing about meaningful physical and communications access, under the Americans with Disabilities Act, for the disabled community through local and national litigation against private and public facilities, including hospitals, hotels, office buildings, stores, shopping malls, theaters, restaurants and other public accommodations.

The Center for Independence of the Disabled in New York, Inc.

The Center for Independence of the Disabled in New York, Inc. ("CIDNY") is a not-for-profit resource center staffed by and for people with disabilities. Its purpose is to help people with disabilities obtain the skills and services they need to live independently in the community.

Disability Advocates, Inc.

Disability Advocates, Inc. provides protection and advocacy to individuals in New York State who are diagnosed with a mental illness and other disabilities. Since 1989, Disability Advocates has opposed laws and practices which deprive individuals with disabilities of the rights enjoyed by other persons.

Judge David L. Bazelon Center for Mental Health Law

The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of our work involves efforts to remedy

disability-based discrimination through enforcement of the ADA and Section 504.

League for the Hard of Hearing

League for the Hard of Hearing is the oldest not-for-profit, out of hospital hearing rehabilitation facility in the United States, serving over 22,000 adults, children and infants each year. Through its multidisciplinary approach, including medical services, rehabilitation, education, and counseling, the League aims to assist individuals who are hard of hearing and deaf and their families.

Mood Disorders Support Group, Inc.

The Mood Disorders Support Group, Inc. is a not-for-profit organization founded in 1981. Attendance at its meetings and lectures now exceeds 8000 annually and more than 3400 persons are on its mailing list. Its primary mission is to assist people with mood disorders and their families and friends. It also educates the community at large about depression and manic depression, in order to emphasize their seriousness and to reduce stigmatization.

National Association of the Deaf

The National Association of the Deaf ("NAD") is a national non-profit organization whose members are deaf or hard of hearing adults, parent of deaf or hard of hearing children, and professionals in the areas of service to deaf and hard of hearing individuals. The NAD is the largest and oldest consumer organization of deaf and hard of hearing people in the United States, safeguarding the civil rights of 28 million deaf and hard of hearing Americans. NAD is a federation of 51 State associations. The NAD has been actively involved in enforcing the rights of persons who are deaf or hard of hearing, bringing lawsuits under the Americans with Disabilities Act and providing

extensive support, education and training to individuals and organizations in the scope of federal and State laws that protect persons with disabilities.

National Association of Protection and Advocacy Systems

The National Association of Protection and Advocacy Systems ("NAPAS") is the membership organization for the nationwide system of protection and advocacy ("P&A") agencies. Located in all 50 States, the District of Columbia, Puerto Rico, and the territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network.

National Multiple Sclerosis Society, New York City Chapter

The New York City Chapter of the National Multiple Sclerosis Society is the only voluntary health agency dedicated to serving Multiple Sclerosis patients and their families in the five boroughs. It is one of over 100 chapters across the United States providing education, programs and advocacy and supporting scientific research aimed at finding the cause and cure for Multiple Sclerosis.

New York Association of Psychiatric Rehabilitation Services

The New York Association of Psychiatric Rehabilitation Services is a statewide coalition of New Yorkers who receive and/or provide community-based mental health services working together to improve services and social conditions for people with psychiatric disabilities by promoting their recovery, rehabilitation and rights.

New York Lawyers for the Public Interest

Founded in 1976, New York Lawyers for the Public Interest ("NYLPI") is a public interest law firm that provides protection and advocacy services to people with disabilities in New York State. NYLPI has litigated against the State to redress discrimination against people with disabilities in such areas as institutionalization, education, and scientific experimentation. NYLPI has an interest in preserving Title II of the ADA and Section 504 of the Rehabilitation Act so that it may continue to fight discrimination at all levels of government on behalf of its clients with disabilities.

New York State Independent Living Council, Inc.

The New York State Independent Living Council, Inc.'s vision is to achieve a world where people with disabilities achieve equal rights and opportunities in all aspects of society. This is achieved through four primary goals: (1) to increase funding and resources, (2) to increase public awareness, (3) to provide technical assistance and training, and (4) to develop and pursue a public policy agenda that results in systemic change. The scope of this work includes defending the constitutionality of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

State of Connecticut, Office of Protection and Advocacy for Persons with Disabilities

The Office of Protection and Advocacy for Persons with Disabilities was established by statute in 1977. Conn. Gen. Stat. §46a-7. The State of Connecticut recognized that it "has a special responsibility for the care, treatment, education, rehabilitation of and advocacy for its disabled citizens" and The Office of Protection and Advocacy has the authority to "represent, appear, intervene in or bring an action on behalf of any person with disability . . . in any proceeding before

any court . . . in this state in which matters related to this chapter are in issue." Conn. Gen. Stat. §46a-11(7). In the case before this Court, The Office of Protection and Advocacy has an interest in preventing further erosion of the protections afforded persons with disabilities under the Americans with Disabilities Act.