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 Fried 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 Chastain; 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 Patricia Bowlen; Tyler Blanchard, 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 Lane; Madison Polk, by and Through her Father and Next Friend John Polk; Paige Smith, by and Through her Mother and Next Friend Gretta Smith, Plaintiffs-Appellees,

v.

Karen F. HALE, ET AL., Defendants,

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

No. 03-50608.

November 11, 2003.

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

Reply Brief of Defendants-Appellants

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I. the court can and should decide the substantive issues presented in this appeal.

A. *Version's Ex Pane Young* Holding Does Not Prevent the Court From Determining the *Validity* of the Statutes Sought to Be Enforced.

McCarthy and the United States misplace reliance on *Verizon Maryland, Inc. v. Pub. Serv. Commn*, 535 U.S. 635 (2002), for the proposition that the Eleventh Amendment is not implicated in this appeal and, thus, the Court should remand the case to the district court without deciding the substantive issues. *See* McCarthy Br. at 6-7, 15; U.S. Br. at 16-19. *Verizon*, however, is distinguishable and should not control this appeal.

The Supreme Court held in *Verizon* that a properly pleaded *Ex pane Young* action against state utility commissioners was not barred by the Eleventh Amendment when the substance of the commissioners' Eleventh-Amendment defense was that they had not violated federal law. *See* 535 U.S. at 646. The Supreme Court had no occasion to consider the issues raised in this appeal: whether the *Exparte Young* doctrine, which is an exception to States' Eleventh Amendment immunity, allows a State to be sued under an *invalid* federal statute or under a statute that provides no federal right of action. Allowing suit to go forward under these circumstances would ***3** be an affront to state sovereignty not even contemplated - much less condoned - by *Verizon.*

In *Verizon*, a telecommunications carrier sued members of the Maryland Public Service Commission in their official capacities, alleging that the Commissioners' order requiring the carrier to pay reciprocal compensation for calls to Internet service providers violated the Telecommunications Act of 1996. *See* 535 U.S. at 640. The Supreme Court held that the Eleventh Amendment did not bar a *Young* suit against the state utility commissioners to determine the parties' rights under a Telecommunications Act provision that no party questioned was a valid federal law. *Id.* at 646. Instead, the *Young* issue in *Verizon* was whether state commissioners correctly applied federal law. *See id.* at 650-51 & n.3 (Souter, J., concurring) (clarifying that Verizon's suit sought federal judicial review of the correctness of an adjudication by a "state commission *qua* federal regulator").[FN1]

FN1. indeed, the *Verizon* suit threatened no impermissible intrusion on state sovereignty because it was a suit against utility commissioners, much like *Ex pane Young* itself. 535 U.S. at 645 (recognizing pre-

> vious approvals of injunctions against "state regulatory commissioners"); *see also id.* at 648 (Kennedy, J., concurring); *id.* at 649-51 & n.3 (Souter, J., concurring). As Justice Souter emphasized in his concurrence, Verizon's suit for federal judicial review of an adjudication by a "state commission *qua* federal regulator" - as opposed to a suit against a State *qua* State - falls under a different category than cases like *Board of Trustees of the University of Alabama* v, *Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (2000), *College Savings Bank* v, *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Id.*, 535 U.S. 649-51 & n.3 (Souter, J., concurring).

***4** The Supreme Court rejected the argument that, because the carrier failed to demonstrate a violation of federal law, the Eleventh Amendment barred the carrier's *Young* suit:
In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

Id. at 645 (quoting *Idaho v. Coeurd'Alene Tribe of Idaho*, 521 U.S. 261,296 (1997)). Because the carrier's pleadings satisfied that standard, the Court held that the suit could proceed. *See id.*

Contrary to McCarthy's and the United States' arguments, the fact that McCarthy's complaint seeks prospective relief and alleges an ongoing violation of federal statutes is not sufficient, by itself, to avoid the Eleventh Amendment bar. The Supreme Court's requirement that the complaint "allege[] an ongoing violation of federal law," *id.*, presumes that such law must be valid and enforceable. Because Appellants (collectively, "Hale" or the "State") have demonstrated that the federal laws McCarthy seeks to enforce - Title II[FN2] of the ADA, § 504 of the Rehabilitation Act, and § 1396a(a)(3) of the Medicaid Act - are beyond Congress's power and/or ***5** unenforceable, McCarthy's suit is not a proper *Ex parte Young* action and cannot override Male's Eleventh Amendment immunity. Even though the constitutionality of a statute is not usually a jurisdictional issue, *see* U.S. Br. at 18 (citing *United States v. Lipscomb*, 299 F.3d 303, 350 (5th Cir. 2002)), it becomes one when the statute is sought to be enforced through *Ex parte Young*, because that doctrine is an exception to State's Eleventh Amendment immunity, which is a quasi-jurisdictional bar. *See Edelman v. Jordan*, 415 U.S. 651,678 (1974); *accord Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998).

> FN2. Although the parties have, throughout these proceedings, referred to Title II without qualification, it is evident that suit was brought under Title II(A), which contains the general provisions applicable to all state programs, and not under Title II(B), which concerns only transportation. Compare42 U.S.C. §§ 12131-12134 (TitleD(A))with 42 U.S.C. §§ 12141-165 (Title n(B)).

Verizon sought to prevent the *construction* of statutory or constitutional provisions from becoming an Eleventh Amendment issue: "the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 642 (internal quotations omitted). "[T]he inquiry into whether suit lies under *Ex parte Young does* not include an analysis of the *merits* of the claim." *Id.* at 646 (emphasis added). There is no indication that the Court intended its rule to apply when the *validity*, as opposed to the construction, of a statute was implicated.

And in this case, unlike *Verizon*, Hale is not asking the Court to analyze the *merits* of McCarthy's statutory claims. Instead, she is asking the Court to determine ***6** whether the federal statutes McCarthy is attempting to

enforce are valid, enforceable exercises of Congress's authority. If they are not, then McCarthy's suit is not a proper *Exparte Young* action and should not be allowed to proceed in the face of the.Eleventh Amendment.

In his *Verizon* concurrence, Justice Kennedy agreed with the result but cautioned that the Court's so-called "'straightforward inquiry"' is "deceptively simple" and should not be applied mechanically in every case. *Id.* at 648-49. Instead, "our *Ex pane Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Id.* at 649 (confirming that this cautious approach "whether stated in express terms or not, is the path followed in *Coeur d 'Alene* as well as in the many cases preceding it").

Indeed, McCarthy's and the United States' expansive reading of *Verizon* is incompatible with state sovereignty because it would prevent States from obtaining an immediate determination, via a motion to dismiss under Rule 12(b)(1), of the validity of the statute to be enforced. *See* FED. R. Civ. P. 12(b)(1). Even though States could bring a motion to dismiss under Rule 12(b)(6), such a motion would not challenge the court's subject-matter jurisdiction and, therefore, the State could not pursue an interlocutory, collateral-order appeal of the district court's denial of the ***7** motion. *See* 28 U.S.C. § 1291; *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-46 (1993) (discussing the interlocutory appealability of denials of Eleventh Amendment immunity and the importance of these appeals for vindicating the States' immunity from suit).

It is small comfort to note that the State should ultimately prevail against a party who attempts to enforce an invalid statute, since the State must nevertheless submit to the expense and indignity of trial on a claim that has no chance of success. Such a rule neither respects state sovereignty nor protects the supremacy of federal law - the central objective of the *Ex parte Young* doctrine - because it is beyond question that only *valid* federal law can be supreme. Instead, interpreting *Verizon* to allow Eleventh-Amendment challenges to the validity and enforceability of a federal statute would accord the proper deference to state sovereignty while detracting nothing from the supremacy of federal law.

B. The Court Should Decide the State's Constitutional Challenges in This Appeal.

The Eleventh Amendment is a jurisdictional constraint that affords the State immunity from suit. The United States erroneously urges this Court to disregard the substantial Eleventh Amendment and sovereign-immunity barriers to McCarthy's suit and to instead remand for consideration of the merits of McCarthy's claims under the Medicaid Act, Title II of the ADA, and § 504 of the Rehabilitation Act. *See* U.S. Br. ***8** at 19-21. But the Eleventh Amendment's jurisdictional threshold must be crossed before the State can be compelled to adjudicate the merits of McCarthy's claim.

The Eleventh Amendment's "withdrawal of jurisdiction" over suits against unconsenting States "effectively confers an immunity from suit." *Puerto Rico Aqueduct*, 506 U.S. at 144. Indeed, "[t]he very object and purpose of the I1th Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at 146. This sovereign interest is so great that denials of Eleventh Amendment immunity are interlocutorily appealable to ensure that States will "not be unduly burdened by litigation" and that "States' dignitary interests can be fully vindicated." *Id.*

The United States's suggested approach to this case contradicts fundamental Eleventh Amendment and sovereignty principles. Although the Supreme Court has deemed it appropriate, in narrow circumstances, to determine whether Congress intended a statute to apply to the States before assessing whether the statute validly abrogates the States' Eleventh Amendment immunity, *see, e.g., Vermont Agency of Natural Res.* v. *United States ex rel*

Stevens, 529 U.S. 765, 779-80 (2000),[FN3] the United States asks this Court to extend that principle beyond reason when it urges resolution of the *merits* of McCarthy's claim prior to consideration of the State's ***9** constitutional immunity from suit.

> FN3. The issue in *Vermont Agency* was whether a private individual may sue a State in federal court for an alleged violation of the False Claims Act. 529 U.S. at 768.

Contrary to the United States' characterization, whether Title II is valid § 5 legislation, for any purposes, is neither a novel nor a complex issue. In this circuit, there is no question that Title II was intended to apply to the States but fails, under § 5, to validly abrogate the States' immunity. *See Reickenbacker v. Foster, 274 F.3d 974, 983 (5th Cir. 2001). Indeed, when* Reickenbacker is congruence-and-proportionality rationale is applied to Title II's vague, anecdotal findings regarding the unconstitutional conduct of state *and local* governments combined, it is apparent that Title 11 fails § 5 scrutiny entirely, for any purpose. *See infra* Part II.B. Under these circumstances, subjecting the State to the burdens and indignities of litigation on the merits of McCarthy's claims cannot be squared with the Eleventh Amendment and with the States' residuary and inviolable sovereignty.

Although the validity of Title II as Commerce Clause legislation and its constitutionality under the Tenth Amendment, in contrast, are indeed novel issues, Texas does not share the United States' reluctance that this Court should be the first to decide them. Nor should any perceived inadequacies in the Appellees' briefing or in the district court's opinion deter the Court from deciding these important, and purely legal, Eleventh Amendment questions. Indeed, these issues need not have been decided by the district court at all and could have been raised for the first time ***10** on appeal. *See Edelman*, 415 U.S. at 678 ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *accord Calderon*, 523 U.S. at 745 n.2.

Accordingly, regardless of whether the Court decides to hold this case until the Supreme Court decides Tennessee v. Lane,[FN4] the Court should reject the United States's invitation to remand this case for consideration on the merits and should, instead, dismiss the suit on immunity grounds.

> FN4. The State agrees with the United States' suggestion that the Court delay a decision in this appeal until a decision is issued in *Lane*. If, in *Lane*, the Supreme Court holds that Title II validly abrogates state immunity, then the State would likely have no Eleventh Amendment immunity against the Title II claim. Even if the Court holds that Title II does not validly abrogate state immunity, which is the holding of *Reickenbacker*, the Supreme Court could conceivably provide additional guidance that might impact this appeal.

II. BECAUSE TITLE II OF THE ADA WAS NOT VALIDLY ENACTED, IT CANNOT FORM THE BASIS OF AN *EXPARTE YOUNG* SUIT.

Title II exceeds Congress's lawmaking power under § 5 of the Fourteenth Amendment and the Commerce Clause. Moreover, the Tenth Amendment prohibits federal laws - like Title II - that directly regulate States in their sovereign capacities. *Exparte Young* should not apply to subject States to suit for prospective relief under an invalid statute.

A. *Garrett's* Footnote 9 Does Not Mean That *Ex Pane Young* May Be Used To Enforce an Invalid Federal Law.

Determining whether an *Exparte Young* suit is permissible to enforce Title II ***11** and § 504 is not as easy as McCarthy, the United States, and the district court would like. The district court mistakenly relied upon *dicta* contained in a footnote of the Supreme Court's opinion in *Garrett* suggesting that, although Title I of the ADA did not validly abrogate States' immunity from suits for money damages, *Young* suits nevertheless may be used to enforce "standards" prescribed under Title I of the ADA.[FN5] See 531 U.S. at 968 n.9; 6R. 1117-18. In *Garrett*, of course, *Ex pane Young was not* at issue; instead, the only question was whether States could be sued for money damages under Title I. Moreover, in *Garrett* no party argued that Title I (as the State argues here regarding Title II) was invalid under § 5 *and* the Commerce Clause.

> FN5. In footnote 9, the *Garrett* Court seemed to assume that Title I was valid Commerce Clause legislation. *See* 531 U.S. at 369 ([Local governmental] entities are subject to private claims for damages under [Title I] without Congress' ever having to rely on § 5 of the Fourteenth Amendment

These distinctions are important because of the crucial difference between holding that a statute did not validly abrogate the States' immunity from suit for money damages and holding that a statute is invalid/or *any purpose* and, therefore, cannot be enforced against any defendant no matter what relief is sought. This difference is illustrated by the Supreme Court's recent § 5 decisions. *Garrett*, *Kimel*, and *Florida Prepaid* all concerned federal statutes that subjected the States to suits for money damages, and all determined that those statutes failed to pass muster under ***12** § 5. *See Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. 62 at 91, *Fla. Prepaid*, 527 U.S. 666 at 668, 691.

Yet, Section 5 limits more than merely Congress's ability to authorize suits for money damages against the States when they invoke their Eleventh-Amendment immunity. Federal statutes must pass § 5 scrutiny even when they apply to local governments - and, thus, no Eleventh-Amendment issue is presented - and even when they impose no monetary liability. For example, in *City ofBoerne v. Flores*, in which the Supreme Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), a city - not a Stale - was the defendant, and the plaintiff sought not money damages, but an injunction against the enforcement of the city's historic-preservation ordinance. See 521 U.S. 507, 512 (1997). Because Congress relied on § 5 in enacting the portions of RFRA challenged in *Boerne*, *id.* at 516, and, presumably, because RFRA was not within any other of Congress's enumerated powers, the Supreme Court applied § 5's congruence-and-proportionality test and held that RFRA was "beyond congressional authority," with no qualifications. *Id.* at 536. Yet, the parties' and the district court's reliance on footnote 9 of *Garrett* indicates a belief that even invalid statutes such as RFRA - could be enforced through *Ex parte Young*. The dicta in footnote 9 simply do not support such an incredible conclusion.

***13** The Supreme Court has never evaluated a private litigant's attempt to use *Young* to enforce a law that exceeds Congress's § 5 power to authorize suits for money damages against States, or that exceeds Congress's power under any grant of authority. And it is difficult to imagine that, if squarely confronted with the intrusive consequences of a suit to enforce a statute like Title II, the Supreme Court would permit this end run around state sovereignty. Thus, this Court should not permit an *Exparte Young* suit to enforce a statute, such as Title II, that this Court has already held fails to validly abrogate the States' Eleventh Amendment immunity from suits for damages, *see Reickenbacker*; 274 F.3d at 983, despite footnote 9. But, even if this Court elevates footnote 9's dicta to a holding, the Court should not extend such *dicta* to situations in which a statute is invalidybr *all purposes*, such as RFRA or Title II.

As Justice Kennedy recently cautioned, federal courts must not assume that private litigants have free rein to sue States for prospective enforcement of all federal laws. *See Verizon*, 535 U.S. at 648-49 (Kennedy, J., concur-

ring). "Were it otherwise, the Eleventh Amendment, and not *Ex parte Young*, would become the legal fiction." *Id.* at 649. This Court should ensure that the Eleventh Amendment is not relegated to a legal fiction. When a statute - like Title II - is beyond Congress's authority to enact, there is no constitutional basis to subject a State to suit under that statute. Because permitting *Young* suits based on statutes Congress lacked authority to enact ***14** would offend fundamental notions of federalism, the Court should hold that there is no Eleventh Amendment exception permitting prospective enforcement of federal laws - like Title II - that were not validly enacted for any purpose.

B. Title II Is Invalid § 5 **Legislation for All Purposes.**

The federal government possesses limited, enumerated powers *See City of Boerne*, 521 U.S. at 516 (citing *M'Culloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819)). Congress relied upon its powers under § 5 of the Fourteenth Amendment and the Commerce Clause in enacting the ADA. *See* 42 U.S.C. § 12101(b)(4). "[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid, 527* U.S. at 639.

This Court already determined in *Reickenbacker* that Title II failed both (1) to identify a pattern of Fourteenth Amendment violations by States, and, assuming such violations were identified, (2) to provide a congruent and proportional remedy. *See* 274 F.3d at 982-83. As the United States correctly notes, *Reickenbacker* apparently left open the possibility that Title 11 could be valid for other purposes, *i.e.*, as against local governmental entities that do not possess Eleventh Amendment immunity. *Id*, at 982 n.60. *Reickenbacker* suggests that, in order to determine the validity of Title II as a whole, it is necessary to examine whether Congress identified any evidence of ***15** constitutional violations by local governmental entities. *See id.*

When this inquiry is undertaken, it is apparent that Title II again - this time as a whole - fails to pass § 5 scrutiny. Tellingly, the United States cites **no** specific congressional findings or evidence of constitutional violations against the disabled by local governments. Instead, the United States relies solely on the conclusory and misleading statement, "As this Court observed in *Reickenbacker*, and as the Supreme Court noted in *Garrett*, the combined record is much more substantial than the predicate reviewed by this Court in *Reickenbacker"* U.S. Br. at 23-24. That statement mischaracterizes both *Garrett* and *Reickenbacker*. While those cases acknowledge that numerous examples of alleged discrimination by local governments are cited in the ADA's legislative history, they nowhere describe the entire record as "substantial" or otherwise discuss the *quality* of the evidence. *See Garrett*, 531 U.S. at 368-69; *Reickenbacker*, 274 F.3d at 982.

It is no accident that the United States fails to cite, in its brief, a single scrap of evidence of irrational discrimination on the part of local governments. In fact, the evidence regarding local governments suffers from the same defect as the evidence regarding States: that evidence is no more than "unexamined, anecdotal accounts of 'adverse disparate treatment"' by local officials. *Reickenbacker*, 274 F.3d at 982 (quotations omitted); *Garrett*, 531 U.S. at 370 (same). For instance, the example ***16** quoted in *Reickenbacker*, "discrimination against the mentally ill in city zoning process," is too vague and lacking in context to constitute evidence of irrational - and therefore unconstitutional - discrimination against the disabled. 274 F.3d at 982; *cf. Garrett*, 531 U.S. at 370. Similar inadequate examples abound in the ADA's legislative history.[FN6]

FN6. *See Garrett*, 531 U.S. at 392-93 (Breyer, J., dissenting) ("inaccessible public schools," "inaccessible public transportation," "failure to enforce building codes requiring access for persons with

> disabilities," "school placed child with cerebral palsy in special education classes," "child erroneously placed in special education classes," "state and local agencies disregarded laws requiring accessibility," "city failed to train employees how to communicate with people with hearing impairments," "inaccessible city hall," "school district retaliated against teacher for asking to be assigned to an accessible classroom." "lack of curb cuts: inaccessible nuhlic transnortatinn"

Having examined the *entire* legislative record, as instructed by *Reickenbacker*, and having found *no* evidence of a pattern of unconstitutional discrimination against the disabled by local governmental actors to combine with the inadequate record regarding state violations detailed in *Reickenbacker*, the Court should now reach the same conclusion it reached in *Reickenbacker*. Title II fails the congruence-and-proportionality test. *See* 274 F.3d at 983. However, because the Court has considered the entire legislative record, and not just alleged constitutional violations by the States, it should go one step farther and hold that Title II is invalid § 5 legislation for all purposes because it is not a congruent and proportional remedy for any pattern of unconstitutional conduct by state or local governments, its sole targets.

Title II suffers from the same defects as RFRA, which, as discussed above, was ***17** invalidated for all purposes in *Boerne*, The Court found two major flaws in RFRA. First, the legislative record revealed no particular history of religious discrimination through generally applicable laws. *See Boerne*, 521 U.S. at 530. And, more importantly, RFRA was aimed, not at preventing or remedying unconstitutional behavior, but rather at effecting "a substantive change in constitutional protections." *Id.* at 530-32. Like RFRA, Title It's legislative record is completely lacking in a pattern of irrational discrimination by governmental entities. And, like RFRA, Title II "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* Like RFRA, therefore,Title 11 is invalid § 5 legislation for all purposes.

Moreover, the Court should reject the United States' alternative argument, unsupported by any authority, that Title II can somehow be valid § 5 legislation "as applied to unjustified institutionalization." U.S. Br. at 25. As the United States correctly notes, the statute should be examined in all of its potential applications. *Id.* Even if the Court were to conduct an "as applied" inquiry, the United States cites to only two pieces of "evidence" in the ADA's legislative history, neither of which pertain to unjustified institutionalization. *See id.* at 28. Most of the United States' other "evidence" - which suffers from the same defects of vagueness and lack of context as the evidence detailed *supra* - is not even contained in the legislative ***18** history of the ADA, but in the legislative history of other statutes. *Id.* at 29-32. Thus, this "evidence" cannot be considered as having supported Congress's enactment of Title II. *See Fla. Prepaid*, 527 U.S. at 639 ("[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions.")

Much of United States' other evidence of disability discrimination has been plucked from Justice Marshall's concurrence in *City ofCIeburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *See, e.g.*, U.S. Br. at 26-27. It scarcely bears observing that Justice Marshall's concurrence is not the law, and surely it is not *evidence* on which Congress could have relied to justify Title IPs remedial measures. But there is a deeper irony at work. Justice Marshall concurred in the *result* of *Cleburne*, but he strenuously argued that the historical mistreatment of the disabled marked them for suspect-class treatment and some form of heightened scrutiny. *Cleburne*, 473 U.S. at 455-78 (Marshall, J., concurring in the judgment in part and dissenting in part). But Justice Marshall's view of the disabled as a suspect class did not prevail in *Cleburne*, as has been emphasized recently by *Garrett* and *Kirnel*. *See Garrett*, 121 S.Ct. at 963; *Kimel*, 528 U.S. at 83. The United States' attempt to justify Title II's remedial scope by repeated references to Justice Marshall's *Cleburne* concurrence is, therefore, utterly beside the

point.[FN7]

FN7. In its outdated historical essay, the United States goes so far as to invoke the bugbears of "eugenics," "Social Darwinism," and "compulsory sterilization laws," *see* U.S. Br. at 26-28, forgetting that *Garrett* concluded that "there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted." 531 U.S. at 369 n.6.

***19** Finally, even if there were evidence of a pattern of irrational unjustified institutionalization by state and local governments, Title II's "integration mandate" would not be a congruent and proportional response to this problem. First, the United States attempts to narrow the scope of Title II review by characterizing Title II's mandate as emanating from a mere "regulation." *See* U.S. Br. at 32-33. But, the Supreme Court made clear in *Olmsteadthat* Title II itself, and not just its regulations, prohibits unnecessary institutionalization. *See Olmstead v. Zimring*, 527 U.S. 581, 597 (1999) (plurality op.). It is clear that Title II's "integration mandate" reaches far beyond prohibiting irrational institutionalization of the disabled. In fact, it prohibits unnecessary institutionalization unless it would constitute a "fundamental alteration" of the government's program. *See id.* at 607. As *Reickenbacker* already held, this is a transparent attempt to do precisely what *Boerne* and *Garrett*, prohibit: redefine the requirements of the Fourteenth Amendment. *See Reickenbacker*, 274 F.3d at 983. In fact, far from advancing the congruence-and-proportionality of Title II, as the United States incorrectly argues, the fundamental-alteration defense "creat[es] another disjunction between the remedy and injury that contributes to the failure of Title II in the proportionality and congruence analysis." *Reickenbacker*, 274 F.3d at 983.

***20 C. Title II Is an Invalid Use of Congress's Commerce Power in This Instance.**

Instead of arguing that the State's decision whether to fund care for the mentally-retarded and the developmentally-disabled in institutions or in community-based settings is within reach of Congress's commerce power, the other parties to this appeal attempt to categorize the State activity as broader in scope so as to more easily satisfy the Commerce Clause standard. The Court should reject this sleight-of-hand and require those parties to demonstrate that the particular activity at issue in this case is within the commerce power. Because they cannot meet this standard, the Court should hold that the commerce power does not reach the State's funding decisions regarding care of the mentally retarded and developmentally disabled.[FN8]

FN8. McCarthy incorrectly asserts that the Supreme Court "implicitly" decided the Commerce Clause question in *Garrett* - despite the fact that the Commerce Clause was not at issue in *Garrett.* McCarthy Br. at 26-27; *see also supra* note 5.

1. The State's decisions regarding what type of care to fund are not economic in nature.

In defending Congress's power to reach the State's conduct through the commerce power, the other parties to this appeal argue only that the State's activity substantially affects interstate commerce. *See* McCarthy Br. at 27; U.S. Br. at 34; ADAPT Br. at 9. As to the first factor in the "substantially affects" test - whether the statute regulates "economic activity" - the United Stales argues that, because ***21** "nonprofit nursing homes and hospitals can engage in activity that substantially affects interstate commerce," the State activity in this case is economic in nature. U.S. Br. at 36. The State does not dispute that institutions could hypothetically engage in conduct that substantially affects interstate commerce. But the question in this case is different: do the State's decisions about what type of care to fund in fact - not hypothetically - have a substantial effect on interstate commerce? The United States' argument sheds no light on that question or on the question relevant to the first factor: whether the State's decision to primarily fund institutional rather than community-based care for the mentally retarded and

developmentally disabled is economic in nature.

Moreover, the United States' unsupported assertion that the State's funding decisions could be noneconomic "intrastate activity [that] is part of an economic regulatory scheme" should be rejected. First, the state programs and services targeted by Title II are not an "economic regulatory scheme." Second, the "economic regulatory scheme" advanced by the United States consists of eliminating disability discrimination from *employment* andp-wMc *accommodations*, areas that are not even regulated by Title II and are not related to the provision of public services.

ADAPT *et al.*, as amici curiae, also fail to address whether the State's funding decisions constitute "economic activity." Instead, they attempt to broaden the state ***22** conduct at issue to the administration of the Medicaid program as a whole, at the nationallevel. ADAPT Br. at 12-17. While it is undoubtedly true that the Medicaid program is large in scope, administers billions of dollars, and could conceivably have a substantial effect on interstate commerce, the State is not challenging the Medicaid program as a whole. Instead, the State challenges the "integration mandate" of Title 11 of the ADA as it applies to the State's funding of the care of the mentally retarded and the developmentally disabled in institutions. ADAPT's arguments do not address this issue.

Title II simply cannot meet the first prong because the activity at issue in this case - the manner in which Texas funds Medicaid services to persons with mental retardation and developmental disabilities - is simply not "economic" in nature. The other parties misplace reliance on *Groome Resources Ltd, v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), which upheld a provision of the Fair Housing Amendments Act (FHAA) prohibiting discrimination against the disabled. In *Groome*, a local zoning board failed to act on a commercial housing provider's application for a zoning variance, causing the provider to lose a contract of sale on a house. *See Groome*, 234 F.3d at 195-97. The zoning board argued that the FHAA was invalid Commerce Clause legislation. *See id.* This Court held that the suit could proceed because the FHAA satisfied both prongs of the test set out in ***23** *United States v. Lopez*, 514 U.S. 549(1995). *Id.* al216.

The other parties fail to recognize, however, that the FHAA provision in *Groome* - unlike Title II of the ADA - squarely fell within the *LopezlMorrison* rubric because: it regulated an "economic activity," 234 F.3d at 205-06 (observing that "it is a transparently commercial action to buy, sell, or rent a house," and the FHAA prohibits "an act of discrimination that directly interferes with a commercial transaction"); the legislative record included express references to the Act's effect on interstate commerce, *id.* at 213 n.3; and there was no need "to pile 'inference upon inference"' or use "several logical links to connect the regulated activity with commerce as in *Lopez* and *Morrison." Id.* at 215.

In holding that the FHAA fulfilled the first prong - that the regulated activity be "commercial" in nature - the court relied on the fact that the provider was a for-profit company engaged in the business of operating group homes. *See id.* at 195, 206. By contrast, neither McCarthy nor the State are engaged in a for-profit commercial activity. Thus, the "actors" lack commercial character. *See id.* at 204 (discussing *Lopez* and *Morrison).* McCarthy's attempt to rely on the commercial character of Medicaid providers is unavailing, because the State - and not the providers - are regulated by Title II. Thus, whether the State is a commercial actor when it determines how to fund care for the mentally retarded and developmentally ***24** disabled is The only relevant inquiry. *Cf. id. Groome* demonstrates what commercial character is necessary to survive Commerce Clause scrutiny and highlights that, in this case, such character is entirely lacking. Thus, the first prong of *Lopez* is not satisfied.

2. Whether Medicaid services are provided in an institution or in a community setting does not substan-

tially affect interstate commerce.

Title II similarly fails the second prong *of Lopez.* In *Groome*, the court relied on the commercial and interstate nature of renting and purchasing real property to show a substantial effect on interstate commerce. *Id*, at 206-08. By contrast, the other parties to this appeal fail to demonstrate that whether Medicaid services for the mentally retarded and the developmentally disabled are funded in an institution or in individual communities has any effect whatsoever on interstate commerce - much less the "substantial" effect required under the Commerce Clause. The other parties misplace reliance on this Court's recent decision in *United States v. Mississippi Department of Public Safety*, 321 F.3d 495 (5th Cir. 2003), and on congressional findings to demonstrate this essential element. *See* U.S. Br. at 43-45; McCarthy Br. at 31-33, ADAPT Br. at 19-22. But *Mississippi* concerned a Commerce Clause challenge to Title I - not Title II. And Title I, which deals with employment and regulates States only incidentally, as employers, has a much stronger link to interstate ***25** commerce than Title II, which regulates state programs and services alone. *Mississippi*, therefore, sheds no light on the constitutionality of Title II.

Similarly, the "findings'1 cited by the other parties are no evidence at all because they pertain only to Title I or Title III - not to Title II. *See* U.S. Br. at 43-45; 42 U.S.C. § 12101 (a) ("Findings"). It is telling that nowhere within the "vast" record compiled by Congress do the other parties identify a single legislative source reflecting any determination that discrimination in public services substantially affects interstate commerce. Nor has the State located such a finding in its independent review of Title II's legislative history.[FN9] Just as the "vast record" for the ADA failed to justify an exercise of Congress's § 5 power regarding Title I *(Garrett*, 531 U.S. at 968 n.9), or Title II *(Reickenbacker*, 274 F.3d at 981-83), nor does it ***26** support an exercise of Congress's Commerce Clause power regarding Title II's regulation of public services, programs, and activities.

> FN9. The only statutory finding directed at Title II's subject matter - *public* services, programs, and activities - relates to discrimination (a § 5 remedial goal), not interstate commerce. *See* 42 U.S.C. § 12101(3) (finding discrimination in "access to public services"). Presumably, the other parties suggest that - in theory - Congress's other, general discrimination findings might apply to public services. But Congress *did not* specifically apply those findings to public services and, therefore, they cannot justify Congress's enactment of Title II. Moreover, as will be discussed *infra*, none of these findings establish a substantial effect on interstate commerce because the leap from generalized findings of discrimination to interstate commerce relies on impermissibly attenuated reasoning.
>
> Moreover, even if Congress had found that inadequate access to public services substantially affects interstate commerce - which Congress did not do - that hypothetical finding would not end the inquiry. "[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614-15 (rejecting numerous legislative findings regarding the serious impact of gender-motivated violence on victims and their families because their link to commerce was too attenuated). Indeed, the Supreme Court reiterated, in both *Morrison* and *Lopez*, that "[sjimply because Congress may conclude that a particular activity substantially affects commerce does not necessarily make it so." *Id.* (quoting *Lopez*, 514 U.S. at 557 n.2) (quoting *Model v. Va. Surface Mining & Reclamation Ass'n, 452* U.S. 264, 311 (1981) (Rehnquist, J., concurring))).

Furthermore, McCarthy's claim that failure to provide community-based services will burden her working, shopping, and interstate travel, and the United States' claim that a prohibition on discrimination in public services is critical to Congress's legitimate regulation of employment and public accommodations, are perfect examples of

the piling of "inference upon inference" in order to find a substantial effect on commerce that was rejected in *Lopez* and *Morrison.* FN[FN10] *Cf. id.* at 215. For this independent reason, McCarthy's claims under Title II should not be allowed to proceed.

FN10. Plaintiffs' *reliance on Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McCIung,* 379 U.S. 294 (1964), is misplaced, as those cases dealt with commercial establishments-a hotel and a restaurant-and thus no piling of inferences was necessary.

3. Title IPs "integration mandate" violates the Tenth Amendment.

Finally, even if Title II were to constitute a legitimate exercise of the commerce power, it would be invalid because it violates the Tenth Amendment. *See* State's Br. at 26-28. Title IPs "integration mandate" impermissibly "require[s] the States to govern according to Congress's instructions." *New Yorkv, United States,* 505 U.S. 144, 162 (1992). The Unites States glosses over the fact that Title II is directed only at governmental entities, and not at private parties, explaining that the ADA as a ***27** whole is "generally applicable" to public and private entities alike because Title HI - not Title 11 - imposes requirements on public *accommodations.* U.S. Br. at 49-50.

But the State's funding decisions regarding care for the mentally retarded and developmentally disabled are not public accommodations (such as hotels and restaurants), and the Court should reject the United States' attempt to characterize Title II as "generally applicable" to public and private parties alike and thereby bring Title 11 within the permissible ambit of the statute upheld in *Reno v. Condon,* 528 U.S. 141 (2000). Title II - unlike Title 1 - is not a law of general application that incidentally affects the States. Instead, it prescribes requirements for *public* programs, services, and activities - thereby directly regulating the States in their sovereign capacities. This commandeering of state governmental processes and burdening of state fiscs cannot be squared with the federalism principles upon which this nation's constitutional framework rests. *See, e.g., Alden, 521* U.S. 745-54; *cf. State v. Rendon,* 832 So.2d 141, 146 n. 5 (Fla. 3d Dist. Ct. App. 2002).

III. EX PARTE YOUNG CANNOT BE USED TO ENFORCE § 504 OF THE REHABILITATION ACT AGAINST HALE BECAUSE THAT STATUTE IS INVALID UNDER THE SPENDING CLAUSE AS APPLIED TO HER.

McCarthy's response to the State's § 504 argument consists largely of an irrelevant discussion of whether the State waived its Eleventh Amendment immunity ***28** by accepting federal funds. McCarthy Br. at 37-39. The issue here is not whether the State waived its immunity, but whether Congress had the authority, pursuant to its spending power, to impose a condition unrelated to its grant of federal funds. If not, the statute could not form the basis of an *Ex parte Young* action and overcome the State's Eleventh Amendment immunity. *See* State's Br. at 28-31.

The portion of McCarthy's brief that does pertain to the issue in the case, however, pays only lip service to the Supreme Court's decision in *South Dakota v. Dole,* 483 U.S. 203 (1987), and admits no limitation whatsoever on Congress's spending power. McCarthy's argument reduces *Dole's* relatedness requirement to an empty shell. Supreme Court precedent deserves more credence.[FN11]

FN11. The United States references its briefing on *Dole's* relatedness requirement in its other § 504 appeals in this Court; the State notes that it too filed extensive briefing on this issue in those cases.

IV. MCCARTHY CANNOT ASSERT A "FEDERAL RIGHT" TO ENFORCE THE "DUE PROCESS"

PROVISION OF THE MEDIC AID ACT.

In her brief, McCarthy completely fails to address the State's central argument: that the district court's holding that McCarthy lacked a federal right to enforce the Medicaid Act's "reasonable promptness" provision precludes her from possessing a federal right to enforce the Act's due-process provision, which is a procedural device designed to protect against erroneous denials of the reasonable-promptness provision. *See* State's Br. at 15-18. Instead, McCarthy cites cases that have nothing to do with ***29** an initial entitlement to Medicaid waiver services, but instead deal with the withdrawal of waiver services from people already receiving them or with the initial entitlement to non-waiver services. SeeMcCarthyBr. at 14-15. These circumstances do not bear on the issue in this case. *See* State's Br. at 18.

Further, McCarthy essentially attempts to impermissibly change the allegations in her complaint on appeal. In her complaint, McCarthy failed to allege that slots were available in the waiver programs at issue. *See* 2R.222-73. That failure, which the district court apparently viewed as an admission that the programs were indeed full, was integral to its decision to dismiss some of her claims. *See* 6R.1110-11. McCarthy attempts to avoid the effect of her pleading error by alleging that she does not know whether any slots are *in fact* available. But that is a matter of proof, not of pleading. McCarthy was required to plead facts sufficient to assert a federal right enforceable through 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). She cannot now, on appeal, disavow the content of her pleadings.

"The Eleventh Amendment limits [a federal court's subject-matter jurisdiction under *Exparte Young]* to the enforcement of federal rights." *Frazar v. Gilbert*, 300 F.3d 530,543 (5th Cir. 2002), *cert, granted in part, Frewv. Hawkins*, 123 S.Ct. 1481 (2003). Accordingly, the Court should dismiss McCarthy's remaining Medicaid Act claim in this appeal.

***30** conclusion

McCarthy's claims under the Medicaid Act, Title II of the ADA, and § 504 of the Rehabilitation Act should be dismissed.

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 Fried 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 Chastain; Al, by and Through his Next
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