IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Civil Case No. C2-99-1097
v.	:	JUDGE HOLSCHUH
CITY OF COLUMBUS, OHIO, et al.,	:	MAGISTRATE JUDGE KING
Defendants.	:	

DEFENDANT CITY'S MEMORANDUM REGARDING SUPPLEMENTAL AUTHORITY

In its objections to the *Report and Recommendation*, defendant City of Columbus [hereinafter "City"] objected to that portion of the *Report and Recommendation* which determined that 42 U.S.C. § 14141 reflects a valid exercise of congressional power under § 5 of the Fourteenth Amendment. The City's argument is focused on whether § 14141 exhibits "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). Application of the "congruence and proportionality" test requires, *inter alia*, an examination of the legislative record in order to ascertain whether Congress has sufficiently identified the infringing conduct for which it has authorized a remedy. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 640-41 (1999). The United States Supreme Court just last week again addressed this legislative record inquiry in the context of Congress' § 5 authority in *Bd. of Trustees of the Univ. of Alabama v. Garrett*, No. 99-1240, 2001 U.S. LEXIS 1700 (Feb. 21, 2001) [hereinafter "*Garrett*"]. While this case also deals with issues inapplicable to the case at bar, such as sovereign immunity under the Eleventh Amendment and the scope of equal protection, it

provides valuable guidance on the analysis to be used by the courts in determining the propriety of legislation enacted pursuant to § 5 authority.

Section III of *Garrett* deals with the inadequacy of the legislative record to support any finding that there was a pattern of unconstitutional state action. In reaching that conclusion, the Court first notes that the legislative record contained only several incidents of refusal by state officials to make accommodations for the disabled as required by the ADA. *Garrett, supra*, at *24-25. "But even if it were determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of discrimination on which § 5 legislation must be based." *Id.*, at *25, citing *Kimel*, 528 U.S. at 89-91; *City of Boerne*, 521 U.S. at 530-31. What is significant about the Court's analysis is that it reaffirms that the legislative record must reflect a pattern of unconstitutional conduct on the part of the entity that will be subjected to the remedial legislation. While in *Garrett* the focus was on the State because the Eleventh Amendment was at issue in that case, in the instant case the focus entity is the City. The City has argued that there is a lack of *any* legislative record for 42 U.S.C. § 14141 evidencing a pattern of unconstitutional action—much less a pattern of unconstitutional action on the part of municipalities. And even if the indirect legislative history relied upon by plaintiff and amici is taken into account, such evidence falls far short of the level of evidence that the Court found insufficient in *Garrett*.

There has already been extensive briefing by the parties and amici on § 14141's legislative history, or lack thereof. The sole purpose of this memorandum is to note the application to this case of that portion of the *Garrett* decision that addresses the legislative record inquiry in the context of Congress' § 5 authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by facsimile and regular U.S. Mail, postage prepaid, to:

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