TASC/NAPAS

Fact Sheet on Congress's Commerce Clause Authority To Enact Title II of the Americans with Disabilities Act

July 2005

Prepared by the Disabilities Law Project and the Bazelon Center for Mental Health Law

In July 2001, a NAPAS Fact Sheet provided a discussion of Congress's authority under the Commerce Clause to enact Title II of the ADA. Since that time, there have been a number of significant developments, and it has become increasingly important for plaintiffs in Title II cases to be able to establish Commerce Clause authority to support the applications of the ADA that they are seeking to enforce. Accordingly, this quarterly Fact Sheet provides an update on case law developments concerning the scope of Congress's commerce power.

A. Background

The constitutionality of many applications of the ADA has come under attack in recent years. As part of a "new federalism" movement, state defendants in ADA cases have repeatedly challenged Congress's authority to pass parts of the ADA. Congress invoked its power under the Fourteenth Amendment and the Commerce Clause in passing the ADA. 42 U.S.C. §23202(b)(4). States have argued that Congress exceeded its authority under both of these powers in enacting portions of the ADA.

To date, the validity of the ADA as Fourteenth Amendment legislation has received far more scrutiny than the validity of the ADA as Commerce Clause legislation. Challenges to Congress's power to pass the ADA under Section 5 of the Fourteenth Amendment have been raised ever since the Supreme Court ruled in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress could not use its commerce power to abrogate states' sovereign immunity, leaving the Fourteenth Amendment as the only means by which sovereign immunity could be validly abrogated in ADA cases. Thereafter, states have argued that, under the Fourteenth Amendment, Congress had not validly abrogated their immunity and that damage claims could not be brought against state entities.

In *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Congress exceeded its power under Section 5 of the Fourteenth Amendment in applying Title I of the ADA to state entities. Following *Garrett*, appeals courts split in determining whether Title II of the ADA was valid Fourteenth Amendment legislation. In May 2004, the Supreme Court then held in *Tennessee v. Lane*, 541 U.S. 509 (2004), that Congress validly exercised its power under the Fourteenth Amendment to abrogate states' sovereign immunity in suits brought under Title II of the ADA involving access to courts.

Since *Lane*, however, a number of federal appeals courts have ruled in different ways regarding whether particular applications of Title II are valid Fourteenth Amendment legislation. *See, e.g.*, *Constantine v. Rectors and Visitors of George Mason Univ.*, No. 04-1410, 2005 WL 1384373, at * 12 (4th Cir. June 13, 2005) (Title II valid Fourteenth Amendment legislation with respect to public higher education); *Association for Disabled Americans v. Florida International Univ.*, 405 F.3d 954, 959 (11th Cir. 2005) (same); *Bill M. v. Nebraska Dep't of Health & Human Servs. Finance & Support*, 408 F.3d 1096, 1100 (8th Cir. 2005) (in context of community integration case, refusing to disturb pre-*Lane* ruling that Title II in its entirety is invalid Fourteenth Amendment legislation but suggesting that en banc court might determine that *Lane* supersedes previous circuit precedent); *Miller v. King*, 384 F.3d 1248, 1275-76 (11th Cir. 2004) (Title II not valid Fourteenth Amendment legislation with respect to state prisons); *Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791, 792-93 (9th Cir. 2004) (Title II in its entirety is valid Fourteenth Amendment legislation). The Supreme Court is scheduled in its upcoming term to hear *Goodman v. Georgia*, No. 04-1236, presenting the issue of whether Title II is valid Fourteenth Amendment legislation with respect to state prisons.

While states initially challenged the Fourteenth Amendment validity of the ADA as part of their efforts to assert sovereign immunity and avoid liability for

damage claims, some states now have broadened their constitutional attacks. A determination that part of the ADA is not valid Fourteenth Amendment legislation has broader ramifications than the abrogation of states' immunity. In such a case, the only possible remaining constitutional authority for that application must be the Commerce Clause. Thus, some states have begun arguing that parts of the ADA are neither valid Fourteenth Amendment legislation nor valid Commerce Clause legislation, and therefore no cause of action exists – whether seeking damages or otherwise -- for those applications.[1]

[1] There is some possibility that the Commerce Clause may not be the only remaining constitutional basis for a portion of the ADA that a court has found does not validly abrogate states' sovereign immunity. Arguably, if the Fourteenth Amendment analysis of a law considers only the history of state-sponsored discrimination against people with disabilities and does not consider local government discrimination, there may still be a basis for arguing that the law is valid Fourteenth Amendment legislation with respect to local government conduct, even if it does not abrogate states' sovereign immunity. In *Garrett*, for example, the Court refused to consider the history of local government discrimination underpinning Title I, stating that only state discrimination was relevant since the Court was considering whether states' immunity had been abrogated. 531 U.S. at 369. In *Lane*, on the other hand, the Court did consider the history of local government discrimination underpinning Title II. 541 U.S. at 527 n. 16.

Some courts have effectively invalidated certain ADA claims on the ground that no valid source of Congressional authority exists for those claims. For example, in *Pierce v. King*, 918 F. Supp. 932, 938-42 (E.D.N.C. 1996), *aff'd on other grounds*, 131 F.3d 136 (4th Cir. 1997), *vacated and remanded on other grounds*, 525 U.S. 802 (1998), Judge Terrence Boyle, currently a nominee for the Fourth Circuit, concluded that Title II of the ADA was neither valid Fourteenth Amendment legislation nor was its application to state prisons valid commerce legislation, and, therefore, state prisoners could not bring ADA Title II claims challenging discrimination by the prisons. In *Klingler v. Dep't of Revenue*, 366 F.3d 614 (8th Cir. 2004), *cert granted, vacated and remanded*, 2005 WL 1383725 (June 13, 2005), the Eighth Circuit, having previously held that Title II was not valid Fourteenth Amendment legislation, concluded that Title II was not valid Commerce legislation with respect to surcharges for handicapped parking placards. In *McCarthy v. Hawkins*, 381 F.3d 407, 417-33 (5th Cir. 2004), Judge Garza filed a dissenting opinion concluding that plaintiffs could not bring their integration mandate claims because Title II was not valid Fourteenth Amendment legislation, nor was it valid commerce legislation to the extent that it regulated who participates in state entitlement programs.

These opinions make it clear that the need to establish Commerce Clause authority to support ADA claims is critical for plaintiffs raising ADA Title II claims.

After *Lane*, ADA plaintiffs face the possible risk that courts will find no Fourteenth Amendment authority for some applications of Title II. If the application at issue is found to be beyond Congress's Fourteenth Amendment power, the Commerce Clause power will be the only possible source of authority for the law. If the court finds that there is no commerce authority for the application, however, the plaintiff will be unable to pursue the claim at all.

B. The Significance of *Ex parte Young* Claims

In *Garrett*, the Supreme Court included a footnote explaining that, even though Congress did not validly abrogate states' immunity under Title I of the ADA, Title I still prescribes standards applicable to the states, and Title I claims for prospective injunctive relief could still be brought against state officials under the doctrine of *Ex parte Young*. *Garrett*, 531 U.S. at 32 n.9. *Ex parte Young*, 209 U.S. 123 (1908), permits actions for prospective injunctive relief against state officials in their official capacity where sovereign immunity would bar a suit directly against the state.

The availability of *Ex parte Young* claims does not eliminate the requirement that Congress have a source of authority for the law. The *Garrett* footnote suggests that Congress did have a valid source of authority for Title I claims apart from the Fourteenth Amendment. Indeed, since Title I covers employment, which clearly has a substantial effect on interstate commerce, there is little doubt about Title I's validity as

commerce legislation. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226 (1983) (Age Discrimination in Employment Act is valid commerce legislation). Some courts considering the constitutional underpinnings of Title II of the ADA, however, seem to be less ready to conclude that particular applications of Title II are valid commerce legislation.

C. The Supreme Court's Commerce Clause Jurisprudence

For many years, beginning with cases upholding Congress's authority to enact New Deal programs, Supreme Court's decisions afforded Congress extremely broad latitude in using its Commerce Clause power to legislate. For a discussion of significant case law defining the scope of Congress's commerce power, see our June 2001 Fact Sheet, available on the NAPAS website. As noted in that discussion, two relatively recent cases, *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), significantly curtailed Congress's power to legislate under the Commerce Clause.

1. *Lopez* and *Morrison*

In *Lopez*, the Supreme Court held that Congress lacked the power to restrict the possession of guns in areas near schools because the regulated conduct did not involve the channels or instrumentalities of commerce and did not have a substantial relation to interstate commerce. 514 U.S. at 559-61. The Court rejected arguments that

violent crime substantially affects commerce because (1) it has significant costs that are spread throughout the population; (2) it reduces people's willingness to travel to areas perceived as unsafe; and (3) having guns in schools would hinder education and ultimately affect commerce. *Id*. at 564. The Court declined to "pile inference upon inference" to support a connection to interstate commerce that the Court found too tenuous. 514 U.S. at 560-69. In *Morrison*, the Court found that Congress lacked commerce authority to pass the Violence Against Women Act because the statute did not involve the channels or instrumentalities of commerce and since gender-based violence does not have a substantial effect on interstate commerce because it is not economic activity. *Id*. at 609, 613.

In *Lopez* and *Morrison*, the Court set forth a series of specific factors to be considered in determining whether Congress has acted within the scope of its commerce power. In *Lopez*, the Court read its previous cases to allow Congress to use its commerce power to regulate three broad areas of activity: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Id*. at 558-59. In *Morrison*, the Court set forth four factors to be considered in evaluating whether Congress's regulation of an activity substantially affects interstate commerce: (1) whether the activity is economic in nature; (2)

whether the statute contains a jurisdictional element limiting its reach to activities having an explicit connection with, or affect on, interstate commerce; (3) whether Congress made express findings concerning the effects of the activity on interstate commerce; and (4) whether the link between the activity and interstate commerce is too attenuated. 529 U.S. at 610-12.

2. *Raich*

Just last month, the Supreme Court issued a very significant Commerce Clause ruling that signaled a shift away from the direction in which the Court headed in *Lopez* and *Morrison*. In *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), in a 6-3 opinion authored by Justice Stevens, the Court seemed to take an expansive view of Congress's commerce power, relying heavily on a 1942 case that has been widely viewed as among the most permissive of the Court's cases allowing Congress broad latitude to legislate under its commerce authority. *Raich* involved a challenge to Congress's authority, under the Controlled Substances Act, to regulate the possession of marijuana cultivated and used for medicinal purposes pursuant to a doctor's prescription as permitted by California law.

The *Raich* plaintiffs were being treated by licensed and certified doctors who had concluded, after prescribing many conventional medicines to treat the women's conditions, that marijuana was the only drug that provided effective treatment. 125 S.

Ct. at 2200. After a loss in the district court, the Ninth Circuit ruled in their favor, finding that they "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress's Commerce Clause authority." *Id*. at 2201. Relying on *Lopez* and *Morrison*, the Ninth Circuit concluded that the intrastate, noncommercial cultivation and possession of marijuana for personal medical purposes as recommended by a physician constituted a "separate and distinct class of activities" different from drug trafficking and other activities that are properly regulated by the Controlled Substances Act. *Id.*

The Supreme Court then reversed, noting that "[w]ell-settled law controls our answer." *Id*. The Court discussed the history of Congress's attempts to regulate the possession, use, and sale of drugs as part of a "war on drugs" aimed at the national drug market. The Controlled Substances Act, which was part of the Comprehensive Drug Abuse Prevention and Control Act, repealed most earlier anti-drug laws and created a comprehensive regime to fight interstate and international traffic in illegal drugs. *Id*. at 2203. Congress made a number of findings in the law, including that incidents of controlled substance traffic "which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce" for a number of specified reasons, and that "[l]ocal distribution and possession of controlled

substances contribute to swelling the interstate traffic in such substances." *Id*. at 2203 n. 20.

The plaintiffs argued that, while most of the CSA is proper commerce legislation, the categorical bar on possessing and manufacturing marijuana, as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law, is beyond Congress's commerce authority. The Court disagreed, stating that its "case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id*. at 2205. The Court noted that it had never required Congress to legislate with "scientific exactitude," and Congress may regulate a class of activities when it decides that the "total incidence" of a practice poses a threat to a national market. Id. at 2206.

The Court observed that the facts of this case bore a striking resemblance to the facts in *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the Court upheld Congress's authority under the Commerce Clause to regulate the growing of wheat purely for a farmer's personal consumption. The Court had reasoned that the statute was intended to restrict the amount of wheat that could be produced for the market as well as the extent to which a person could forestall resort to the market by producing to meet his own needs. While *Wickar*d's contribution to the demand for wheat might

be trivial by itself, taken together with the contributions of others similarly situated, the result was far from trivial. 125 S. Ct. at 2206 (citing *Wickard*, 317 U.S. at 127-28). The Court noted that *Raich* and *Wickard* were similar in that both involved the cultivation, for home consumption, of a fungible commodity for which there is an established interstate market; both involved statutes that were designed to control the volume of the commodity moving in interstate and foreign commerce in order to control supply, demand, and prices; and the production of the commodity for home consumption has a substantial effect on supply and demand in the national market for that commodity. 125 S. Ct. at 2206-07.

The Court dismissed the plaintiffs' contention that the CSA could not be constitutionally applied to their activities because Congress had not made a specific finding that the intrastate cultivation and possession of marijuana for medical purposes would substantially affect the larger interstate drug market. The Court stated that, while findings are helpful in reviewing a statutory scheme, it had "never required Congress to make particularized findings in order to legislate." *Id*. at 2208. The Court went on to note that it need not determine whether the plaintiffs' activities, when taken in the aggregate, in fact substantially affect interstate commerce. Rather, the Court must determine "only whether a 'rational basis' exists for so concluding." *Id*. Here, Congress had a rational basis because of (1) the enforcement difficulties of

distinguishing between locally grown marijuana and marijuana grown elsewhere; and (2) concerns about diversion of marijuana into illicit channels. *Id*. at 2209.

The Court chastised the plaintiffs for reading *Lopez* and *Morrison* far too broadly and overlooking the larger context of modern Commerce Clause jurisprudence. It pointed out that, in both *Lopez* and *Morrison*, the party challenging the statute argued that a statute or a provision fell outside of Congress's commerce power in its entirety. The Court stated that this distinction was "pivotal, for we have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to 'excise, as trivial, individual instances' of the class.'" *Id*. According to the Court, unlike the activities regulated in *Lopez* and *Morrison*, the activities regulated here were quintessentially economic, citing a definition of "economics" as "the production, distribution, and consumption of commodities." *Id*. at 2211.

The Ninth Circuit was able to conclude that the activity was non-economic and non-commercial only by isolating a particular class of activities. Even if there were differences between these activities and others regulated by the CSA that were sufficient to justify a policy decision to exempt this class of activities from the reach of the CSA, the only question is whether Congress's policy judgment to do otherwise

was constitutional. The Court concluded that Congress acted rationally in determining that this class of activities was an essential part of a larger regulatory scheme. *Id*.

D. Cases in Which Courts Have Considered the Commerce Basis of the ADA

1. Handicapped Parking Placard Fees

Only a handful of cases to date have considered whether Congress had authority to enact parts of Title II of the ADA (or any other part of the ADA) under the Commerce Clause. Most recently, the Eighth Circuit held that Congress had no commerce authority to prohibit a $2 per year surcharges for handicapped parking placards. *Klingler v. Dep't of Revenue*, 366 F.3d 614 (8th Cir. 2004). The parking placards, displayed in the windshield of a vehicle, allowed people with physical disabilities to park in reserved spaces close to the entrances of buildings. The court applied the standards set forth in *Lopez* and *Morrison* to conclude that Congress had exceeded its commerce authority to the extent that Title II applies to prohibit the surcharges.[2]

[2] While acknowledging that where a case can be decided without deciding constitutional questions, those questions should generally be avoided, the court concluded that "this is one of those rare occasions where the appropriate resolution of the constitutional issue is reasonably straightforward and determinate and the resolution of the statutory issue is, by contrast, difficult and complex." 366 F.3d at 616. Accordingly, the court decided the case on constitutional grounds and declined to decide whether Title II of the ADA actually prohibits the imposition of surcharges for handicapped parking placards.

The court rejected plaintiffs' contention that Title II as a whole is valid commerce legislation and instead posed the issue as "whether the statute's application to the regulated activity in the case at hand is a valid one." *Id*. at 617. Without any discussion, the court dismissed the notion that the regulated activity in this case fit within either of the first two *Lopez* categories – the channels of commerce or the instrumentalities of commerce (people or things in interstate commerce). *Id*. Oddly, if any case would seem to concern the channels or instrumentalities of commerce, it would be this type of case, which concerns the use of streets and roads to get to commercial establishments, and the vehicles that transport people to those establishments.

The court turned to the *Morrison* factors to determine whether the regulated activity substantially affects interstate commerce. First, it concluded that the activity is not commercial or economic in nature. While the activity was economic in the sense that the state collected money for the parking placards, the court stated that the test should be whether the activity was commercial, "in the sense of being closely connected to some national market," rather than "simply any broadly understood concept of 'economic.'" *Id*.[3] The court decided that a government's activity of non-

[3] Notably, this standard seems inconsistent with *Raich*'s broad definition of "economic." 125 S. Ct. at 2211.

profit revenue collection could not be classified as commercial. *Id*. at 618. Second, the court noted that Title II of the ADA contains no express jurisdictional element requiring a case-by-case showing of a nexus between the regulated activity and interstate commerce.[4]

Third, the court found that there were no specific congressional findings in Title II that this type of parking placard fees affects commerce. The court acknowledged that Congress had expressly invoked its commerce authority to address discrimination, that Congress had found in the statute that "the continuing existence of unfair and unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity," and had included additional findings in the legislative history concerning the effects of disability discrimination on the economy. The court also acknowledged that congressional findings are not required. Nonetheless, the court felt that there was no obvious substantial relation between the placard surcharge and interstate commerce, and the findings concerning the general economic effects of disability discrimination

[4] In *Raich*, the Court did not even consider the presence or absence of an express jurisdictional element limiting the statute's reach to activities with a nexus to interstate commerce.

"do not lend much support" to the propriety of using commerce authority to prohibit the surcharges. *Id.* at 618.[5]

Finally, the court concluded that the link between the parking placard surcharge and a substantial effect on interstate commerce is attenuated. While the court agreed that people with mobility impairments could engage in many economic transactions more flexibly and conveniently with a placard, the court noted that the issue was not whether the *absence* of placards would substantially affect commerce but whether the *$2 surcharge* for placards would substantially affect commerce. The court found that the impact of the surcharge was much more speculative than the impact of racial discrimination at issue in its cases finding that Congress could use its commerce power to regulate race discrimination in public accommodations. While racially exclusive policies blocked a great number of potential economic transactions, the court found that the nominal placard fee "is unlikely to deter any significant number of people" from buying them and increasing their ability to engage in economic transactions. *Id*. at 619. The court indicated that the one way in which the surcharge could be deemed to have a substantial effect on interstate commerce is that the accumulation of surcharge fees collected from thousands of people with disabilities

[5] Some of the findings concerning the impact of disability discrimination on the national economy are far more specific than the findings that the Supreme Court cited in *Raich* to bolster Congress's use of its commerce authority to regulate the cultivation of marijuana for personal use.

would have presumably flowed into the channels of interstate commerce had it not gone to the state. Nonetheless, the court decided that this effect was too indirect and remote and would "effectually obliterate the distinction between what is national and what is local." *Id*. at 620 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Significantly, last month the Supreme Court granted *certiorari* in *Klingler* and vacated and remanded in light of both *Raich* and *Lane* (*Lane* is relevant because the Eighth Circuit had ruled in *Klingler* prior to *Lane* that, consistent with circuit precedent, Title II as a whole was not valid Fourteenth Amendment legislation). 2005 WL 1383725 (June 13, 2005). It remains to be seen what the Eighth Circuit will do on remand, but *Raich* and the Supreme Court's remand cast serious doubts on the viability of the *Klingler* decision concerning commerce authority.

2. <u>Prison Work Programs</u>

In a case brought long before challenges to Congress's commerce authority to pass the ADA became a subject of serious discussion, one district court concluded that Congress had no authority under either the Commerce Clause or the Fourteenth Amendment to apply Title II of the ADA to the claims of state prisoners. In *Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996), the court considered ADA and constitutional claims brought by a prisoner claiming, among other things, that he was excluded due

to his disabilities from prison work programs that would have enabled him to earn good time credit.

The court did not consider the merits of plaintiff's claims, but instead reached out to conclude that Title II provided no cause of action for discrimination by state prisons because Congress lacked a constitutional basis to apply the ADA to state prisons. In considering the commerce basis for Title II, the court stated that a state's prison labor pool is not a channel of interstate commerce and does not involve instrumentalities of commerce, or people or things in interstate commerce. The court observed that a state's use of prison labor has a number of effects on interstate commerce (for example, prison labor is used to maintain roads and construction, to engage in light manufacturing, and as a means of providing job skills and training to inmates, and the incarceration of prisoners also removes them from participation in commerce). *Id*. at 939. Nonetheless, the court declined to "pile inference upon inference" to find a substantial relation to interstate commerce.

The court read *Lopez* to mean that "the concept of substantiality is informed in part by traditional understandings of the proper roles of the federal government, the state governments, and the individual." *Id*. It based this reading on statements in *Lopez* expressing concern about federal government intrusion into "areas such as criminal law or education where States historically have been sovereign." *Id*. (citing

Lopez, 115 S. Ct. at 1632). Finding that a state's control and direction over prison labor has traditionally been an element of state sovereignty, the court concluded that there was no substantial effect on interstate commerce: "Whatever the effects of prison labor upon interstate commerce might be, they are not sufficiently substantial as an objective matter, and are wholly insubstantial within the context of our nation's federalist traditions, to legitimate application of labor laws such as the ADA and state prisons." *Id*. at 940.

The *Pierce* decision was affirmed on a different ground – that the text of the ADA does not cover state prisons. 131 F.3d 136 (4th Cir. 1997). That decision was subsequently vacated and remanded by the Supreme Court after it had ruled that the ADA did cover state prisons. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). The district court's ruling in *Pierce* is disturbing, however, because it appears to resurrect a doctrine overruled by the Supreme Court years ago. In *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), the Court overruled its prior decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which it had found that Congress could not use its commerce power to regulate areas involving states' "traditional government functions." *Garcia* ruled that this standard was unworkable. *Pierce* does not mention *Usery* or *Garcia*, and seems to be in direct conflict with *Garcia*.

3. Community Integration

In *McCarthy v. Hawkins*, 481 F.3d 407 (5th Cir. 2004), the Fifth Circuit declined to consider a Commerce Clause challenge to Title II's integration mandate. In that case, plaintiffs with developmental disabilities brought *Olmstead* and Medicaid claims challenging Texas's failure to provide sufficient community-based services. Plaintiffs sought access to Texas's home and community-based waivers for people with mental retardation and other developmental disabilities. After the district court declined to dismiss plaintiffs' claims on Eleventh Amendment immunity grounds, defendants took an interlocutory appeal. On appeal, they challenged the Commerce Clause basis as well as the Fourteenth Amendment basis for this application of the ADA. The appeals court ruled that the only issue properly before it on the interlocutory appeal was whether plaintiffs' claims were barred by Eleventh Amendment immunity or whether plaintiffs could proceed with *Ex parte Young* claims, and it could not consider a broader constitutional challenge. *Id*. at 415-17.

Judge Emilio Garza, who is widely considered to be a potential candidate for nomination to the Supreme Court, authored a lengthy dissent arguing that the constitutional bases of the statute must be considered in the course of determining whether plaintiffs could proceed with *Ex parte Young* claims, and that neither the

Fourteenth Amendment nor the Commerce Clause authorized the plaintiffs' Title II cause of action.

Judge Garza focused much of his Commerce Clause analysis on Title II as a whole. He began by stating that Title II cannot be justified under the authority to regulate "channels" or "instrumentalities" of interstate commerce because "it solely regulates intrastate activity." *Id*. at 427. In determining whether Title II has a substantial effect on interstate commerce, Garza rejected the contention that Title II is a regulation of an economic enterprise because public entities engage in various commercial activities such as hiring staff, buying or renting facilities, and borrowing money. He concluded that Title II does not regulate any of these things, but merely regulates decisions about who receives the benefits of social services. *Id*. at 428.

Judge Garza next rejected the argument that Title II affects interstate commerce because when people with disabilities are denied access to public services it affects their ability to engage in economic activity. He stated that the "relevant question is not whether the regulated activity affects commerce, it is whether the regulated activity *is* commerce." *Id*. at 419. Only when an activity is determined to be economic does the question arise whether it substantially affects interstate commerce. Finally, Judge Garza considered the argument that the ADA is a comprehensive economic regulation of the activities of people with disabilities in the national

economy and that in providing services, states often compete with private entities. He acknowledged that the ADA as a whole is commerce legislation but argued that Title II is not an integral part of the ADA's economic regulation, as states do not compete with private entities in the provision of services. *Id*. at 430-31.

Judge Garza similarly found that the other factors failed to support Congress's commerce authority for Title II. Title II contains no jurisdictional element, in contrast to Title III, which limits the regulation of public accommodations to those involved in commerce. *Id*. at 432. While Congress made findings that the purpose of the ADA is to regulate interstate commerce and that disability discrimination leads to unnecessary costs, Congress did not make express findings connecting disability discrimination in the provision of social services to interstate commerce. *Id*. Lastly, Judge Garza found inapplicable the question of whether the link between Title II's regulated activities and interstate commerce is too attenuated. This factor, according to Garza, only comes into play if Congress is regulating economic activity. *Id*. at 432-33.

One Seventh Circuit case does state that Title II of the ADA is valid commerce legislation, but it contains no substantive reasoning to explain the conclusion. *Walker v. Snyder*, 213 F.3d 244 (7th Cir. 2000), involved a challenge to state prison officials' failure to provide a visually impaired inmate with accommodations to enable him to read books. The court observed that the Commerce Clause gives Congress authority

to enact Title II, but held that state officials were not proper defendants because the ADA only applied to "public entities" and not public officials.[6] 213 F.3d at 345. *See also Stanley v. Litscher*, 213 F.3d 340, 343-33 (7th Cir. 2000) (noting commerce authority for Title II). While we are unaware of other cases holding that Title II or parts of it are valid commerce legislation, there is a helpful Fifth Circuit case holding that the Fair Housing Amendments Act is valid commerce legislation. This case, *Groome Resources, Ltd. V. Parish of Jefferson*, 234 F.3d 192, 211 (5th Cir. 2000), is discussed in our July 2001 Fact Sheet, available on the NAPAS website.

E. Implications of recent case law developments for the ADA

While the small number of cases considering Congress's commerce power to enact Title II are not particularly encouraging, the Supreme Court's recent decision in *Raich* signals that courts may take a much different view of the scope of the commerce power now that the Supreme Court has cautioned against reading *Lopez* and *Morrison* "far too broadly." *Raich* is likely to be helpful in a number of specific respects in challenges to the commerce basis for Title II. For example:

[6] The conclusion that Title II does not authorize *Ex parte Young* suits against state officials in their official capacity was later rejected by the Seventh Circuit. *Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003).

* *Raich* makes clear that a broad definition of "economic" must be used in determining whether regulated activities are "economic activity." This is a more helpful formulation than is found in the Commerce Clause cases rejecting a broad definition of "economic" as too all-encompassing, such as *Klingler*. Under the *Raich* definition – the production, distribution, and consumption of commodities – *Klingler* (distribution of parking placards for a fee), *Pierce* (prison labor and production of goods), and *McCarthy* (provision of housing and services in institutional and community settings) would all seem to involve regulation of economic activity.

* Raich makes clear that Congress need not make specific findings establishing a connection between the particular activity regulated and interstate commerce. Given the broad scope of activities regulated by Title II, it is inconceivable that Congress could make findings concerning every possible application of Title II. Yet *Klingler*, *Pierce*, and the *McCarthy* dissent all made much of the absence of such findings. *Raich* suggests, however, that the more general findings in the ADA and its legislative history concerning the effects of discrimination on the national economy should suffice to show that Congress rationally perceived a substantial effect on interstate commerce (and of course, findings are not required but are merely one factor to be considered).

* *Raich* makes clear that ADA plaintiffs need not prove that any application of Title II has a substantial effect on interstate commerce, but merely that Congress was rational in believing that it does, or that it is an essential part of a regulatory scheme that does.

* *Raich* makes clear that particular applications of a statute cannot be excised as beyond Congress's commerce authority. It suggests that courts must look only at a whole statute or a statutory provision, but cannot isolate a particular application of the statute in determining whether it is valid commerce legislation (in contrast to the as-applied analysis that the Court has required for Fourteenth Amendment legislation). Because Title II contains

only a broad non-discrimination provision that is fleshed out in regulations, *Raich* suggests that any Commerce Clause analysis must focus on the broad anti-discrimination provision than on a particular application of it.

* *Raich* makes clear that the absence of an express jurisdictional element limiting the application of Title II to activities with a substantial relation to interstate commerce is not of critical importance. A jurisdictional element is not required for valid commerce legislation, of course. *Raich*'s failure to include any mention at all of the jurisdictional element factor in determining that the legislation at issue was valid commerce legislation suggests that this factor should not be given much weight.

Fortunately, the case law considering the commerce authority for Title II, which has been based primarily on *Lopez* and *Morrison*, has remained largely undeveloped. Now that *Raich* has signaled that Congress's commerce power is not as limited as courts had read *Lopez* and *Morrison* to suggest, disability advocates have a much stronger framework to use in defending Title II against Commerce Clause challenges.