No. 24-249

In the Supreme Court of the United States

A.J.T., BY AND THROUGH HER PARENTS, A.T. & G.T.,

Petitioner,

v.

OSSEO AREA SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 279, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF TENNESSEE AND SIX OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Petitioner states the question presented as:

Whether the ADA and Rehabilitation Act require children with disabilities to satisfy a uniquely stringent "bad faith or gross misjudgment" standard when seeking relief for discrimination relating to their education.

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INTEREST OF *AMICI CURIAE*

The *amici* States have a significant interest in safeguarding their sovereign power to structure state policies and programs. Ensuring that Congress regulates only within the bounds of its limited authority protects States from unlawful federal incursion and avoids the unjustified imposition of liability.

Reading an intent requirement out of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act is unsound legally and unworkable practically. A no-intent approach conflicts with the operative provisions' plain meaning and with traditional interpretive canons. It would invade the States' traditional prerogative to draw rational distinctions in the provision of state services based on disability. And it would allow courts to superintend state decision-making in nearly every context across the country—from prison cafeterias to school playgrounds to public hospitals.

Section 504 and Title II bar intentional discrimination. *See Monahan v. Nebraska*, 687 F.2d 1164, 1170-71 (8th Cir. 1982). They are not, as Petitioner would have it, tools for second-guessing States' sensitive decisions about how to allocate finite resources in areas of traditional state sovereignty. The *amici* States urge the Court to adopt an interpretation of Section 504 and Title II that respects ordinary statutory meaning and the balance of power between the States and federal government.

SUMMARY OF THE ARGUMENT

A series of oft-applied interpretive canons counsel against an interpretation of Section 504 and Title II that would impose discrimination-based liability sans any showing of discriminatory intent.

I. Distinct interpretive rules apply when Congress legislates in areas implicating States' core sovereignty interests. A set of State-protective canons—the Spending Clause clear-statement rule and federalism canon—dictate that clear text must support Petitioner's claim that discriminatory intent isn't a requisite for establishing a Section 504 or Title II violation. But the only clear text points the other way.

A. The Spending Clause clear-statement rule requires Congress to speak clearly when it imposes conditions on a State's acceptance of federal funding. Section 504 is a Spending Clause statute. And on the subject of intent, the statute does speak clearly: Intent is required. The United States' passive-voice theory and resort to legislative history do not show otherwise. Nor does Petitioner's remedy-based distinction hold water since it would read the same Section 504 language to impose different standards in different contexts. This Court's precedents foreclose that kaleidoscope approach. So settled Spending Clause principles weigh against Petitioner's reading.

B. The federalism canon similarly demands that clear text support a federal intrusion into traditional spheres of state sovereignty. At issue here are two statutory provisions with extremely broad coverage—touching every state service and program in every

context at every level. Requiring States to make affirmative accommodations and calibrate core sovereign functions based on disparate impacts to the disabled across contexts is the kind of marked federal power grab requiring exceedingly clear text. But, once again, the provisions' clear text licenses no such invasion of States' inner-workings. So the federalism canon also undercuts Petitioner's interpretation.

II. The constitutional-avoidance canon cuts against interpretations that present constitutional problems. Giving Title II the interpretation Petitioner advocates would likely make it improper Section 5 legislation. Respondents' reading avoids that thicket.

A. Congress may only abrogate States' sovereign immunity under Section 5 of the Fourteenth Amendment when it enforces Fourteenth Amendment-protected rights. And this Court has consistently held that the Fourteenth Amendment does not require States to make special accommodations for the disabled, so long as their treatment of such individuals is rational. Thus, when confronted with Title I of the ADA's disparate-impact and reasonable-accommodation provisions, this Court held that Title I invalidly abrogated state sovereign immunity. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

B. Like logic applies to Title II. If interpreted as Petitioner advocates, Title II far exceeds constitutional requirements by requiring States to consider disparate impacts to disabled persons and affirmatively accommodate them. By contrast, Respondents' interpretation—that Title II requires discriminatory

intent—better tethers Title II to the intentionality this Court has read the Fourteenth Amendment to require. Protecting States from liability for rational (and thus constitutional) actions that happen to disparately impact persons with disabilities or that do not affirmatively accommodate them thus avoids rendering Title II constitutionally suspect.

ARGUMENT

I. Federalism interests weigh against Petitioner's no-intent reading.

Federal statutes regulating States must pass through additional federalism checks. The Spending Clause clear-statement rule, for one, requires Congress to speak "unambiguously" if it intends to impose a condition on a federal-funding grant. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). So too, the federalism canon means Congress must use "*exceedingly clear language* . . . to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 622 (2020) (emphasis added). But neither Section 504 nor Title II clearly tags States with across-the-board liability for rational, facially neutral policies and programs that fail to affirmatively accommodate disabilities or that disparately impact disabled persons. Federalism-based interpretive tools thus place another thumb (or two) on the scale in favor of *Monahan*'s intent-based reading.

A. The Spending Clause prohibits liability without States' clear notice.

Because Section 504 is a Spending Clause statute, its funding conditions must be clear on the front-end. Plainly read, Section 504's "by reason of" language does not fairly notify States that accepting federal funds risks disability-discrimination liability without discriminatory intent. So Petitioner's interpretation of Section 504 contravenes the Spending Clause clear-statement rule. That result translates to Title II, since Title II cross-references Section 504 to confer rights and remedies that "are the same." *Barnes v. Gorman*, 536 U.S. 181, 189 & n.3 (2002); *see also* 42 U.S.C. §§ 12132-33.

1. When Congress funds States using its spending power, any statutory conditions function "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. The very "legitimacy of Congress' power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on whether the [recipient] voluntarily and knowingly accepts the terms of th[at] contract." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022) (citation and quotation marks omitted). That means that "if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. After all, recipients "cannot knowingly accept conditions of which they are 'unaware.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17).

The Spending Clause clear-statement rule reflects the presumption that a federal-funding recipient considers both "what rules it must follow" and "what sort of penalties might be on the table" before accepting federal funds. *Cummings*, 596 U.S. at 220. Thus, this Court has "regularly applied" the Spending Clause "contract-law analogy" in defining the "scope of conduct" the statute prohibits. *Barnes*, 536 U.S. at 186-87 (collecting cases). The Court has held, for example, that Title IX funding recipients may be held liable to third-party beneficiaries only for "intentional conduct that violates the [statute's] clear terms." *Id.* at 187 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999)). And it has declined to impose liability for a recipient's "failure to comply with vague language describing the [statute's] objectives." *Id.* (citing *Pennhurst*, 451 U.S. at 24-25). In each case, it has refused to enforce a federal-State funding agreement unless Congress made clear the "terms" of a State's liability. *Id.* at 186.

2. Nothing in Section 504 clearly states that liability attaches absent discriminatory intent. As Respondents (at 15-16, 35) detail, the ordinary meaning of "solely by reason of" disability "does not encompass actions taken for nondiscriminatory reasons." 29 U.S.C. § 794(a); *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 242 (6th Cir. 2019). To the contrary, the use of the phrase "by reason of," especially in combination with "solely," indicates Section 504 prohibits actions "motivated by" disability. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1045 (11th Cir. 2020) (en banc) (opinion of Pryor, C.J.); *cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350, 352 (2013)

(interpreting phrase meaning "by reason of" similarly). In other words, "mere possession" of a disability "is not a permissible ground" for excluding a disabled person from a federally funded program or denying him or her access to its benefits. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979). But the governing language "does not compel" federal funding recipients to "disregard . . . disabilities" or "to make substantial modifications in their programs to allow disabled persons to participate." *Id.* Nor, as *Monahan* correctly reasoned, 687 F.2d at 1170-71, does it authorize suits that do not require "proof of discriminatory motive," *see Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

The United States points to Section 504's use of the "passive voice" as evidence that it does not require proof of intent. U.S. Amicus Br. 13. But as Respondents explain, that dog won't hunt. Resp. Br. 35-37, 41-44. Section 504 was modeled on Title VI, and "the text of [the] acts are virtually identical; the prohibitions contained in each statute vary only by the type of discrimination that is forbidden." *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 346 & n.8 (11th Cir. 2012). Yet, despite Title VI's use of the same passive voice structure as Section 504, "it is . . . beyond dispute" that Title VI "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Section 504's text just as undisputedly prohibits intentional discrimination alone.

Nor does the United States' sole authority for its passive-voice theory dispel this conclusion. *See* U.S. Amicus Br. 13. There, the Court considered whether

the language "if the firearm is discharged" contained an intent requirement. *Dean v. United States*, 556 U.S. 568, 572 (2009). On its face, that phrase's focus on the fact of discharge does not "require that the discharge be done" with a particular mental state. *Id.* And the Court reasoned that the use of passive voice "further indicate[d]" what the text already suggested. *Id.* By contrast, Section 504's use of "solely by reason of his or her disability" expressly defines prohibited discrimination by reference to the motivation of a cited action. 29 U.S.C. § 794(a). No "further" construction is necessary. Those words carry the day.

The United States' first fallback is legislative history. U.S. Amicus Br. 13-14; *see also* Pet. Br. 37-38. It cites *Alexander v. Choate*'s observation that Congress "perceived" disability discrimination to result "most often" from "benign neglect," not "invidious animus." U.S. Amicus Br. 13 (quoting 469 U.S. 287, 295 (1985)). But this statement rested on congressional commentary, not statutory text. *Choate*, 469 U.S. at 295-96. And whatever the reliability of such sources, they cannot provide the "clear notice" the Spending Clause demands. *See Murphy*, 548 U.S. at 298, 302-04.

The United States next pivots (at 18-19 n.2) to arguing that States can simply "withdraw[] from the federal funding program" to avoid liability under the Rehabilitation Act. But Section 504 compliance is triggered by funding under "any" federal program, 29 U.S.C. § 794(a)—in Tennessee's case, over $20 billion a year. *See* Bill Lee, Governor, *State of Tennessee: The Budget, Fiscal Year 2025-2026*, at xix (2025), https://bit.ly/4i1QYOb. If such a Hobson's choice

sufficed to stymie state objections to funding conditions, longstanding limits on the Spending Clause power would be a dead letter. States need not "acquiesc[e]" to unlawful mandates in that manner. *Kentucky v. Biden*, 57 F.4th 545, 555 (6th Cir. 2023).

In short, neither Petitioner nor its amicus identify clear text supporting Petitioner's intent-free interpretation. Under this Court's Spending Clause framework, that silence should end things.

3. Still more considerations confirm that the Spending Clause clear-statement rule defeats Petitioner's interpretation.

First, the Court should hew especially close to the text when defining judicially implied private rights of action like Section 504's. "Whether the Court ever should have embarked on" implying extra-textual causes of action "is open to question." *Davis*, 526 U.S. at 685 (Kennedy, J., dissenting). The "speculation" involved in such an endeavor is "particularly troubling" in the Spending Clause context because it is "in significant tension" with the clear-statement rule. *Id.* at 656 (Kennedy, J., dissenting). That means the Court "must not imply a private cause of action for damages" or other relief under a Spending Clause statute "unless it can demonstrate that the congressional purpose to create" that claim "is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions" of accepting the associated liability. *Id.* at 656-57 (Kennedy, J., dissenting).

The upshot: "[S]pending conditions" that create "binding duties" on recipients, enforceable by private

lawsuits in federal court, "are unconstitutional" unless they rest on clear "federal-state agreement." *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 225, 228-29 (2023) (Thomas, J., dissenting); *see also Davis*, 526 U.S. at 655-56 (Kennedy, J., dissenting). It may be too late in the day to dispute that "private individuals may sue to enforce" Section 504 and thus Title II, which incorporates Section 504's "rights" and "remedies." *See Sandoval*, 532 U.S. at 279-80; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998); 42 U.S.C. § 12133. But it is not too late to limit the statutory intent standard consistently with the Spending Clause clear-statement rule's demands. If anything, that "duty" takes on particular importance here since Section 504 violations place at risk *all* federal funds. *Davis*, 526 U.S. at 685 (Kennedy, J., dissenting); *see* Resp. Br. 19; 29 U.S.C. § 794(a)-(b); 34 C.F.R. §§ 100.8, 104.61.

Second, Petitioner's proffered remedy-based reading confirms that Section 504 does not clearly impose liability absent intent. Petitioner says (at 29-30 & n.7) that Section 504 and Title II impose different intent requirements depending on the relief pursued. Plaintiffs seeking damages, for their part, "must prove a form of wrongful intent," Pet. Br. 29, while plaintiffs seeking equitable relief may prevail without showing "intentional discrimination," *id.* at 30 n.7. The latter no-intent standard would also apply, according to the

United States (at 1, 13), to federal enforcement actions to terminate funding under Section 504.[1]

The text forecloses any reading that would toggle the intent standard in such a manner. Access to all forms of relief, whether injunctive or monetary, hinge on the same text—whether an action was taken "solely by reason of" disability. 29 U.S.C. § 794; *see also* 42 U.S.C. § 12132. Against that text, neither Petitioner nor the United States point to any sound textual basis for their injunction-damages intent divide. To the contrary, such a "'chameleon'"-like reading defies the rule that "the meaning of words in a statute cannot change with the statute's application." *United States v. Santos*, 553 U.S. 507, 522 (2008) (opinion of Scalia, J.) (citation omitted). It also ignores Section 504's (and thus Title II's) incorporation of Title VI's "remedies," which exclude any relief for non-intent-based claims. 42 U.S.C. § 12133 (incorporating 29 U.S.C. § 794a(a)(2)'s "remedies" (incorporating Title VI's "remedies")); *Sandoval*, 532 U.S. at 280. It is thus Petitioner who advances an "atextual rule," Pet. Br. 30, not *Monahan*.

Again, the need to source liability in clear statutory terms applies even more strongly in the Spending

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[1] The United States asserts that the Department of Justice is "authorized to bring civil actions to enforce Title II." U.S. Amicus Br. 1 (citing 42 U.S.C. § 12133). That remains subject to debate. The text of Title II, after all, provides a cause of action to only "*person[s]*"; under the ADA, the government is not one. *See* States' Amicus Br. at 2-9, ECF No. 117-1, *Haymarket DuPage, LLC v. Vill. of Itasca*, No. 1:22-CV-00160 (N.D. Ill. filed Aug. 1, 2024); *United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730, 748-53 (11th Cir. 2021) (Newsom, J., dissenting from denial of rehearing en banc).

Clause context. States cannot have "clear notice" of a statute's substantive requirements if those requirements vary depending on the relief a future plaintiff decides to pursue. *See Pennhurst*, 451 U.S. at 25. In the analogous circumstance of a statutory provision that imposed both civil and criminal penalties, this Court reasoned that the rule of lenity—a rule for interpreting criminal statutes—provided "an additional reason to remain consistent" in both contexts, "lest those subject to the criminal law be misled." *See Santos*, 553 U.S. at 523. Similarly, only by giving Section 504 its "'unambiguous[]'" meaning, regardless of the remedy, can this Court "be confident" that recipients "'exercise[d their] choice knowingly, cognizant of'" *all* "'the consequences of [their] participation'" in this "federal program." *Cummings*, 596 U.S. at 219-20 (quoting *Pennhurst*, 451 U.S. at 17).[2]

The Court should read Section 504 and thus Title II consistently with constraints on Congress's spending power and reject Petitioner's interpretation.

B. The federalism canon prohibits invasive state liability without clear text.

The federalism canon likewise cuts against Petitioner's no-intent reading. To protect the constitutional balance of power between the States and the

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[2] The United States suggests (at 18 n.2) that "equitable relief does not implicate" the Court's primary concern when applying the Spending Clause clear-statement rule—that a recipient have notice of damages liability. That ignores the substantial costs and burdens on federalism associated with injunctive relief. *See infra* pp. 14-16 & n.3; *cf.* Resp. Br. 21-22 (flagging anticommandeering problems with Petitioner's reading).

federal government, this Court requires clear congressional direction before permitting federal interference with core state prerogatives. Reading Section 504 and Title II to impose an affirmative accommodation duty and to prohibit neutral state actions that merely have a disparate effect on disabled persons would authorize federal intrusion into core areas of state sovereignty. Yet neither Section 504 nor Title II clearly authorizes non-intent-based claims.

1. "[O]ur Constitution establishes a system of dual sovereignty" that divides power "between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, the federal government wields only the "enumerated powers" that the States surrendered in the Constitution. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The States, by contrast, retain "numerous and indefinite" powers that "extend to all the objects . . . concern[ing] the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State[s]." *Gregory*, 501 U.S. at 458 (quoting *The Federalist* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961)).

Recognizing the importance of state sovereignty, this Court has long presumed that Congress "normally preserves 'the constitutional balance between the National Government and the States.'" *Bond v. United States*, 572 U.S. 844, 862 (2014) (citation omitted). To displace traditional spheres of state authority, Congress must "make its intention to do so 'unmistakably clear.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation omitted). And that is no low hurdle:

The text itself must contain "*exceedingly clear language* . . . to significantly alter the balance between federal and state power." *Cowpasture*, 590 U.S. at 621-22 (emphasis added); *see also Sackett v. EPA*, 598 U.S. 651, 679 (2023).

2. Section 504 and Title II cover numerous state services and programs. Reading those provisions to impose no-intent liability would eviscerate state authority in areas of traditional state regulation.

Section 504 prohibits disability discrimination "under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). And it defines "program or activity" as "all of the operations of": (1) "a department, agency, special purpose district, or other instrumentality of a State"; (2) a state "entity . . . that distributes such assistance and each such department or agency (and each other State . . . entity) to which the assistance is extended"; or (3) a college, university, post-secondary institution, public higher-education system, technical or career educational system or "other school system[s]." *Id.* § 794(b).

Title II's coverage is also expansive. It applies its similar disability discrimination bar not only to recipients of federal funds but to the "services, programs, or activities" of "any" "public entity." 42 U.S.C. § 12132. Title II defines "public entity" to mean "any State . . . government" and "any department, agency, special purpose district, or other instrumentality of a State or States." *Id.* § 12131.

In practice, courts have read Section 504 and Title II to cover everything from prison showers, *see, e.g.*,

Jaros v. Ill. Dep't of Corr., 684 F.3d 667, 672 (7th Cir. 2012), to emergency response services, *see, e.g.*, *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 775-77 (W.D. Tex. 2006), to school playgrounds, *see Molly L. ex rel. B.L. v. Lower Merion Sch. Dist.*, 194 F. Supp. 2d 422, 432 (E.D. Pa. 2002), to hospital services, *see Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 624 (1986) (plurality opinion). One court held that the ADA required a city to provide sign language interpreters for municipal weddings. *Soto v. City of Newark*, 72 F. Supp. 2d 489, 495-96 (D.N.J. 1999). Another held that plaintiffs stated Title II and Section 504 claims by alleging that a state university failed to provide closed captioning on its jumbotrons and websites. *Innes v. Bd. of Regents of Univ. Sys. of Md.*, 29 F. Supp. 3d 566, 581 (D. Md. 2014). This is just the tip of the iceberg.

Suffice it to say, Petitioner's intent-free reading of Section 504 and Title II would substantially disrupt States' activities across the board. *See* Resp. Br. 19-23, 41-44. "'[N]othing'" suggests Congress intended Section 504 "'to make major inroads on the States' longstanding discretion to choose the proper mix' of services provided by state agencies." *Bowen*, 476 U.S. at 642 (plurality opinion) (quoting *Choate*, 469 U.S. at 307). Yet, as this Court recognized in *Choate*, interpreting Section 504 to authorize disparate-impact claims would impose a "wholly unwieldy administrative and adjudicative burden" on States, with a dramatic contraction of state discretion. *Id.* at 298. Because persons with disabilities are generally "not similarly situated" to those without disabilities, allowing disparate-impact liability would require States and their agencies to consider the effect of every action on

the disabled, including different "class[es]" of disabilities. *Id.* at 298, 308. They would "then have to balance the harms and benefits to various groups to determine, on balance, the extent to which the action disparately impacts" the disabled. *Id.* at 308. Requiring "substantial," "affirmative" "modifications in [State] programs to allow disabled persons to participate" would likewise impose "undue financial and administrative burdens upon a State." *See Se. Cmty. Coll.*, 442 U.S. at 405, 410-13.

And States would be forced to bear these intrusive constraints in areas of "traditional state authority." *See Sackett*, 598 U.S. at 679. This case is case in point. Petitioner seeks to second-guess state calls on the nitty gritty details of classroom management, teacher overtime, and schools' operating hours. *See* Cert. Pet. 9-12; Resp. Br. 6-10. But education is an area where "States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). The same goes for the many other areas—from prisons, to state hospitals, to enforcement of criminal statutes, to sex-segregation policies—that Petitioner's statutory interpretation would implicate.[3]

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[3] *See, e.g.*, Betsy Ginsberg, *Out with the New, in with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 Fordham Urb. L.J. 713, 714-15, 717 (2009); First Am. Compl. ¶¶ 368-74, 386-93, 422-36, ECF No. 62, *OUT-Memphis v. Lee*, No. 2:23-CV-2670 (W.D. Tenn. filed Feb. 1, 2024) (asserting Section 504 and Title II claims against Tennessee's aggravated prostitution statute and sex-offender registry); U.S. Dep't of Health & Hum. Servs., *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 40,066, 40,068-69 (May 9, 2024)

3. Imposing virtually "boundless" liability on States for operating their programs thus requires abundantly clear text at a minimum. *See Choate*, 469 U.S. at 299; *see also Will*, 491 U.S. at 65. Yet Petitioner points to no textual basis for its intent-free reading, much less an "*exceedingly clear*" one. *Cowpasture*, 590 U.S. at 621-22. The plain meaning of the phrase "by reason of . . . disability" indicates that it protects against decisions "motivated by" an individual's disability. 29 U.S.C. § 794(a); 42 U.S.C. § 12132; *Jones*, 975 F.3d at 1045; *see also supra* pp. 6-7. That phrase does not disclose, let alone clearly, that liability might attach whenever a "facially neutral" state program "fall[s] more harshly" on certain disabled individuals. *See Teamsters*, 431 U.S. at 335 n.15. Nor does it convey that a rational "unwillingness" to make "affirmative," disability-based "adjustments" to a state program will trigger liability. *See Se. Cmty. Coll.*, 442 U.S. at 411, 413; *see also Monahan*, 687 F.2d at 1170-71. Federalism principles provide another strike against Petitioner's interpretation.

II. Constitutional concerns weigh against Petitioner's no-intent reading.

On top of the patent federalism concerns with Petitioner's position, holding that Title II plaintiffs need not show "intentional discrimination" would create constitutional problems under Section 5 of the Fourteenth Amendment. Avoidance principles counsel

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(asserting that gender dysphoria is a "disability" under Section 504 and the ADA).

against that result and toward giving "by reason of . . . disability" its ordinary meaning. *See* Resp. Br. 20-21.

A. Congress cannot use Section 5 to subject States to no-intent liability.

Sovereign immunity bars private lawsuits in federal courts against a non-consenting State. *See Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (collecting cases). Congress may abrogate that immunity if it expresses unequivocal intent to do so and "act[s] pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *see also City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

Congress may not abrogate States' sovereign immunity using its Article I powers. *Garrett*, 531 U.S. at 364. It can only do so under Section 5 of the Fourteenth Amendment. *Id.* But Congress's Section 5 power "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment." *City of Boerne*, 521 U.S. at 519 (citation omitted). And it is a purely "remedial" power. *Id.* (citation omitted). In other words, Congress cannot use Section 5 to "decree the substance" of the Fourteenth Amendment's "restrictions on the States." *Id.* Section 5 gives Congress the "power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.*

To ensure Congress abides those bounds, courts first precisely define "the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Then because Congress may only exercise its Section 5 authority "in response to state transgressions," they consider

whether Congress "identified a history and pattern of unconstitutional employment discrimination by the States against" the relevant group. *Id.* at 368. Finally, Congress's response—the rights and remedies created—must be congruent and proportional to the "targeted violation." *Id.* at 373-74.

This Court has applied that test to the ADA's putative waiver of state sovereign immunity. In *Garrett*, the Court assessed Title I's discrimination scheme, which prohibits disability-based employment "discriminat[ion]," requires employers to make "reasonable accommodations" for employee disabilities, and bars administrative practices that "have the effect of" discriminating based on disability. *See id.* at 361 (citing 42 U.S.C. §§ 12112(a), (b)(3)(A), (b)(5)(A)). Imposing those requirements on the States, the Court held, did not flow from a valid abrogation of state sovereign immunity under Section 5.

To get there, the Court explained that the Fourteenth Amendment does not require States "to make special accommodations for the disabled, so long as" their treatment of such individuals is "rational." *Id.* at 367. The ADA's legislative history "fail[ed] to show" that Congress "identif[ied] a pattern of irrational state discrimination in employment against the disabled." *Id.* at 368. And the "rights and remedies created by the ADA" raised significant congruence and proportionality concerns. *Id.* at 372. For example, the Court found that the duty to reasonably accommodate "far exceed[ed] what is constitutionally required" by making illegal "a range" of rational responses that would "fall short" of the statute's "undue burden" safe

harbor. *Id.* It also highlighted Title I's prohibition of administrative practices disparately impacting the disabled. *Id.* at 372. But evidence of discriminatory effect is "insufficient," it noted, even under strict scrutiny. *Id.* at 373. For these reasons, the Court held that "uphold[ing]" Title I's "application to the States" would improperly "enlarge congressional authority" in violation of settled Fourteenth Amendment law. *Id.* at 374.[4]

Three years later, the Court again applied the "congruence and proportionality" test, this time to Title II. Considering the narrow question of whether Title II was valid Section 5 legislation to enforce the "right of access to the courts," the Court held that it was but went "no further." *Tennessee v. Lane*, 541 U.S. 509, 531-54 (2004). Still, Chief Justice Rehnquist vigorously dissented, writing that *Lane* was "irreconcilable with *Garrett* and the well-established principles it embodie[d]." *Id.* at 538 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist reasoned that, if Title II imposed affirmative accommodation duties and disparate-impact liability like Title I, it would likewise "prohibit[] far more conduct than does the equal protection ban on irrational discrimination," despite resting on a

[4] Although *Garrett* involved a claim for damages, "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996); *cf. Garrett*, 531 U.S. at 374 n.9 (suggesting state officials would still be subject to suit under Title I pursuant to the *Ex parte Young* doctrine).

similarly inadequate congressional record of relevant discrimination. *Id.* at 549, 553.

A few years later, the Court clarified *Lane*'s narrow reach. It signaled that some violations of Title II might not "also violat[e] the Fourteenth Amendment" and that Congress's abrogation of sovereign immunity as to such misconduct might not be "valid." *United States v. Georgia*, 546 U.S. 151, 159 (2006). "[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment," it held, "Title II validly abrogates state sovereign immunity." *Id.* But such a scenario will not arise absent a showing that Congress's abrogation redresses a "widespread pattern" of unconstitutional discrimination by the States that is adequately documented in congressional findings. *Kimel*, 528 U.S. at 90; *Flores*, 521 U.S. at 520.

B. Rejecting Petitioner's reading would avoid Section 5 concerns.

It is a "'cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). That rule favors Respondents and cuts against Petitioner's reading, which would raise serious Section 5 problems.

Most relevant, reading an intent requirement out of Title II would contravene limits on Congress's power to abrogate sovereign immunity. As the Court

has consistently held, the Fourteenth Amendment protects no more than a right to be free from irrational disability discrimination. *Garrett*, 531 U.S. at 368; *Lane*, 541 U.S. at 522. So remedies that go beyond requiring a State to act rationally vis-à-vis those with disabilities are not "congruent and proportional" to the right protected. *Garrett*, 531 U.S. at 372; *see also City of Boerne*, 521 U.S. at 532. The Court applied that rule in reaching the holding of *Garrett*: Title I's creation of a reasonable accommodation duty and disparate-impact liability exceeded Congress's Section 5 power by prohibiting a range of rational actions that would have satisfied the Fourteenth Amendment. 531 U.S. at 372-73. In other contexts, too, this Court has confirmed that proof of discriminatory intent is "required" to show a constitutional violation. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

The same logic applies to Title II. On Petitioner's no-intent view, Title II subjects States to liability for rational, facially neutral actions that disparately impact disabled persons or that fail to provide affirmative disability-based accommodations. But both are "constitutional" actions for Fourteenth Amendment purposes. *Garrett*, 531 U.S. at 372. Just as with Title I in *Garrett*, reading Title II Petitioner's way would exceed the scope of Section 5 by imposing requirements that "far exceed[] what is constitutionally required." *Id.* at 372-74; *accord Lane*, 541 U.S. at 549 (Rehnquist, C.J., dissenting).

It makes no difference that Petitioner's reading of Title II might lawfully abrogate sovereign immunity

in certain limited contexts. *See Georgia*, 546 U.S. at 158-59; *cf. Lane*, 541 U.S. at 533-34 (holding Title II to be valid Section 5 legislation as to a narrow "class of cases"). Avoidance is not a tool for determining the validity of particular applications. Rather, "it allows courts to avoid the decision of constitutional questions," regardless of whether other applications, "standing alone, would not support the same limitation." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Simply put, if one possible interpretation "would raise a multitude of constitutional problems, the other should prevail—*whether or not* those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81 (emphasis added).

Respondents, like *Monahan*, are right on the text of Title II. *See* Resp. Br. 15-19, 35; *Monahan*, 687 F.2d at 1170-71. But even if the question were closer, the avoidance canon counsels against Petitioner's constitutionally suspect construction. Requiring an intent showing to establish a Title II violation aligns States' liability with settled limits on Congress's Section 5 power and the Fourteenth Amendment's focused prohibition of intentional discrimination.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

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