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No. 05-1376

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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IVAN TOLEDO,

Plaintiff-Appellee,

UNITED STATES,

Intervenor,

v.

JORGE SANCHEZ-RIVERA, *et al.*,

Defendants-Appellants,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

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**BRIEF FOR AARP; BAZELON CENTER;  
PUBLIC JUSTICE CENTER; AND 23 OTHER ORGANIZATIONS  
REPRESENTING PEOPLE WITH DISABILITIES  
AS *AMICI CURIAE* IN SUPPORT OF  
PLAINTIFF-APPELLEE**

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## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case concerns Congress’ authority, pursuant to Title II<sup>1</sup> of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131-12165, *et seq.*, to remedy discrimination against persons with disabilities in public schools. After decades of deliberation, Congress determined that, in the context of public education, persons with disabilities had suffered from a virulent history of official governmental discrimination, and that such historic discrimination had repercussions that continued to the present. Substantial contemporary evidence demonstrates that, in the contexts of both public education and public school facilities used to promote core civic functions, these repercussions remain pervasive today. *Amici* therefore submit this brief to demonstrate that: in Title II of the ADA, Congress formulated a statute carefully designed to undo the effects of past disability discrimination, and to root out ongoing instances of disability discrimination in public entities, including public education.

## **INTERESTS OF AMICI CURIAE**

*Amici* consist of 26 organizations committed to vigorous civil rights and disability rights enforcement. The Court’s decision in this case has tremendous significance to the constituents of the *amici* organizations, as their ability to

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<sup>1</sup> Title II of the ADA prescribes, in relevant part, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity.” 42 U.S.C. § 12132.

enforce the ADA's requirements concerning access to public education is at stake. Additionally, a ruling in this case has potential implications for the ability of *amici*'s constituents to seek redress in federal courts for other violations of Title II of the ADA as well. Detailed descriptions of the *amici* organizations are attached in the Appendix to this brief. Pursuant to FRAP R. 29(a), the parties have consented to all *amici* organizations joining this Brief.

## **ARGUMENT**

### **I. TITLE II'S APPLICATION TO PUBLIC SCHOOLS IS SUPPORTED BY A HISTORY AND CONTINUED PATTERN OF UNCONSTITUTIONAL DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES IN THE CONTEXT OF PUBLIC EDUCATION**

Congress, in determining the necessity for the ADA, "conclude[d] that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability." S. Rep. No. 101-116, at 5 (1989); H.R. Rep. No. 101-485(II), at 28 (1990). Congress relied on an extensive study and record.<sup>2</sup> On the basis of that voluminous record, Congress found that

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<sup>2</sup> In the years immediately preceding the ADA's enactment, Congress held no less than 13 hearings; created a Task Force on the Rights and Empowerment of Americans with Disabilities ("Task Force"), which held 63 public forums in every state that were attended by 30,000 people. *Tennessee v. Lane*, 541 U.S. 509, 516 (2004). The Task Force eventually submitted "several thousand documents" that evidenced "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 Staff of House Comm. on Educ. and Labor, 101st Cong., Legislative History of *Pub. L. No. 101-336*: The Americans with Disabilities Act 1324-25 (Comm. Print 1990) ("2 Legis. Hist."). Those "several thousand documents" – were part of the official legislative history of the ADA. 2 Legis. Hist. 1336, 1389. The Supreme Court relied on these documents in *Lane*. 541 U.S. at 527; see also *Bd. of Trustees of the Univ. of Alabama v. Garrett* 531 U.S. 356, 391-424 (Breyer, J., dissenting). This brief

individuals with disabilities have been “subjected to a history of unequal treatment.” 42 U.S.C. § 12101.<sup>3</sup> Congress also found that states were still discriminating against children with disabilities in the “critical area” of “education.” *Id.* § 12101(a)(3). Accordingly, as argued by the United States, this Court must consider the validity of Title II and its abrogation provision as applied to the entire category of public education rather than merely as applied to the facts of the instant case. *See* United States Brief at 11.

Congress supported its findings by relying upon a public record consisting of testimony, judicial rulings, studies, reports, statistical data, and anecdotal evidence. Based on this voluminous public record, Congress had ample evidence of widespread exclusion, segregation, and inequality in public education – including higher education – to act, pursuant to Section 5 of the Fourteenth Amendment, to remedy and prevent unconstitutional disability discrimination in public schools. Indeed, the Supreme Court concluded that Congress enacted Title II based on a documented pattern of unequal treatment in public education, as well as other areas.<sup>4</sup> Moreover, ample evidence exists to demonstrate that the

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refers to the Task Force documents by State and Bates Stamp number.

<sup>3</sup> Furthermore, Congress expressly identified discrimination in education as a particular problem, *see* 42 U.S.C. § 12103(3), which is significant because education is generally an enterprise of state and local government.

<sup>4</sup> *Lane*, 541 U.S. at 525 & n.12; *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005) (holding that Congress validly abrogated a state university’s sovereign immunity to private claims under Title II of the ADA in the higher education context); *Association of Disabled Americans v. Florida Int’l Univ.*, 405 F.3d 954 (11th Cir. 2005) (holding the same).

unfortunate pattern of disability discrimination in public education continues to the present day.

**A. At the Time that Title II of the ADA Was Enacted, Congress Was Aware of Decades of Disability Discrimination in Public Education**

1. Prior to the Consideration of the ADA, Voluminous Evidence of Historical State Disability Discrimination in Public Education Existed

The “propriety of any § 5 legislation ‘must be judged with reference to the historical experience . . . it reflects.’” *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999) (citation omitted). While Appellants ignore it, Congress and the Supreme Court have long acknowledged our nation’s “history of unfair and often grotesque mistreatment” of persons with disabilities. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring).

Our nation’s history of such unfair treatment pervades in the context of public education. Prior to the ADA, a number of states categorically excluded children with disabilities from public education.<sup>5</sup> For example, New Mexico’s and

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<sup>5</sup> See Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Law. 855, 868 (1975); S. Sarason & L. Doris, *Educational Handicap, Social Policy & Social History* (1979). A 1973 study of private and public colleges in Kentucky found that only 24 of 39 colleges would admit students regardless of disability, and five admitted students only with mild disabilities. Joseph W. Madaus, *Services for College and University Students with Disabilities: A Historical Perspective*, 14 J. Postsecondary Educ. & Disability 8 (Summer 2000).

Delaware's state constitutions explicitly did so. N.M. CONST. art. XII, § 5 (2000) (187) ("Every child of school age *and sufficient physical and mental ability* shall be required to attend a public school.") (emphasis added); DEL. CONST. art X, § 1 (1975) (establishing free public schools for all except those who were "physically or mentally disabled").

Additionally, many state statutes explicitly codified states' discriminatory practices, including the exclusion or unequal treatment of children with disabilities from schools.<sup>6</sup> For example, some states expressly barred or excused students with disabilities from completing state education requirements. See e.g., N.C. Gen. Stat. § 115-165 (1966) ("A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such child to profit by instruction given in the public schools shall not be permitted to attend the public schools of the State."); Nev. Rev. Stat. § 392.050 (1967) (excusing from compulsory education students whose "physical or mental condition or attitude is such as to prevent or render inadvisable [their] attendance at school"); Neb. Rev. Stat §§ 79-201, 79-202 (1971) (excusing from compulsory education students who were "physically or mentally incapacitated for the work done in the school").

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<sup>6</sup> One author documented the states' practice of refusing to educate students with disabilities and explained that "the feeble-minded and subnormal represent, as it were, an inassimilable accumulation of human clinkers, ballast, driftwood, or derelicts which seriously retards the rate of progress of the entire class and which often constitutes a positive irritant to the teach[er] and other pupils." J.E.W. Wallin, *The Education of Handicapped Children*, (Houghton Mifflin (1924) (quoted in M. Lazerson, *The Origins of Special Education* (1983)).

State courts traditionally upheld the exclusion of students with disabilities from integrated public education settings. In *Dep’t of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958), for example, an Illinois state court acknowledged the state constitutional mandate of the right to free and universal “common school education.” Nevertheless, the Illinois court rejected the idea that the state constitutional mandate embraces “mentally deficient” children, and instead held that:

[e]xisting legislation does not require the State to provide a free educational program, as part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education.

*Id.* Historically, other state courts had similarly concluded that the right to universal public education did not encompass students with disabilities.<sup>7</sup>

2. Prior to Consideration of the ADA, Congress Had Already Compiled a Substantial Record of State Disability Discrimination in Public Education

Before Congress began debate on Title II, it had already compiled a substantial body of evidence detailing the unconstitutional deprivations

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<sup>7</sup> State courts traditionally upheld the exclusion of students with disabilities from integrated public education settings. See e.g., *Dep’t of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958) (rejecting idea that state constitutional mandate of free and universal “common school education” embraces “mentally deficient” children); *State ex rel. Beattie v. Bd. of Educ.*, 172 N.W. 153, 153 (Wisc. 1919) (excluding child with “peculiarly high, rasping, and disturbing tone of voice, accompanied with uncontrollable facial contortions” and “an uncontrollable flow of saliva, which drools from his mouth onto his clothing and books, causing him to present an unclean appearance”); *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass 1893) (excluding student as “too weak-minded”).

experienced by students with disabilities in the arena of public education. In considering the Rehabilitation Act of 1973, sponsors of the legislation noted that as many as 4.25 million students with disabilities were being excluded from public schools. 118 Cong. Rec. 4341 (1972) (statement of Rep. Charles Vanik). In 1972, similar statistics were presented to Congress in a debate over the Education of All Handicapped Children Act (“EAHCA”), later renamed the Individuals with Disabilities Education Act.

When Congress enacted the EAHCA in 1975, it compiled an extensive record that states simply did not educate children with disabilities. Based on this record, Congress found that “one million of the handicapped children in the United States are excluded entirely from the public school system” and “more than one-half” of the 8 million students with disabilities did not receive appropriate educational services. 20 U.S.C. § 1400(c)(2).<sup>8</sup>

Contemporaneous judicial decisions confirmed Congress’ conclusions. In *Pennsylvania Ass’n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), for instance, students with mental retardation charged that Pennsylvania statutes excluded them from schools. The district court found equal protection and due process violations by the state of Pennsylvania. *Id.* at 295; see

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<sup>8</sup> See also S. Rep. No. 94-168, at 8 (1975) (Dept. of Education statistics show more than 1.75 million students with disabilities receiving no educational services at all, while 2.5 million receiving inadequate services).

*also Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (due process violated when defendant excluded students with disabilities from public education). Both *PARC* and *Mills* revealed stark levels of exclusion,<sup>9</sup> and Congress considered these cases and others like them when it enacted EAHCA.<sup>10</sup>

In short, Congress' specific findings, the well-established judicial history, and the legislative history all provide compelling evidence that states participated in, and perpetuated a pattern of, unconstitutional discrimination, including their treatment of children with disabilities in the context of public schools.

**B. At the Time the ADA Was Enacted, State and Federal Laws Failed to Protect Persons with Disabilities Against Discrimination in Public Education**

“Education is perhaps the most important function of state and local governments” because “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Indeed, “classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class

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<sup>9</sup> See *PARC*, 343 F. Supp. at 296 (stating that in 1965, between 70,000 and 80,000 Pennsylvania students with developmental disabilities were denied any education); *Mills*, 348 F. Supp. at 868-69 (stating that in 1971-72, approximately 12,340 children with disabilities in the District of Columbia were provided no educational services).

<sup>10</sup> S. Rep No. 94-168, at 6-7 (1975) (citing *PARC* and *Mills*, and noting similar decisions in 27 other states); see also *Honig v. Doe*, 484 U.S. 305, 310 (1988) (“[B]y the time of the [EAHCA]’s enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States.”).

distinctions.” *Plyler v. Doe*, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

Accordingly, where the State provides a public education, that right “must be available to all on equal terms.” *Brown*, 347 U.S. at 493.

Further, the Supreme Court has emphasized that “given the important purpose of public education . . . universities occupy a special niche in our constitutional tradition.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing cases). Universities occupy such a special niche because “[a] college milieu is the quintessential ‘marketplace of ideas.’” *Glover v. Cole*, 762 F.2d 1197, 1200 (4th Cir. 1985) and because “universities . . . represent the training ground for a large number of our Nation’s leaders.” *Grutter*, 539 U.S. at 332 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). For these reasons, “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals.” *Id.* at 331.

At the time the ADA was enacted, Congress learned that, despite its earlier enactments, irrational prejudices, fears, and animus still operated to deny persons with disabilities an equal opportunity for public education. The United States Commission on Civil Rights reported to Congress that, as late as 1983, “a great many handicapped children continue to be excluded from the public schools.”<sup>11</sup> Additionally, in enacting Title II, Congress was well informed by

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<sup>11</sup> United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 29 (1983) (“Spectrum”).

contemporaneous judicial decisions that disability discrimination was still ongoing in public education. The Senate took explicit note of a disability discrimination case in which “a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance ‘produced a nauseating effect’ on his classmates.” S. Rep. No. 101-116, at 7 (1989) (citing *State v. Bd. of Educ.*, 172 N.W. 153, 153 (Wis. 1919)).<sup>12</sup>

Congress also heard numerous testimonies from persons with disabilities in regard to state discrimination against persons with disabilities in public education,<sup>13</sup> including institutions of higher education.<sup>14</sup> This evidence was

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<sup>12</sup>Also, following the enactment of the Rehabilitation Act and the EACHA, numerous additional rulings illustrated that disability-based discrimination in public education continued. *Id.*; see e.g., *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987) (unnecessary exclusion of students with HIV from integrated classroom); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979) (unnecessary segregation of students with developmental disabilities and hepatitis B); *Camenisch v. University of Texas*, No. A-78-CA-061, 1978 WL 51, \*3 (W.D. Tex. May 17, 1978) (ordering defendant to provide interpreter for orally delivered course materials); *Crawford v. University of North Carolina*, 440 F. Supp. 1047, 1050 (M.D.N.C. 1977) (same).

<sup>13</sup> See VT Page No. 1635, *supra* note 2 (woman with quadriplegia and cerebral palsy and a high intellect branded “retarded” by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was “not college material.”); Hearings 100th Cong. 74 (1988) (witness testified that “[a]t my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair. . . .”); NY 1123, *supra* note 2 (three elementary schools locked children with mental disabilities in a box for punishment).

<sup>14</sup> See 2 Leg. Hist. 1162 (Barbara Waters) (person with epilepsy asked to leave a state college because her seizures were “disrupt[ive]” and created liability risk); *Id.* (Arlene Mayerson) (doctor with multiple sclerosis denied admission to a psychiatric residency program because the state admissions committee “feared the negative reactions of patients to his disability.”); *Garrett*, 531 U.S. at 391 (Appendix C to dissent of Breyer, J.) (noting Task Force submissions alleging lack of access at over 20 state universities).

consistent with the finding of the United States Commission on Civil Rights, that the “higher one goes on the education scale, the lower the proportion of handicapped people one finds.”<sup>15</sup>

In sum, upon enacting the ADA, Congress had considerable evidence, in the context of public education, to support its finding that “current federal and state laws are inadequate to address [disability discrimination].”<sup>16</sup>

### **C. Following the Enactment of the ADA, Substantial Evidence Continues to Demonstrate that Disability Discrimination in Public Education Remains Pervasive**

“Prejudice, once let loose, is not easily cabined.” *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in part, and dissenting in part). In our society, “irrational fears or ignorance, traceable to the prolonged social and cultural isolation” of persons with disabilities “continue to stymie recognition of the[ir] dignity and individuality.” *Id.* at 467. Consequently, even in the context of public education, Congress recognized that society suffers from a “subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities . . . available to [others].”<sup>17</sup>

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<sup>15</sup> Spectrum at 28.

<sup>16</sup> House Report No. 101-485(II) (1990).

<sup>17</sup> S. Rep. No. 116, at 8-9; *see also* 2 Legis. Hist. 1606 (Arlene Mayerson) (“Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. . . . These assumptions are deeply rooted in history.”)

The trend of state segregation of students with disabilities continued through the 1990s. A 1995 report from a national organization of individuals with mental retardation and their family members reported that, in 1992-93, only 7.1 percent of children with mental retardation received their education in regular classroom settings, and 56.8 percent of children with mental retardation were educated in separate classrooms, with little opportunity to interact with peers without disabilities.<sup>18</sup>

In recent years, students with disabilities have continued to face substantial challenges. According to the Department of Education, between 1984 and 1998, 36 states failed to ensure that students with disabilities were educated in the most integrated setting appropriate.<sup>19</sup> Even recently, studies have shown that it is more likely that students with disabilities (22%) will not have a high school diploma than it is for students without disabilities (9%),<sup>20</sup> and it is less likely that students with disabilities (12%) will graduate from college than it is for students without disabilities (23%).<sup>21</sup> Moreover, studies have shown that since 1998, the percentages of persons with disabilities who have completed some level of college

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<sup>18</sup> *Report Card on Inclusion in Education of Children with Mental Retardation* (The Arc of the United States 1995).

<sup>19</sup> Nat'l Council on Disability, *Back to School on Civil Rights 97-98* (2000).

<sup>20</sup> National Organization on Disability (NOD), *Education Levels of People with Disabilities* (2001), at <http://www.nod.org/content.cfm?id=130>.

<sup>21</sup> *Id.*

education, or who have graduated from college, have *declined*.<sup>22</sup> Additionally, courts have continued to grapple with instances of unconstitutional state exclusion of persons with disabilities in public schools.<sup>23</sup>

In sum, while the ADA has had an important impact on public education, disability discrimination in public education continues to be pervasive, and the remedies that Congress enacted in the ADA continue to be needed.

## **II. TITLE II'S APPLICATION TO PUBLIC SCHOOL BUILDINGS AND OTHER PUBLIC FACILITIES USED FOR CORE CIVIC ACTIVITIES IS SUPPORTED BY UNCONSTITUTIONAL DISABILITY DISCRIMINATION IN VOTING AND GOVERNMENT MEETINGS**

In addition to the public education of students, numerous civic activities occur in public school buildings, including facilities on college and university campuses.<sup>24</sup> Virtually all jurisdictions utilize these buildings as polling sites and as places for public meetings, such as school board meetings. In Puerto Rico and Massachusetts, as just two recent examples, recent government meetings at public

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<sup>22</sup> *Id.*; see also NOD, 2004 *Gaps Study* (Harris Interactive 2004), at [http://www.nod.org/pdffiles/harris2004/harris2004\\_data.pdf](http://www.nod.org/pdffiles/harris2004/harris2004_data.pdf).

<sup>23</sup> See e.g., *Robinson v. Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'd*, 295 F.3d 1183 (10th Cir. 2002) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding); *Coleman v. Zatechka*, 824 F. Supp. 1360, 1373 (D. Neb. 1993) (prohibiting college students with certain disabilities from participating in roommate assignment program violates ADA and Rehabilitation Act).

<sup>24</sup> *Amici* note that while the history of disability discrimination in public education is more than adequate to demonstrate that Title II's application here does not offend principles of sovereign immunity, the record of interference with core activities of civic life provides an additional basis for congressional action.

educational institutions have included both public hearings regarding matters of importance to the community<sup>25</sup> and school board meetings.<sup>26</sup> Voting and voter registration in schools and on college campuses is also common, and often required.<sup>27</sup> Indeed, a 2001 GAO report estimated that 24 percent of all polling places are in schools, and of these, nearly 80 percent have a potential barrier to access. U.S. General Accounting Office, *Voters with Disabilities: Access to Polling Places and Alternative Voting Methods* 8 (Oct. 2001).

The activities of voting and interacting with one's government are central to the fabric of our Constitution's heritage of freedom. See *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (right to vote as granted and prescribed by state legislature is fundamental, and is protected by equal protection principles); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("Central both to the idea of the rule of law and to our own

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<sup>25</sup> According to the State Commission of Election of Puerto Rico (the Commission), the vast majority of all polling stations in Puerto Rico are located in public school buildings. See <http://www.ceepur.org/sobreCee/presidencia/prensa/aviso/pdf/eleccionEspecialPnpCentrosVotacion.pdf> (Oct. 19, 2005) (P.R, Special Election); see also <http://www.umass.edu/chronicle/archives/03/03-14/bulger.html> (Joint Ways and Means Committee held a public meeting on Massachusetts governor's controversial spending and reorganization plan for public higher education at Bridgewater State College) (March 14, 2003).

<sup>26</sup> The Commission holds important forums in public universities throughout Puerto Rico. See <http://www.ceepur.org/> (Oct. 19, 2005); cf. <http://www.post-gazette.com/localnews/20031201boardsidelocal7p7.asp>) (Boston University serves as the "management team" and actually oversees the 58,000 person Chelsea School District) (Dec. 1, 2003).

<sup>27</sup> See e.g., P.R. Special Election, *supra* note 25 (overwhelming majority of polling stations located in public schools and universities); [http://www.ci.lynn.ma.us/public\\_documents/lynhma\\_clerkdocs/2005%20Polling%20Places.pdf](http://www.ci.lynn.ma.us/public_documents/lynhma_clerkdocs/2005%20Polling%20Places.pdf) (visited Oct. 12, 2005) (listing English High School and North Shore Community College in Lynn, MA as polling sites for 2006 elections).

Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance"). Despite the constitutional protection of these rights, the Supreme Court has noted that the history before Congress documented "a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities," including the "systematic deprivations of fundamental rights," including deprivations of the right to vote. *Lane*, 541 U.S. at 524. As the 2001 GAO report makes clear, barriers continue to exclude persons with disabilities and impede their ability to participate in civic life.

## **CONCLUSION**

For the foregoing reasons, *amici* respectfully request that this Court affirm the wise judgment of the district court.

Dated: October 24, 2005

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

Counsel for *amici curiae* certifies that the foregoing Brief complies with the type-volume limitations under Fed. R. App. P. 32(a)(7)(B) & 35(b)(2) and the Local Rules for the U.S. Court of Appeals for the First Circuit.

This Brief has been prepared using 14-point for text, and 12-point for footnotes, proportionally spaced Times New Roman typeface in WordPerfect 8 software. Exclusive of table of contents, table of citations, and certificate of service, this Brief contains 15 pages and 4,002 words.

Dated: October 24, 2005

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## **APPENDIX**

### **Descriptions of *Amici* Organizations**

**AARP** is a nonprofit, nonpartisan membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by states and state entities, in a manner free from discrimination. Many AARP members attend institutions of public higher education in order to enhance their skills, to support efforts to change their career, and/or to pursue life-long learning. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

**ADAPT** is a national organization composed primarily of persons with severe physical disabilities, including persons with spina bifida, cerebral palsy, muscular dystrophy, spinal cord injuries, multiple sclerosis, quadriplegia, paraplegia, head and brain injuries, poliomyelitis, amyotrophic lateral sclerosis, sensory disabilities, and cognitive, mental and developmental disabilities. ADAPT has a long history and record of enforcing the civil rights of people with

disabilities. ADAPT participated in the political and legislative process to pass the 1990 Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

The **Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell)** is a non-profit organization with chapters throughout the United States, and has international affiliates throughout the world. AG Bell advocates for spoken languages in children and adults. AG Bell is deemed to be the preeminent organization in deafness. AG Bell provides advocacy resources and leadership for parents, professionals, and individuals who are deaf or hard of hearing. AG Bell has participated as *amicus curiae* in numerous federal and state cases involving issues that potentially affect the legal rights of its members. *See e.g., Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342 (5th Cir. 2005).

The **American Association of People with Disabilities (AAPD)** is the largest national membership organization for people with all types of disabilities, their families and supporters. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act for the purpose of building the political and economic power of all people with disabilities in the U.S. AAPD has a strong interest in Congress's constitutional authority to protect the civil rights of people with disabilities in higher education and other settings.

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to preserving

the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws, including nondiscrimination against people with disabilities. In support of those principles, the ACLU actively supports the passage of the Americans with Disabilities Act, among other things. The ACLU was founded in 1920, and its Puerto Rico Chapter was founded in 2000.

**The Arc of the United States (The Arc)**, through its approximately 900 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation/intellectual disabilities and other developmental disabilities and their families. The Arc vigorously challenges attitudes and public policies that authorize or encourage segregation of people with mental retardation/intellectual disabilities and other developmental disabilities. Since its inception, The Arc has opposed false stereotypes that limit the freedom and rights of people with mental retardation/intellectual disabilities and other developmental disabilities. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act (ADA). The Arc is now actively involved in the law's implementation and enforcement.

**Founded in 1955, Association of Children and Adults with Mental Retardation of Puerto Rico, Inc.** is a non-profit disability rights organization that advocates in Puerto Rico for the provision of services that promote greater

autonomy, economic self-sufficiency, and empowerment of individuals with disabilities.

The **Association on Higher Education And Disability (AHEAD)** is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including professional licensing and employment. Its membership includes approximately 2,000 institutions including colleges, universities, not-for-profit service providers, and standardized testing organizations, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. In addition, AHEAD members actively work with students in establishing vocational plans and job readiness. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

Founded in 1972, the **Bazelon Center for Mental Health Law (Bazelon Center)** is a national public interest organization which advocates for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for

individuals with mental disabilities. A large portion of the Bazelon Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

**The Civil Rights Commission of the Commonwealth of Puerto Rico** is a public agency created on June 28, 1965, to exercise the following functions: (a) to educate the entire population [of Puerto Rico] on the significance of the fundamental rights and strict enforcement of the laws protecting such rights; (b) to advocate on behalf of groups and individuals and the public at large before government authorities for the protection of human rights and for strict enforcement of the laws protecting such rights; and (c) to carry out surveys and investigations on the effectiveness of fundamental rights, including receiving and resolving complaints and grievances of citizens alleging violations of those rights.

**The Epilepsy Foundation** is a nonprofit corporation founded in 1968 to advance the interests of the more than 2.5 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, the Epilepsy Foundation has, since

its inception, worked to dispel the stigma associated with seizures, and has supported the development of laws, including the Americans with Disabilities Act, that protect individuals from discrimination based on these stereotypes and fears.

**The Legal Aid Society – Employment Law Center** (The LAS-ELC) is a public interest law firm that advocates on behalf of the workplace rights of individuals with disabilities and other under-represented communities. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The LAS-ELC’s interest in the legal rights of those with disabilities is longstanding. The Center has represented and continues to represent clients, including students, faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to persons with disabilities.

**Founded in 1988, Movement to Reach an Independent Life, Inc. (MAVI)** is a non-profit, non-residential private organization that serves people with significant disabilities in Puerto Rico. MAVI promotes the independence, productivity, and inclusion of this population in all segments of our society. MAVI’s mission is to promote the Philosophy of Independent Life empowering each individual to take control over the decision making in their lives. Through a

network of centers located across Puerto Rico, MAVI serves over 1,000 people with disabilities through information and referral, independent living skills development, peer counseling and self, individual, and system advocacy.

**The National Association for Rights Protection and Advocacy (NARPA)** includes recipients of mental health and developmental disabilities services; lay, professional, and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally disabled.

**The National Association of Councils on Developmental Disabilities (NACDD)** is a national, member-driven organization consisting of 55 State and Territorial Developmental Disabilities Councils. NACDD advocates and continually works towards positive system change on behalf of individuals with developmental disabilities and their families. NACDD believes in removing all barriers against persons with developmental disabilities to ensure full participation in society. As such, NACDD supports full compliance with the Americans with Disabilities Act, in both the spirit and the letter of the law. NACDD advocates for implementing the Developmental Disabilities Assistance and Bill of Rights Act (P.L. 106-402) and to promoting the interests and rights of people with developmental disabilities and their families.

Established in 1880, the **National Association of the Deaf (NAD)** is the nation's oldest and largest consumer-based, nonprofit organization promoting, protecting, and preserving the civil rights and quality of life of 28 million deaf and hard of hearing Americans. As a national federation of state association, organizational and corporate affiliates, the advocacy work of the NAD encompasses a broad spectrum of areas including, but not limited to, accessibility, education, employment, health care, mental health, rehabilitation, technology, telecommunications, and transportation. The NAD is committed to ensuring that deaf and hard of hearing individuals in the United States have equal access to the facilities and services of, and an equal opportunity to participate in, all programs and activities of state and local governments, including prisons and correctional facilities. Removal of communication barriers by providing reasonable accommodations, including auxiliary aids and services, is necessary to ensure access by individuals with sensory disabilities. The NAD is a private, nonprofit, non-stock, membership organization incorporated in the District of Columbia. The NAD has no parent corporation.

The **National Council on Independent Living (NCIL)** is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights

organizations. As a membership organization, NCIL advances independent living and the rights of people with disabilities through consumer-driven advocacy. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

The **National Disability Rights Network (NDRN)**, formerly the National Association of Protection and Advocacy Systems (NAPAS) is the membership association of protection and advocacy (“P&A”) agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&A’s are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. In fiscal year 2004, P&A’s served over 76,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation’s largest provider of legally based advocacy services for persons with disabilities. This case is of particular interest to NDRN due to the small number of individuals with disabilities who seek higher education. Providing people with disabilities access to higher education promotes their independence, self-sufficiency, employability and integration in their communities. It contributes to the exercise of their rights and responsibilities as full-fledged citizens on the same basis as people who do not have disabilities.

For over thirty years, the **National Health Law Program (NHeLP)** has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NHeLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NHeLP has worked with the ADA, and the program's work and our clients will be significantly affected by the Court's decision in this case.

Established in 1909, the **National Mental Health Association (NMHA)**, with its more than 340 affiliates, is dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. NMHA envisions a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free of stigma and prejudice.

The **National Mental Health Consumers' Self-Help Clearinghouse** (the Clearinghouse) is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and

advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The **Polio Society** serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The ADA and the Rehabilitation Act are key elements of the Polio Society's advocacy. The Polio Society's members are persons with disabilities as a result of polio and post-polio syndrome.

Founded in 1985, **Public Justice Center (PJC)** is a non-profit civil rights and anti-poverty legal services organization that advocates nationally to protect the rights of the underrepresented. Since its inception, the PJC has used impact litigation, public education, and legislative advocacy to accomplish law reform for its clients in numerous areas of civil rights, including *inter alia*, disability rights. The PJC has established an Appellate Advocacy Project, to expand and improve the representation of indigent and disadvantaged persons before various state and federal appellate courts.

Founded in 1964, **Puertorican Association of the Blind, Inc. (PAB)** is a civil non-profit organization that advocates to protect the rights of blind persons. The mission of the PAB is to enable blind persons (children and adults) to achieve

their maximum potential through increased independence, productivity, and integration into the community and to improve their quality of life.

**The Puerto Rican Foundation of Down Syndrome, Inc. (PR Foundation)** was founded in 1991. PR Foundation was formerly known as the Puerto Rican Society of Down Syndrome which was founded in 1986 and incorporated under Puerto Rico's laws in 1989. The PR Foundation is a civil non-profit organization with a commitment to offer vitally needed support, orientation, and services to all people with Down Syndrome in Puerto Rico. The mission of the PR Foundation is to promote the well-being of individuals with Down Syndrome by fostering their inclusion and integration in mainstream society and by creating the conditions for them to lead independent lives.

**TASH** (formerly the Association for Persons with Severe Handicaps) is an international membership association of people with disabilities, their families, advocates and professionals in the disability field. TASH has over 30 chapters covering 37 states and members in 34 nations. TASH is committed to inclusive education, self-directed community living, meaningful jobs and lives that are of personal value for people with disabilities and their families. As such, TASH views this case as an important one in assuring disability rights and opportunity.

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of October, 2005, I served by first class mail, postage prepaid, a copy of the foregoing Brief on the following:

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