The State as Deployer:

Title II of the Americans with Disabilities Act and Government Artificial Intelligence

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Working draft, June 2026 (v3)

Abstract

When a state or local government deploys an artificial intelligence system to deliver its own programs, services, or activities, Title II of the Americans with Disabilities Act reaches that government directly. Title II carries no federal financial assistance requirement, so the procurement and recipient questions that confine Section 504 do not arise, and it carries no physical place or nexus requirement, so the circuit split that has stranded purely digital providers under Title III does not arise either. A public entity cannot escape the statute by purchasing a discriminatory tool instead of building one. This Article develops the route that does not depend on winning the hardest fight. It locates the public entity behind the automated decision, shows that the contractual arrangements and methods of administration regulations at 28 C.F.R. §35.130(b)(1) and (b)(3) bar a government from contracting out of the duty, draws the boundary that keeps the theory honest by distinguishing service delivery from mere licensing, and corrects the record on that boundary's most quoted authority, *Ivy v. Williams*, which the Supreme Court vacated as moot and which now binds no court. It then demonstrates that an automated system that systematically degrades a public service for a class of people with disabilities is a method of administration with a cognizable disparate impact and an attendant duty of reasonable modification. The Article then confronts the obstacle that cannot be skipped. The marquee government algorithm decisions, *Elder v. Gillespie* in the Eighth Circuit and *K.W. v. Armstrong* in the Ninth, were won on procedural due process and expressly declined to reach the disability theory or the validity of the algorithm itself. That leaves the clean Title II disparate impact holding unplanted across two circuits. The Article meets the sovereign immunity question on two tracks. Prospective injunctive relief under *Ex parte Young* is the safe harbor, and against

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the funded deployer, Section 504 returns to the case as the carrier of damages, because 42 U.S.C. §2000d-7 conditions federal assistance on an express waiver of Eleventh Amendment immunity that requires no abrogation analysis at all. Title II abrogation remains the contested frontier reserved for the rare unfunded deployer, and *Tennessee v. Lane* secures even that frontier categorically where the deployment touches access to the courts. The Article proposes a remedy of configuration and process, not abstention.

Keywords: Americans with Disabilities Act; Title II; Section 504; artificial intelligence; algorithmic decision systems; disparate impact; reasonable modification; sovereign immunity; public entities; procurement; government technology.

Contents

I. Introduction

The recipient-and-funding terrain was always the wrong ground on which to fight artificial intelligence harm. Section 504 of the Rehabilitation Act reaches only entities that receive federal financial assistance, and only while the assistance continues, which leaves a litigant chasing grants, forgiven loans, and cooperative agreements that may have lapsed before the harm occurred.[1] Title III of the Americans with Disabilities Act reaches private businesses, but a circuit split over whether a digital service must be tied to a physical place has stranded the purely digital provider in much of the country.[2]

There is dry ground. Title II of the ADA governs state and local government. It does not require federal money, and it does not require a physical place. The two doctrines that defeat the company defeat nothing here. A government that deploys an artificial intelligence system to run a benefits determination, a public-facing service portal, or a constituent communication function is delivering a service, program, or activity, and Title II reaches that delivery whether the government performs it by hand, by employee, or by purchased model.[3]

Three routes reach this harm under disability civil rights law, and they are worth distinguishing. Title III reaches the private company that builds the model, but only by resolving whether a digital service must be tied to a physical place, the question on which the circuits have divided. Title II reaches the state or local government that deploys the model, and it does so with no physical place question and no federal funding question. Section 504 reaches the subset of deployers that take federal financial assistance, and only while they take it; against the funded deployer, though, it carries a remedial cargo Title II lacks, an express statutory waiver of sovereign immunity, and Part VIII puts it to work. This Article concerns the second route, the

1. 29 U.S.C. §794(a) (prohibiting disability discrimination under "any program or activity receiving Federal financial assistance"); *see* U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986) (procurement contracts are not federal financial assistance for purposes of the funding trigger).

2. That circuit split is not relitigated here. *Compare* Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994) (functional reading, no physical place required), *and* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32–33 (2d Cir. 1999) (same), *with* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th Cir. 2000) (physical place or nexus required).

3. 42 U.S.C. §§12131–12132.

deploying government, because the deploying government is the defendant a plaintiff can reach today.

A. Scope

This Article concerns Title II of the ADA, state and local government. It does not relitigate the Title III question whether a digital service must be connected to a physical place, and it does not depend on resolving it. It references Section 504 in two places only: to mark the contrast that Title II carries no funding trigger, and to supply the damages waiver of Part VIII where the deployer is itself federally funded. The disability theory advanced here is not limited to any single mechanism of harm. It is the ordinary law of disability-based disparate impact and reasonable modification, applied to an automated method of administration. An automated decision that strips a procedural step a person with an attention disability relies on is as cognizable as one that degrades a screen reader's access to a benefits portal.

B. Roadmap

Part II describes the deployment problem and calibrates it honestly: most current government artificial intelligence use is internal and employee facing, which is the entry point and not yet the strong case, and the strong case arrives the moment the model touches a public-facing service or a benefits determination. Part III states why Title II reaches the government without a nexus or a dollar of federal money. Part IV establishes that a government cannot contract out of the duty. Part V draws the boundary that keeps the theory honest and corrects the vacated status of its most quoted authority. Part VI develops the disparate impact and reasonable modification theory against an automated decision. Part VII identifies the unplanted hole that the leading government algorithm cases left open. Part VIII confronts sovereign immunity on two tracks, the injunction and the funding waiver, and identifies the court system as the one category where even Title II damages are secure. Part IX presents the same model evidentiary showing. Part X proposes a remedy of configuration and process. Part XI concludes.

II. The Deployment Problem

Governments at every level are acquiring general-purpose artificial intelligence to run benefits eligibility, public-facing service portals, document processing, and constituent communication. The acquisition pattern is procurement: a public entity licenses a commercial model and routes some part of its work through it.

The publicly reported state pilots illustrate the entry point. Pennsylvania launched what its administration called the first state government pilot of a commercial enterprise generative artificial intelligence tool in January 2024, initially limited to a small group of Office of Administration employees, and Tennessee followed with a phased pilot in the spring of 2025 that it has since expanded into day-to-day operations across thousands of licensed employees.[4] Both state pilots were described, at announcement, as internal employee productivity tools. That matters for the calibration of any disability claim. An internal tool that drafts memoranda for state employees has a weak public-facing hook, because the affected population is not the public seeking the service. The strong claim does not arise there. It arises the moment the model touches a public-facing service or a benefits determination, when the output reaches a person with a disability who is seeking something the government is obligated to deliver.

The trajectory is not speculative. The government algorithm cases discussed below involved exactly the move from internal discretion to automated allocation. Arkansas replaced the professional discretion of a registered nurse with a computer-based allocation algorithm for home and community based services, and almost half of the affected beneficiaries received service reductions after the switch.[5] Idaho built an individualized budget algorithm for its

4. Office of Admin., Commonwealth of Pa., *Shapiro Administration and OpenAI Launch First-in-the-Nation Generative AI Pilot* (Jan. 9, 2024), `https://www.pa.gov/agencies/oa/newsroom/shapiro-administration-and-openai-launch-first-in-the-nation-generative-ai-pilot.html` (pilot limited to Office of Administration employees, and stating that no resident would interact directly with the tool); *Inside Tennessee's Deployment of ChatGPT Enterprise*, StateScoop (Mar. 9, 2026), `https://statescoop.com/tennessee-chatgpt-enterprise-kristin-darby/` (describing a 60-day phased pilot in spring 2025 with 1,000 licenses, since expanded to more than 5,000 licensed employees). These pilots are illustrative entry points; the argument does not turn on their particulars.

5. Elder v. Gillespie, 54 F.4th 1055 (8th Cir. 2022) (describing the move to a "computer-based system that used an algorithm called Resource Utilization Groups" and the subsequent reductions).

developmental disabilities waiver, and the calculated budget capped the value of services a participant could receive.[6] The general-purpose model is the next iteration of the same substitution, and it arrives with broader reach because it can touch the front door of a service rather than a single allocation table.

III. Title II Reaches the Government Without a Nexus or a Dollar of Federal Money

Title II's operative prohibition is categorical. "[N]o 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 subjected to discrimination by any such entity."[7] A "public entity" is any state or local government and any department, agency, special purpose district, or other instrumentality of a state or local government.[8] The phrase "services, programs, or activities" is comprehensive; it reaches everything a public entity does.

Two features of this text do the work. First, there is no federal financial assistance requirement. Title II's duty attaches because the defendant is a government, not because the defendant took a federal dollar. The recipient question that governs Section 504, and the rule that procurement contracts do not count as federal financial assistance, are simply absent from Title II.[9] Second, there is no physical place or nexus requirement. Title II speaks of the services, programs, and activities of a public entity, not of a place of public accommodation, and the textual hook that generated the Title III split has no analog in the Title II text.

The implementing regulation tracks the statute and confirms its breadth. The Department of Justice regulation prohibits a public entity from excluding a qualified individual with a disability from participation in, or denying the benefits of, the entity's services, programs, or

6. K.W. ex rel. D.W. v. Armstrong, 789 F.3d 962 (9th Cir. 2015) (describing the budget calculation and its effect of capping covered services under Idaho law).

7. 42 U.S.C. §12132.

8. 42 U.S.C. §12131(1).

9. *See* U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986). Section 504's coverage rises and falls with the receipt of federal financial assistance; Title II's does not.

activities.[10] The point of this Part is narrow and load bearing. A litigant proceeding under Title II against a deploying government never reaches the nexus question and never reaches the funding question. The defendant is covered because it is a government delivering a service.

IV. A Government Cannot Contract Out of the ADA

The natural defense of a deploying government is that the artificial intelligence belongs to a vendor, that the vendor is a private company, and that the government cannot be held to answer for a private company's product. The regulation forecloses that defense by its terms.

A. The Contractual Arrangements Rule

A public entity, "in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability," deny a qualified individual the opportunity to participate, afford an unequal opportunity, or otherwise limit the enjoyment of the service.[11] The phrase "directly or through contractual, licensing, or other arrangements" is the answer to the vendor defense. The discrimination is no less the public entity's because it is delivered through a purchased system.

The methods of administration rule reinforces the point. A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination, or that have the purpose or effect of defeating or substantially impairing the accomplishment of the public entity's program objectives with respect to people with disabilities.[12] An artificial intelligence system that a government routes its service through is a method of administration. If its output systematically degrades the service for a class of people with disabilities, the government has

10. 28 C.F.R. §35.130(a). The regulation was confirmed current against the Electronic Code of Federal Regulations as of this writing.

11. 28 C.F.R. §35.130(b)(1) (verified current text). The same provision prohibits a public entity from aiding or perpetuating discrimination "by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program." *Id.* §35.130(b)(1)(v).

12. 28 C.F.R. §35.130(b)(3)(i)–(ii) (verified current text).

administered its program through a method with a discriminatory effect, and it has done so whether the method is a paper rule, a human reviewer, or a model.

B. The Agency Principle in the Cases

The courts have applied this regulatory architecture to private contractors performing public functions. Where a public entity contracts with a private third party to perform services that the public entity is itself responsible for performing, such that the third party acts as the agent of the public entity, the services are services of the public entity and Title II liability may attach.[13] The principle is settled enough that it operates as the baseline rather than the frontier. The frontier is only the application to an automated agent, and that application is straightforward.

C. Mobley and the Automated Agent

The employment side of disability law has already confronted the automated agent, and its answer maps onto Title II by analogy. In *Mobley v. Workday*, the court held that an artificial intelligence vendor whose tools perform a traditional hiring function, such as screening and rejecting candidates, qualifies as an agent of the employer for purposes of the federal antidiscrimination statutes.[14] The court's reasoning is the part that travels. "Nothing in the language of the federal anti-discrimination statutes or the case law interpreting those statutes distinguishes between delegating functions to an automated agent versus a live human one," and the analysis "focused on the 'function' that the principal has delegated to the agent, not the manner in which the agent carries out the delegated function."[15] The function-not-manner

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13. *See* Battle v. State of Tennessee, No. 3:22-cv-00022 (M.D. Tenn. Sept. 24, 2025) (stating that when a public entity contracts with a private party to perform services the entity is responsible for performing, such that the party is the entity's agent, the services are the entity's and Title II liability may attach); Prado v. City of Berkeley, No. 3:23-cv-04537 (N.D. Cal. Aug. 6, 2024) (applying the methods of administration analysis to a public entity's systemic accessibility).

14. Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (N.D. Cal. 2024). *Mobley* is an employment case under Title VII, the ADEA, and Title I of the ADA, not a Title II case; it is offered here as an analogy for how the law treats a delegated automated function, not as Title II authority.

15. *Id.* The court drew the boundary precisely: a spreadsheet used to sort data and an email program used to send rejection notices are not agents, because they do not participate in the decision, while a system that screens and dispositions candidates is, because it does. *Id.*

principle is exactly the principle Title II needs. When a government delegates the traditional government function of administering a benefit or delivering a public service to a model, the model's output is the government's act, just as the screening tool's output was the employer's act in *Mobley*.

V. The Boundary That Keeps the Theory Honest

A theory that swept in every private actor a government touches would be naive, and a court would reach for the boundary before reaching the merits. The boundary should be stated before a court states it adversely. Stating it accurately also requires a correction that much of the discussion has not absorbed: the decision most often quoted for the boundary no longer binds any court.

A. The Licensing Line and Its Surviving Anchor

The line is this: mere licensing or regulation of a private industry does not convert the industry into a service, program, or activity of the public entity. Its surviving appellate anchor is *Noel v. New York City Taxi and Limousine Commission*, in which the Second Circuit held that the city's licensing and pervasive regulation of the private taxi industry did not make that industry a program or activity of the city: "[C]ontrol over the taxi industry, however pervasive it is at this time, does not make the private taxi industry 'a program or activity of a public entity.' "[16]

B. The Vacated Echo

The statement of the line that courts and commentary quote most often came from the Fifth Circuit in *Ivy v. Williams*. The Texas Education Agency licensed and regulated private driver education schools, and deaf plaintiffs who could not find an accessible school sued the agency under Title II. The panel held that "the mere fact that the driver education schools are heavily regulated and supervised by the [agency] does not make these schools a 'service, program, or

16. Noel v. New York City Taxi & Limousine Comm'n, 687 F.3d 63, 72 (2d Cir. 2012).

activity' of the [agency]," and it rested the holding on the absence of a contractual or agency relationship between the schools and the state.[17]

What the discussion that still quotes that sentence routinely omits is the subsequent history. The Supreme Court granted certiorari and, when the dispute became moot while the case was pending, vacated the Fifth Circuit's judgment and remanded with instructions to dismiss.[18] A vacated opinion binds no court, including the court that issued it. The licensing boundary therefore rests, as binding circuit authority, on *Noel* alone; everywhere else it persists only as persuasive reasoning that district courts continue to engage.[19]

The vacated panel was itself divided on the regulation closest to the deployment case. Judge Wiener, dissenting in relevant part, read the significant assistance provision to cover "a public entity that farms out the practical implementation of its program to private entities while retaining and exercising considerable oversight, regulation, and other substantive involvement."[20] After the vacatur, the majority's narrower reading and the dissent's broader one stand on the same footing: persuasive, and nothing more.

C. The Deployment Case Sits on the Far Side of the Line, However Stated

Ivy concerned an actor the state merely permitted in the market, and *Noel* concerned an industry the city licensed. The artificial intelligence deployment case concerns an actor the state hired to perform the state's own function. There is a contract. The state delegated a service it is responsible for delivering. The discriminatory output is the result of the state's own deployment, and the contractual and agency relationship whose absence decided *Ivy* is exactly what a procurement deployment supplies. Courts applying the boundary have distinguished it on this

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17. Ivy v. Williams, 781 F.3d 250, 256 (5th Cir. 2015), *vacated as moot sub nom.* Ivy v. Morath, 580 U.S. 956 (2016).

18. Ivy v. Morath, 580 U.S. 956 (2016) (mem.) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit with instructions to dismiss as moot."); *see* United States v. Munsingwear, Inc., 340 U.S. 36 (1950) (describing vacatur as the established practice for civil cases that become moot while pending review).

19. *See, e.g.*, Price v. Shibinette, 2021 DNH 179 (D.N.H. 2021) (engaging and distinguishing the *Ivy* analysis).

20. Ivy, 781 F.3d at 262–63 (Wiener, J., concurring in part and dissenting in part) (construing 28 C.F.R. §35.130(b)(1)(v)).

axis, declining to treat the licensing cases as controlling where the state contracts for or directly provides the service.[21] The boundary, in either its binding form or its persuasive one, therefore confirms coverage of the deploying government rather than defeating it.

The vacatur carries one further consequence for the harder cases at the line's edge. Outside the Second Circuit, the question whether a state that meets its own service obligations through approved private platforms is answerable for their accessibility is formally open, and the strongest statement against coverage is an opinion that binds no one.

VI. Disparate Impact and Reasonable Modification Against an Automated Decision

The substantive theory is the ordinary law of disability-based disparate impact and reasonable modification, and it fits an automated decision without strain.

A. Meaningful Access and the Disparate Impact Theory

The Supreme Court established in *Alexander v. Choate* that disability discrimination law reaches facially neutral conduct, because the discrimination Congress sought to reach "would be difficult if not impossible to reach if the Act were construed to proscribe only conduct fueled by a discriminatory intent."[22] The governing question is meaningful access: whether a facially neutral government policy or practice has the effect of denying people with disabilities meaningful access to a public service.[23]

The Ninth Circuit applied this directly in *Payan v. Los Angeles Community College District*, holding that a disparate impact disability claim under Title II and Section 504 is

21. *See, e.g.*, Price v. Shibinette, 2021 DNH 179 (D.N.H. 2021) (distinguishing *Ivy* where the challenged services were furnished through the state's own waiver program rather than through mere licensing of a private industry).

22. Alexander v. Choate, 469 U.S. 287, 296–97 (1985). The Court assumed without deciding that the statute "reaches at least some conduct that has an unjustifiable disparate impact" on people with disabilities, and framed the inquiry as whether a facially neutral policy denies "meaningful access" to the benefit. *Id.* at 299, 301.

23. *See* Crowder v. Kitagawa, 81 F.3d 1480, 1484–86 (9th Cir. 1996) (treating Hawaii's facially neutral quarantine requirement, which had a disparate impact on blind users of guide dogs, as a candidate for reasonable modification under Title II).

privately enforceable and survives *Alexander v. Sandoval*, and that a disability discrimination claim may proceed on any of three theories: disparate treatment, disparate impact, or failure to make a reasonable accommodation.[24] The systemic-versus-individualized distinction is the one that matters for an automated deployment. A single denied request for an accommodation is a failure to modify claim. A model that degrades a service across an entire class is a systemic barrier, and the disparate impact theory is the natural fit.

B. The Regulation Supplies Three Hooks

The regulation supplies the cause of action in three forms. The methods of administration provision reaches an automated method with a discriminatory effect.[25] The eligibility criteria provision reaches an automated screen that tends to screen out a class of people with disabilities, unless the criteria can be shown necessary for the provision of the service.[26] The reasonable modification provision imposes an affirmative duty to modify policies, practices, or procedures when necessary to avoid discrimination, subject only to a fundamental alteration defense.[27]

C. The Move

The synthesis is direct. An artificial intelligence system that systematically degrades a public service for a class of people with disabilities is a method of administration with a disparate impact, and the public entity's duty is to test the system for that effect, mitigate it, and provide an accessible alternative, not to abstain from automation altogether. The duty is one of design and process. Nothing in the theory requires proof of intent, and nothing in it requires a place.

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24. Payan v. Los Angeles Cmty. Coll. Dist., 11 F.4th 729, 740 (9th Cir. 2021). The court distinguished a reasonable accommodation claim, which is focused on an individualized request or need, from a reasonable modification responding to a disparate impact finding, which is focused on modifying a policy or practice to improve systemic accessibility. *Id.* This proposition is contested. Judge Lee dissented on the availability of disparate impact after *Sandoval*, the panel decision was vacated in relevant part and remanded, and the holding that disparate impact survives *Sandoval* is a Ninth Circuit position that not every circuit shares. *See* Payan v. Los Angeles Cmty. Coll. Dist., No. 24-1809 (9th Cir. Mar. 11, 2026) (subsequent appeal on remand). A litigant outside the Ninth Circuit should treat the disparate impact theory as available but unsettled and should plead failure to modify in the alternative.

25. 28 C.F.R. §35.130(b)(3).

26. 28 C.F.R. §35.130(b)(8) (verified current text).

27. 28 C.F.R. §35.130(b)(7)(i) (verified current text).

VII. The Unplanted Hole

The contribution this Article makes is available because the leading government algorithm decisions did not foreclose it. They did not reach it at all.

Elder v. Gillespie is the most visible government algorithm disability case in the country. Arkansas had replaced nurse discretion with an allocation algorithm for home and community based services, and beneficiaries challenged the resulting reductions. The Eighth Circuit affirmed on the ground that beneficiaries have a clearly established procedural due process right to adequate notice of a reduction in benefits, and it held that sovereign immunity did not bar the suit because the harm was ongoing and likely to recur.[28] What the court did not do is decisive for present purposes. It did not reach any ADA Title II disparate impact claim, it did not reach any Section 504 claim, and it did not reach the substantive validity of the ARChoices algorithm itself. The disability theory was left on the table.

K.W. v. Armstrong is the Idaho analog, and it leaves the same theory on the same table. The Ninth Circuit affirmed an injunction restoring Medicaid budget levels on the ground that the state's failure to explain its automated budget reductions violated both the Medicaid Act's fair hearing requirements and the Due Process Clause.[29] As in *Elder*, the court did not reach Title II disparate impact, did not reach Section 504, and did not reach the substantive validity of the budget-setting algorithm.

The pattern is the opening. Two circuits have now resolved high-profile challenges to government benefit algorithms on procedural due process, and both expressly declined to reach the disability discrimination theory or the validity of the algorithm. The clean Title II disparate impact holding against a government artificial intelligence deployment is unplanted across both. The contribution of this Article is to identify where that holding belongs and how a litigant

28. Elder v. Gillespie, 54 F.4th 1055 (8th Cir. 2022) (affirming on procedural due process and holding the suit not barred by sovereign immunity); *see also* Elder v. Gillespie, No. 3:19-CV-00155 KGB, 2021 WL 1226671 (E.D. Ark. Mar. 31, 2021) (district court opinion); Estate of Jacobs v. Gillespie, No. 3:16-cv-00119 (E.D. Ark. Nov. 1, 2016) (requiring that the notice be specific about the beneficiary's conditions and the algorithm's role).

29. K.W. ex rel. D.W. v. Armstrong, 789 F.3d 962 (9th Cir. 2015) (affirming on Medicaid Act fair-hearing and Due Process Clause notice grounds).

should plead it so that a court reaches it rather than disposing of the case on notice grounds and leaving the substance for another day.

VIII. The Sovereign-Immunity Hurdle, Addressed Head-On

A Title II theory against a state that ignored sovereign immunity would be naive, and the obstacle cannot be skipped. It can be navigated, and on two separate tracks. The relief that matters most is untouched by the bar, and against the deployers this Article centers on, the damages question runs through a waiver the state has already signed rather than through abrogation.

A. Prospective Injunctive Relief Is the Safe Harbor

The Eleventh Amendment does not bar a suit seeking declaratory and injunctive relief against a state officer in an official capacity to halt an ongoing violation of federal law. That is the doctrine of *Ex parte Young*, and the government algorithm cases supply its application.[30] *Elder* held that sovereign immunity did not bar the suit because, on the plaintiffs' allegations, the state had no plans to change its assessment tool or its notices, so "[t]he very harm alleged remains likely to recur barring a change in the state's operation of the program or judicial intervention."[31] *K.W.* held that an order restoring benefit levels prospectively was permissible Eleventh Amendment relief, because it restored class members going forward and was not measured by past monetary loss.[32] A recurring automated deployment is the paradigm of an ongoing violation, and prospective relief to require testing, an accessible alternative, and a human appeal path is exactly the kind of forward-looking order *Ex parte Young* permits.

30. Ex parte Young, 209 U.S. 123 (1908).

31. Elder v. Gillespie, 54 F.4th 1055 (8th Cir. 2022) (concluding that sovereign immunity did not bar the suit because, on the plaintiffs' allegations, the state had "no plans to switch to a different assessment tool, allocation methodology, or notice of action," so "[t]he very harm alleged remains likely to recur"). The court grounded the conclusion in the recurrence of the algorithmic harm, which is precisely the posture of a continuing automated deployment.

32. K.W. ex rel. D.W. v. Armstrong, 789 F.3d 962 (9th Cir. 2015) (joining sister circuits in rejecting Eleventh Amendment challenges to orders reinstating social assistance benefits prospectively, on the ground that such relief is not measured by past monetary loss).

B. Section 504 Supplies the Damages Waiver

The deployers at the center of the government algorithm cases are state Medicaid and human services agencies, and those agencies hold federal financial assistance as a structural fact rather than an incident. Two consequences follow, and together they change the damages posture.

The first is coverage without tracing. Under the Civil Rights Restoration Act, when any part of a state or local department or agency receives federal assistance, the covered program or activity is all of the operations of that department or agency.[33] A Section 504 claim against the deploying department therefore requires no showing that any federal dollar touched the artificial intelligence procurement. The deployment is covered because the department is.

The second is the waiver. Congress conditioned the assistance on an express surrender of immunity: a state "shall not be immune under the Eleventh Amendment" from suit in federal court for a violation of Section 504.[34] The Supreme Court has described the provision as an unambiguous waiver of the states' Eleventh Amendment immunity,[35] and the courts of appeals have enforced the condition as written: a state that accepts federal funds for a specific department or agency voluntarily waives its sovereign immunity for Rehabilitation Act claims against that department or agency, and because the funds a department receives are fungible, the waiver does not depend on tracing any dollar to the challenged function.[36]

The pairing with Title II is structural rather than duplicative. Title II and Section 504 are construed in tandem, and the disparate impact and reasonable modification theories developed in Part VI proceed identically under both statutes.[37] Pleaded together against a funded deployer, the statutes divide the labor. Title II supplies the conduct standards, the regulatory architecture

33. 29 U.S.C. §794(b)(1)(A) (defining "program or activity" as "all of the operations of" a department, agency, special purpose district, or other instrumentality of a state or local government, any part of which is extended federal financial assistance).

34. 42 U.S.C. §2000d-7(a)(1).

35. Lane v. Pena, 518 U.S. 187, 200 (1996).

36. Koslow v. Pennsylvania, 302 F.3d 161 (3d Cir. 2002) (holding that a state's acceptance of federal funds for a specific department waives Eleventh Amendment immunity for Rehabilitation Act claims against that department, and treating the funds a department receives as fungible rather than traceable).

37. *See* Payan v. Los Angeles Cmty. Coll. Dist., 11 F.4th 729 (9th Cir. 2021) (analyzing the Title II and Section 504 theories under shared standards).

of Part IV, and the prospective relief; Section 504 supplies the waiver that carries compensatory damages. The state cannot accept the structure of one and disclaim the other, because it signed up for both, one by governing and one by taking the money.

The waiver carries compensatory damages, and the bounded scope should be stated plainly rather than discovered late. Emotional distress damages are unavailable under the Spending Clause statutes after *Cummings*, and punitive damages are unavailable under *Barnes v. Gorman*, so the recoverable money is economic loss, the value of wrongly denied benefits, and attorney's fees.[38] Compensatory damages under both statutes also require intentional discrimination, which the courts of appeals have generally defined as deliberate indifference: knowledge that harm to a federally protected right is substantially likely, and a failure to act on that knowledge.[39] For an automated deployment, the standard converges with the remedy this Article proposes. A department on notice of a disparate effect, through hearings, complaints, or its own refusal to test, that continues the deployment unchanged is assembling the deliberate indifference record itself.

C. Title II Damages Are the Contested Frontier

Where the deployer is not itself a recipient of federal assistance, damages must run through Title II alone, and Title II money damages against a state run through the abrogation analysis. Congress may abrogate state sovereign immunity when it acts within its power to enforce the Fourteenth Amendment, and the abrogation is valid where the conduct that violates Title II also independently violates the Fourteenth Amendment.[40] Where the conduct does not independently violate the Constitution, abrogation is tested by congruence and proportionality, and the analysis

38. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022) (emotional distress damages unavailable under the Spending Clause statutes); Barnes v. Gorman, 536 U.S. 181 (2002) (punitive damages unavailable).

39. *See, e.g.*, Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001).

40. United States v. Georgia, 546 U.S. 151 (2006) (Title II validly abrogates sovereign immunity insofar as it creates a private cause of action for conduct that independently violates the Fourteenth Amendment).

is context specific.[41] The difficulty is that disability classifications draw only rational-basis review, so the constitutional violation that makes abrogation easy is not present in the ordinary disparate impact case.[42] The damages claim therefore depends on the context specific analysis *Lane* requires and is strongest where the automated deprivation also offends a constitutional guarantee, such as the procedural due process interest the algorithm cases vindicated. The article should lead with injunctive relief as the safe harbor, take the Section 504 waiver wherever the deployer is funded, and reserve the abrogation fight for the deployer that took no federal dollar, won case by case rather than across the board.

D. Access to the Courts Is the Secure Zone

One class of deployments escapes the contested frontier entirely. In *Tennessee v. Lane*, the Supreme Court held that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, is a valid exercise of Congress's power to enforce the Fourteenth Amendment, sustaining the abrogation of sovereign immunity for that class without any case specific inquiry.[43] Court systems are now deploying automated tools at their public-facing edge: online dispute resolution platforms, electronic filing assistants, self help and triage services, automated fee waiver screening. When such a tool screens out a litigant with a disability, the discriminatory method of administration operates on access to the courts itself, and the damages question that the preceding subsection leaves contested is already answered for this class. *Lane* also supplies the measure of the duty: the state need not employ any and all means to make judicial services accessible, only reasonable modifications that do not fundamentally alter the service or impose an undue burden,[44] which is the same configuration and process remedy this

41. City of Boerne v. Flores, 521 U.S. 507 (1997) (establishing the congruence and proportionality test for Fourteenth Amendment enforcement legislation); Tennessee v. Lane, 541 U.S. 509 (2004) (sustaining Title II abrogation as applied to the fundamental right of access to the courts, on a context specific analysis).

42. Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Title I abrogation invalid; disability classifications reviewed for rational basis); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (rational basis for disability classifications).

43. Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

44. *Id.* at 531–32.

Article proposes in Part X. The deployment theory should claim this category explicitly, because it is the one place where the strongest defendant objection has been resolved by the Supreme Court in the plaintiff's favor, and because the court system deployment is arriving on the same procurement pattern as the benefits deployment.

IX. The Same Model Evidentiary Showing

A single base model is common across the consumer, enterprise, government, and raw application programming interface surfaces of a provider's offering, and the principal variable across those surfaces is the safety configuration. Against a deploying state, that fact is evidentiary rather than a direct claim, because the state does not control the provider's configuration dial. Its evidentiary force is real all the same. The common base model proves that a safer configuration was demonstrably available, and demonstrable availability is the answer to the two defenses a state will raise against a reasonable modification claim.

The reasonable modification duty yields only to a showing that the modification would fundamentally alter the service or impose an undue burden.[45] A defendant who argues that a safer configuration would fundamentally alter the service, or that it would be unduly burdensome, must contend with proof that the same provider already offers the safer configuration on another surface of the same base model. The modification that already exists in the provider's own catalog is neither a fundamental alteration nor an undue burden. The *Mobley* principle reinforces the attribution: because the law looks to the function delegated rather than the manner of execution, the state cannot disclaim the configuration as the vendor's private affair when the state chose the surface and the settings under which the model would administer the state's program.

The showing has a discovery condition that should be stated plainly. It fires only if discovery reaches the harm-relevant output behavior of the configurations, rather than the data privacy handling that distinguishes an enterprise tier from a consumer tier. A government defendant will be tempted to characterize the difference between surfaces as a matter of data

45. 28 C.F.R. §35.130(b)(7)(i) (fundamental alteration defense).

retention and confidentiality alone. The litigant must reach the output layer, because it is the variance in output behavior, not the variance in data handling, that establishes that a safer service was available.

X. Remedy

The remedy is the spine of the theory, and it is deliberately modest. Prospective injunctive relief should require three things: testing of the deployed system for disparate effects on classes of people with disabilities, an accessible alternative channel for the service the system administers, and a human appeal path for any automated adverse decision.

Each element stays inside the reasonable modification frame and away from the overstated position that a government may never use artificial intelligence. The duty is to test, mitigate, and accommodate, not to abstain. A remedy of configuration and process is also the remedy a court can grant comfortably, because it asks the state to administer its program without the discriminatory effect rather than to abandon the program. The overstated abstention position should be disclaimed expressly, both because it is wrong on the law and because it deters the very plaintiffs and courts whose participation the theory needs. The point is not that the government cannot use the model. The point is that the government must use it in a manner that does not deny meaningful access, and must offer a path around it when it does.

XI. Conclusion

The company that builds the model is the hardest defendant and the slowest reform. Reaching it under Title III requires winning a circuit split, and the reform matures only as the functional circuits accumulate. The state that deploys the model is already standing in the open. It is covered because it is a government, without a nexus and without a federal dollar. It cannot contract out of the duty, because the regulation reaches contractual and other arrangements and treats a delegated automated function as the government's own. The disability theory against it is the ordinary law of disparate impact and reasonable modification, and the leading government algorithm cases left that theory unplanted while resolving the cases on notice. Sovereign immunity does not bar the prospective relief the theory most needs, and where the deployer accepted federal funds, as the benefits agencies at the center of the algorithm cases always have, Section 504 stands alongside Title II and carries the damages waiver the state signed when it took the money. Where the deployment touches the court system, *Tennessee v. Lane* has already resolved even the abrogation question in the plaintiff's favor. Title II is the route to the same harm pattern through a defendant a plaintiff can reach today, while the Title III reform matures in the functional circuits. The public entity behind the automated decision has already signed the contract. The task is to name it.