ORAL ARGUMENT IS REQUESTED

No. 96-2278

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

K.L., a child, by WILLIAM S. DIXON, his next friend; J.B., a child, by FREDERICK M. HART, his next friend; Y.A., D.A., E.A., F.A., V.C., C.C., by ELLA JOAN FENOGLIO, their next friend; M.H., a person with developmental disabilities, by BARBARA SHAPIRO, her next friend; R.E., C.E., J.E., E.E., children, by BARBARA E. BERGMAN, their next friend; J.S., a child, by PETER H. JOHNSTONE, his next friend; A.S., a child, by his mother and next friend T.S.; E.W., a child, by his next friend MARY DOUGHERTY, on behalf of themselves and all others similarly situated,

Plaintiff-Appellants

v.

J. ALEX VALDEZ, Secretary of the New Mexico Department of Health; DOROTHY DANFELZER, Secretary of the New Mexico Human Services Department; HEATHER WILSON, Secretary of the New Mexico Children, Youth and Families Department; ALAN MORGAN, State Superintendent of Public Instruction; ELEANOR ORTIZ, President of the State Board of Education; VAN W. WITT, Vice President of the State Board of Education; EMMALOU RODRIGUEZ, Secretary of the State Board of Education; RUDY CASTELLANO, WALLACE DAVIS, ROGER LENARD, MARLIS MANN, LYNN MEDLIN, DARL MILLER, BEVERLY R. O'DELL, ELIZABETH ORTEGA, MILLIE POGNA, STEVEN SCHMIDT, CATHERINE SMITH, VIRGINIA TRUJILLO, members of the State Board of Education,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF RELATED APPEALS

The United States is aware of no prior appeals. However, the constitutionality of the abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act has also been raised in Martin v. Kansas, Nos. 98-3102, 98-3118 (10th Cir.).

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiffs-appellants filed a complaint in the United States District Court for the District of New Mexico, alleging that the defendants violated, inter alia, Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act, and various provisions of the Constitution. For the reasons discussed in this brief, the district court had jurisdiction over these claims pursuant to 28 U.S.C. 1331, and over the IDEA claim additionally pursuant to 20 U.S.C. 1415(i)(3).

This appeal is from a September 17, 1997, entry of final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing all the claims of certain plaintiffs. Plaintiffs filed a timely amended notice of appeal on September 30, 1997. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the doctrine of Ex parte Young applies to suits brought against state officials for prospective injunctive relief to remedy continuing violations of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act (IDEA).

2. Whether the statutory abrogation of Eleventh Amendment immunity for suits under the ADA is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

3. Whether the statutory abrogation of Eleventh Amendment immunity for suits under Section 504 is a valid exercise of Congress' authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

4. Whether the statutory abrogation of Eleventh Amendment immunity for suits under IDEA is a valid exercise of Congress' authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

1. On November 11, 1993, plaintiffs brought this suit for declaratory and injunctive relief in the United States District Court for the District of New Mexico against state officials in their official capacities. Plaintiffs allege that these officials failed to provide children with mental and/or physical disabilities in state custody with services required by federal law under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq.[1/]

2. On June 26, 1996, the district court denied plaintiffs' Motion for Class Certification, finding that the named plaintiffs were not typical of the children being denied services. K.L. v. Valdez, 167 F.R.D. 688 (D.N.M. 1996). On October 8, 1996, the court dismissed the claims of most of the plaintiffs on the basis of abstention (Aplt. App. 0197-0208). Under Fed. R. Civ. P. 54(b), the court certified the claims of the dismissed plaintiffs as final on September 17, 1997 (Aplt. App. 0223-0224).

[1/] IDEA was reauthorized, with amendments, on June 4, 1997. See Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37. These amendments became effective on July 1, 1998. Id. at tit. II, § 201, 111 Stat. 156. Because plaintiffs are seeking injunctive relief for future compliance with IDEA, statutory citations in this brief refer to IDEA in its 1997 recodification unless otherwise noted.

Plaintiffs appealed the class certification and abstention issues. In their response brief, defendants raised for the first time an Eleventh Amendment defense, claiming that this suit was not permissible under the doctrine of Ex parte Young, and that the express abrogation in the ADA was unconstitutional.

STANDARD OF REVIEW

The district court did not address this question. Because the questions of Eleventh Amendment immunity in this case are purely ones of law, this Court may determine the issues de novo. See United States v. Telluride Co., No. 97-1236, 1998 WL 337856, at *2 (10th Cir. June 25, 1998); Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1483 (10th Cir. 1995).

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under the ADA, Section 504, and IDEA to remedy discrimination against persons with disabilities. First, under the doctrine of Ex parte Young, federal courts have jurisdiction to hear suits against state officials seeking prospective injunctive relief in order to end a continuing violation of federal law. Because state officials are the only defendants in this action, and because the only relief sought is a prospective injunction, there is no Eleventh Amendment bar to the district court's jurisdiction.

If this Court finds it appropriate to reach the question, the ADA, Section 504, and IDEA all contain valid statutory abrogations of Eleventh Amendment immunity. The abrogation in the ADA is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact

"appropriate legislation" to "enforce" the Equal Protection Clause. In exercising that power, Congress is not limited to legislating in regard to classifications that the courts have found are "suspect." To the contrary, Congress has broad discretion to enact whatever legislation it determines is appropriate to secure to all persons "the enjoyment of perfect equality of civil rights and the equal protection of the laws." Ex parte Virginia, 100 U.S. (10 Otto) 339, 346 (1879).

Nor is Congress' remedial authority limited to prohibiting present intentional discrimination against persons with disabilities. Congress found that due to the pervasiveness of discriminatory exclusion, irrational fears, and inaccurate stereotypes, the interests of people with disabilities were not considered when purportedly "neutral" rules and practices were established. The continuing effects of this past exclusion, combined with present discrimination, has resulted in persons with disabilities being excluded from full participation in all aspects of society. In light of these findings, Congress required public entities to take reasonable steps to modify their practices and physical facilities so that persons with disabilities would have meaningful access to all the services, programs, or activities of those entities. This finely tuned mandate is plainly adapted to the underlying purpose of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." Plyler v. Doe, 457 U.S. 202, 222 (1982).

Like the ADA, the abrogations of Eleventh Amendment immunity for Section 504 and IDEA actions are valid under Section 5 of the Fourteenth Amendment. The abrogations for Section 504 and IDEA suits are also valid exercises of Congress' power under the Spending Clause to impose unambiguous conditions for receiving federal funds. In 42 U.S.C. 2000d-7 and 20 U.S.C. 1403, Congress put States ~~on notice that accepting federal funds waived~~ their Eleventh Amendment immunity to discrimination suits under Section 504 and IDEA, respectively. Under either Section 5 or the Spending Clause, the abrogations for Section 504 and IDEA suits are constitutional, and the district court had jurisdiction over this action.

ARGUMENT

I

THE DISTRICT COURT HAD JURISDICTION OVER THE DEFENDANTS UNDER THE DOCTRINE OF EX PARTE YOUNG

The defendants contend (Br. 33-37) that Congress did not have the constitutional authority to abrogate Eleventh Amendment immunity for suits brought by private plaintiffs under the Americans with Disabilities Act (ADA). They also suggest (Br. 9, 34) that the Eleventh Amendment bars plaintiffs' claims under Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Individuals with Disabilities Education Act (IDEA), ignoring the fact that both these statutes contain express abrogations of Eleventh Amendment immunity. But the Eleventh Amendment is no bar to this action because the abrogations are constitutional exercises of Congress' power under Section 5 of the Fourteenth Amendment and the Spending Clause.

However, there is no need to reach the constitutionality of Congress' abrogations in this appeal because the only defendants in this action are state officials sued in their official capacities for prospective injunctive relief, and thus this action falls within the scope of the doctrine of Ex parte Young, 209 U.S. 123 (1908). Under Ex parte Young, "when a party seeks only prospective equitable relief -- as opposed to any form of money damages or other legal relief -- then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States." ANR Pipeline Co. v. Lafaver, Nos. 96-3250, 96-3345, 1998 WL 406632, at *8 (10th Cir. July 21, 1998). Two Supreme Court decisions -- Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028 (1997) -- have recently reexamined and confirmed the core of Ex parte Young.

In Seminole Tribe, the Court reaffirmed that the Eleventh Amendment is no bar to "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" Seminole Tribe, 517 U.S. at 73 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)). Thus it held that an Ex parte Young action was a constitutionally permissible method of seeking to enforce federal law against state officials in federal court. See 517 U.S. at 71-72 nn.14 & 16.[2/]

[2/] In Seminole Tribe, the Court found that Congress' decision to enact a "carefully crafted and intricate remedial scheme" for enforcing the statutory rights created by the Indian Gaming Regulatory Act, including provisions that limited the court to strictly regimented procedures to adduce compliance, "strongly

(continued...)

Contrary to the defendants' assertion, the Supreme Court's recent decision in Idaho v. Coeur d'Alene Tribe of Idaho does not prohibit reliance on the Ex parte Young doctrine in this case. Coeur d'Alene involved a suit by an Indian tribe against state officials regarding whether certain lands, including "submerged

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2/ (...continued)
indicate[d] that Congress had no wish" to permit a suit under Ex parte Young. Id. at 73-74, 76. Thus the Court concluded that the limited remedial scheme reflected a congressional intent not to permit plaintiffs to rely on Ex parte Young. Id. at 75 n.17.

Defendants do not argue that Congress has manifested such an intent with the ADA, Section 504 or IDEA. Neither the ADA nor Section 504 contains such a "detailed remedial scheme." Id. at 74. Title II of the ADA adopts the "remedies, procedures and rights" of Section 504. 42 U.S.C. 12133. Section 504, in turn, "does not expressly provide for" a private right of action. Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1378 (10th Cir. 1981). However, this Court has held that a private right of action does exist under Section 504. Id. at 1377-1380. As such, remedies under the ADA and Section 504 are governed by the "general rule" under which "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70-71 (1992). And such relief clearly includes prospective injunctions. See DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1381 (10th Cir. 1990), cert. denied, 498 U.S. 1074 (1991). Thus courts of appeals have routinely permitted Section 504 actions to proceed against state officials under the Ex parte Young doctrine. See, e.g., Lussier v. Dugger, 904 F.2d 661, 670 n.10 (11th Cir. 1990); Brennan v. Stewart, 834 F.2d 1248, 1255, 1260 (5th Cir. 1988); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981). The only court to address the issue post-Seminole Tribe has concurred, holding that ADA and Section 504 suits may continue to be brought pursuant to Ex parte Young. See Armstrong v. Wilson, 942 F. Supp. 1252, 1264 (N.D. Cal. 1996), aff'd, 124 F.3d 1019 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998).

Similarly, IDEA, which expressly provides for a private right of action, see 20 U.S.C. 1415(i)(2), (i)(3); Board of Educ. v. Rowley, 458 U.S. 176, 204-205 (1982), is also structured to permit injunctive suits against state officials. See, e.g., Marie O. v. Edgar, 131 F.3d 610, 616-617 (7th Cir. 1997); Kerr Ctr. Parents Ass'n v. Charles, 897 F.2d 1463, 1468-1469 (9th Cir. 1990); Rose v. Nebraska, 748 F.2d 1258, 1262 (8th Cir. 1984), cert. denied, 474 U.S. 817 (1985).

lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect," were tribal lands. 117 S. Ct. at 2041. The Tribe's action was not simply the "functional equivalent of quiet title in that substantially all benefits of ownership and control [of certain lands] would shift from the State to the Tribe." Id. at 2040. Instead, the Tribe was seeking "relief with consequences going well beyond the typical stakes in a real property quiet title action," asking for a declaration that certain lands were "not even within the regulatory jurisdiction of the State." Ibid. The Court found that under these "particular and special circumstances," such a suit did not fall within the Ex parte Young doctrine. Id. at 2043. The judgment of the Court was announced by Justice Kennedy, but only Chief Justice Rehnquist joined his entire opinion. Justice O'Connor, for herself and Justices Scalia and Thomas, wrote an opinion that concurred in part and concurred in judgment. Justice Souter wrote for the four dissenting justices.

The portion of Justice Kennedy's opinion joined by a majority reaffirmed that "[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the Young fiction." Id. at 2040. Justice O'Connor in her concurrence stressed the unique nature of the suit before them and reiterated that "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court." Id. at 2043.

Seven members of the Court expressly rejected a suggestion by Justice Kennedy, and likewise argued by the defendants here

(Br. 31), that the application of Ex parte Young should be examined on a "case-by-case" basis. Id. at 2046-2047 (O'Connor, J.); id. at 2048, 2051 n.6 (Souter, J.). They held that the fact that the judgment in an Ex parte Young suit would, as a practical matter, affect the State's interest was not sufficient to deprive federal courts of jurisdiction, explaining that "[e]very Young suit names public officials, and we have never doubted the importance of state interests in cases falling squarely within our past interpretations of the Young doctrine." Id. at 2047 (O'Connor, J.); see id. at 2053-2054 (Souter, J.). Acknowledging "the importance of having federal courts open to enforce and interpret federal rights," id. at 2045-2046 (O'Connor, J.); see id. at 2055-2056 (Souter, J.), these seven Justices agreed that "a Young suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." Id. at 2046 (O'Connor, J.); see id. at 2048 (Souter, J.).

This suit falls squarely within the tradition of Ex parte Young. Unlike Coeur d'Alene, this is not a suit about land and would not divest the State of any regulatory authority over its territory. Instead, this is a lawsuit intended to vindicate individual rights related to freedom from invidious discrimination on the basis of disability and meaningful access to education, areas where courts have long permitted suits against state officers.

As this Court explained in a case decided after both Seminole Tribe and Coeur d'Alene, "we agree * * * that Ex parte Young is still viable." V-1 Oil Co. v. Utah Dep't of Pub.

Safety, 131 F.3d 1415, 1421 n.2 (10th Cir. 1997). Indeed, there is a "consensus among other courts" of appeals that, save for the exceptional circumstances of Coeur d'Alene, "a majority of the [Supreme] Court would continue to apply the rule of Ex parte Young as it has been traditionally understood." Earles v. State Bd. of Certified Pub. Accountants of La., 139 F.3d 1033, 1039 (5th Cir. 1998) (collecting cases). This is because, as this Court explained in ANR Pipeline, the "controlling concurrence by Justice O'Connor rejected Justice Kennedy's view that the Ex parte Young doctrine should be applied on a case-by-case approach." 1998 WL 406632, at *10 n.12.

In ANR Pipeline, this Court read Coeur d'Alene as barring a suit to enjoin state officials from imposing taxes because, in its view, "Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system" when it enacted the Tax Injunction Act, 28 U.S.C. 1341, which prohibits federal courts from hearing Ex parte Young suits involving state taxes when there are plain, speedy and efficient state court remedies. 1998 WL 406632, at *14. The result in ANR Pipeline does not control the present case. The Court simply held that where Congress had taken the unusual step of restricting federal court jurisdiction over suits to enjoin state taxation, it was not necessary for the Court to independently determine the extent to which the relief implicates the state's sovereign interests. Instead, the Court was deferring to a congressional determination to that effect embodied in a statute that deprived courts of jurisdiction. Ibid. In the present case, Congress has likewise "done our work

for us," ibid., manifesting its clear determination that the federal interest in having these suits heard in federal court should predominate by granting jurisdiction for such suits and abrogating Eleventh Amendment immunity.

Since the State was not named as a defendant in this action and the plaintiffs seek only prospective injunctive relief, this suit may proceed under the doctrine of Ex parte Young. It is therefore not necessary to reach the question of Congress' power to remove States' Eleventh Amendment immunity. If this Court finds it appropriate to reach the constitutional question, however, for the reasons discussed below the statutory abrogations of Eleventh Amendment immunity enacted for the ADA, Section 504, and the IDEA are valid.

II

THE ABROGATION OF ELEVENTH AMENDMENT IMMUNITY CONTAINED IN THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Citing the Supreme Court's recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the defendants contend (Br. 33-37) that Congress did not have the constitutional authority to abrogate Eleventh Amendment immunity for suits brought by private plaintiffs under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 et seq. To date, four courts of appeals have upheld the abrogation in the ADA as valid Section 5 legislation. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), petition for cert. filed, 66 U.S.L.W. 3783 (May 28, 1998) (No.

97-1941); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir. 1998); Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998); see also Autio v. Minnesota, 140 F.3d 802 (8th Cir.), vacated for reh'g en banc (July 7, 1998). We agree with these courts and urge this Court to follow these well-reasoned decisions.

In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated States' Eleventh Amendment immunity:

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

517 U.S. at 55 (citations, quotations, and brackets omitted).

Section 12202 of Title 42 provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." This language exceeds that necessary to constitute an abrogation. See Seminole Tribe, 517 U.S. at 56-57; Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-14 (1989); id. at 29-30 (Scalia, J., concurring in part and dissenting in part). Indeed, defendants concede (Br. 8-9, 33) that Section 12202 satisfies the first requirement.

The second inquiry under Seminole Tribe is whether "Congress has the power to abrogate unilaterally the States' immunity from suit." 517 U.S. at 59. Here the Fourteenth Amendment provides that authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal

Protection Clause. As the Supreme Court explained over a hundred years ago:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. (10 Otto) 339, 345-346 (1879). A statute is thus "appropriate legislation" to enforce the Equal Protection Clause if the statute "may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court upheld the abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as "appropriate" legislation under Section 5. It explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Id. at 456. In Seminole Tribe, the Court reaffirmed the holding of Fitzpatrick. See 517 U.S. at 59, 65, 71 n.15. Thus, even after Seminole Tribe, Congress has the power under Section 5 of the Fourteenth Amendment to eliminate States' Eleventh Amendment immunity. See Hurd v. Pittsburg State Univ.,

109 F.3d 1540, 1543-1544 (10th Cir. 1997); ANR Pipeline Co., 1998 WL 406632, at *7.

A. The ADA Is An Enactment To Enforce The Equal Protection Clause

Defendants concede (Br. 8-9, 33-34) that Congress acted pursuant to Section 5 of the Fourteenth Amendment in enacting the ADA. Indeed, Congress declared that its intent in enacting the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment * * *, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

Defendants suggest (Br. 34, 35), nonetheless, that because classifications on the basis of disability are not subject to strict scrutiny, Congress does not have the power to enact legislation to protect that class under Section 5 of the Fourteenth Amendment. But neither the prohibitions of the Equal Protection Clause nor Congress' Section 5 authority is limited to suspect classifications. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918). Thus "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988); see, e.g., Romer v. Evans 517 U.S. 620, 631-634 (1996); Mills v. Maine, 118 F.3d 37, 46 (1st Cir. 1997)

(collecting cases). And the Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985), made clear that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary. Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "unprotected from invidious discrimination." Id. at 446; see Bangerter v. Orem City Corp., 46 F.3d 1491, 1503 & n.20 (10th Cir. 1995).

The four courts of appeals to date to address the validity of the ADA's abrogation have affirmed Congress' power to prohibit discrimination against persons with disabilities pursuant to Section 5. As the Seventh Circuit explained, "[i]nvidious discrimination by governmental agencies * * * violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5 * * *." Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997). This is consistent with this Court's holding in Hurd, 109 F.3d at 1544, that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., is a valid exercise of Congress' Section 5 authority, despite the fact that age is not a suspect classification.[3/]

[3/] A majority of the courts of appeals are in accord. See, e.g., Coger v. Board of Regents, No. 97-5134, 1998 WL 476164, at *5-*11 (6th Cir. Aug. 17, 1998); Scott v. University of Miss., 148 F.3d 493, 501-503 (5th Cir. 1998); Keeton v. University of Nev. Sys., No. 97-17184, 1998 WL 381432, at *2-*3 (9th Cir. July

(continued...)

Like these statutes, the ADA can be regarded as legislation to enforce the Equal Protection Clause. As Representative Dellums explained during the enactment of the ADA, "we are empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are 'able-bodied,' not just those who own property -- but every citizen shall enjoy the equal protection of the laws." 136 Cong. Rec. 11,467 (1990); see also id. at 11,468 (remarks of Rep. Hoyer).

B. The ADA Is Plainly Adapted To Enforcing The Equal Protection Clause

The defendants next suggest (Br. 33-34, 35-36) that the ADA is not "plainly adapted" to enforcing the Equal Protection Clause. The Supreme Court's recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), addressed the question of what constitutes "plainly adapted" enforcement. It concluded that even statutes that prohibit more than does the Equal Protection Clause on its own can be "appropriate remedial measures" when there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169.

3/ (...continued)
10, 1998); Goshtasby v. Board of Trustees, 141 F.3d 761, 770-772 (7th Cir. 1998); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 698-700 (1st Cir. 1983); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); see also Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 30 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992). A challenge to the holding of Hurd is pending before this Court in Migneault v. Peck, No. 97-2099 (oral argument heard May 20, 1998).

1. Congress Found That Discrimination Against People With Disabilities Was Severe And Extended To Every Aspect Of Society

Congress made express findings about the status of people with disabilities in our society, and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2). We need not repeat these findings here in toto. (They are attached as an addendum to this brief.) Nor can we provide a complete summary of the 14 hearings held by Congress at the Capitol, the 63 field hearings, the lengthy floor debates, and the myriad of reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, see Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991) (collecting citations), as well as Congress' thirty years of experience with other statutes aimed at preventing discrimination against persons with disabilities, see Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-389 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities). However, in the next few pages we will briefly sketch some of the major areas of discrimination Congress discovered and was attempting to redress.

First, the evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8

(1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). The legislative record contained documented instances of exclusion of persons with disabilities from hospitals, theaters, restaurants, bookstores and auction houses simply because of prejudice. See Cook, supra, at 408-409 (collecting citations). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7).

The decades of ignorance, fear, and misunderstanding created a tangled web of discrimination, resulting in and being reinforced by isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more

generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

Similarly, there was evidence before Congress that, like most public accommodations, government buildings were not accessible to people with disabilities. For example, a study conducted in 1980 of state-owned buildings available to the general public found 76 percent of them physically inaccessible and unusable for providing services to people with disabilities. See 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coelho); U.S. Commission on Civil Rights, supra, at 38-39. In another survey, 40 percent of persons with disabilities reported that an important reason for their segregation was the inaccessibility of buildings and restrooms. See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 334 (1989) (House Hearings).

Of course, even when the buildings were accessible, persons with disabilities were often excluded because they could not reach the buildings. The evidence before Congress showed that, in fact, public streets and sidewalks were not accessible. See House Report, supra, at 84; House Hearings, supra, at 248, 271. And even when they could navigate the streets, people with disabilities were shut out of most public transportation. See

H.R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 24 (1990); National Council on the Handicapped, Toward Independence 32-33 (1986); U.S. Commission on Civil Rights, supra, at 39. Some transit systems offered paratransit services (special demand responsive systems for people with disabilities) to compensate for the absence of other means of transportation, but those services were often too limited and further contributed to the segregation of people with disabilities from the general public. See Senate Report, supra, at 13, 45; House Report, supra, at 38, 86; Toward Independence, supra, at 33; U.S. Commission on Civil Rights, supra, at 39. As Congress reasoned, "[t]ransportation plays a central role in the lives of all Americans. It is a veritable lifeline to the economic and social benefits that our Nation offers its citizens. The absence of effective access to the transportation network can mean, in turn, the inability to obtain satisfactory employment. It can also mean the inability to take full advantage of the services and other opportunities provided by both the public and private sectors." H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 25 (1990); see House Report, supra, at 37, 87-88; Senate Report, supra, at 13.

Finally, even when people with disabilities had access to generally available goods and services, often they could not afford them due to poverty. Over 20 percent of people with disabilities of working age live in poverty, more than twice the rate of other Americans. See National Council on the Handicapped, On the Threshold of Independence 13-14 (1988). Congress found this condition was linked to the extremely high unemployment rate among people with disabilities, which in turn

was a result of discrimination in employment combined with inadequate education and transportation. See Senate Report, supra, at 47; House Report, supra, at 37, 88; Toward Independence, supra, at 32; U.S. Commission on Civil Rights, supra, at 80. Thus, Congress concluded that even when not barred by "outright intentional exclusion," people with disabilities "continually encounter[ed] various forms of discrimination, including * * * the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. 12101(a)(5).

"[T]here is consistent * * * empirical evidence to back up the claims * * * that handicapped persons are more stable workers, with lower turnover, less absenteeism, lower risks of accident, and more loyalty to and satisfaction with their jobs and employers than other workers of similar characteristics in similar jobs." Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 208 (Monroe Berkowitz & M. Anne Hill eds., 1986); see also Senate Report, supra, at 28-29 (discussing studies that show job performance of employees with disabilities was as good as others); House Report, supra, at 58-59 (same).

Given these facts, it is not surprising that surveys of both people with disabilities and employers revealed that discrimination was one of the primary reasons many people with disabilities did not have jobs. See Senate Report, supra, at 9; House Report, supra, at 33, 37; On the Threshold of Independence, supra, at 15. "[R]ecent studies suggest that prejudice against

impaired persons is more intense than against other minorities. [One study] concludes that employer attitudes toward impaired workers are 'less favorable than those . . . toward elderly individuals, minority group members, ex-convicts, and student radicals,' and [another study] finds that handicapped persons are victims of 'greater animosity and rejections than many other groups in society.'" William G. Johnson, The Rehabilitation Act and Discrimination Against Handicapped Workers, in Disability and the Labor Market 242, 245, supra. Evidence at congressional hearings suggested that similar discrimination may exist in government employment. See Stephen L. Mikochik, The Constitution and the Americans with Disabilities Act: Some First Impressions, 64 Temp. L. Rev. 619, 624 n.33 (1991) (collecting relevant testimony). And even when employed, people with disabilities received lower wages that could not be explained by any factor other than discrimination. See U.S. Commission on Civil Rights, supra, at 31-32; Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 8,581 (1991) (citing studies); Johnson, supra, at 245 (same).

These government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. at 464; see also U.S. Commission on Civil Rights, supra, at 43-45. Congress could reasonably have found government discrimination a root cause of

"people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).[4/]

2. The ADA Is A Proportionate Response By Congress To Remedy And Prevent The Pervasive Discrimination It Discovered

Section 5 of the Fourteenth Amendment vests in Congress broad power to address the "continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity * * * to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

"Prejudice, once let loose, is not easily cabined." Cleburne, 473 U.S. at 464 (Marshall, J.). After extensive

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[4/] Since the enactment of the ADA, people with disabilities "have experienced increased access to many environments and services" and "employment opportunities have increased." National Council on Disability, Achieving Independence: The Challenge for the 21st Century 34 (1996). (The Council is an independent federal agency charged with gathering information about the effectiveness and impact of the ADA, see 29 U.S.C. 780a, 781(a)(7)). However, discrimination continues to be a significant force in the lives of people with disabilities. See id. at 14-16, 35-36; National Council on Disability, ADA Watch -- Year One: A Report to the President and the Congress on Progress in Implementing the Americans with Disabilities Act 36 (1993) ("Reports of discrimination abound in formal actions through the courts and federal agencies, in statistical survey data, and in anecdotal evidence.").

investigation (and long experience with the analogous nondiscrimination requirement contained in Section 504), Congress found that the exclusion of persons with disabilities from government facilities, programs and benefits was a result of past and ongoing discrimination. In the ADA, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander v. Choate, 469 U.S. 287, 301 (1985) (emphasis added).[5/] Thus the ADA requires that programs not unnecessarily exclude persons with disabilities, either intentionally or unintentionally, and that government entities make "reasonable modifications to rules, policies, or practices" for a "qualified individual with a disability," 42 U.S.C. 12132(2), when the modifications are "necessary to avoid discrimination on the basis of disability." 28 C.F.R. 35.130(b)(7) (emphasis added). While this requirement imposes some burden on the States, the statutory scheme created by Congress acknowledges the importance of other interests as well. The ADA does not require governmental entities to articulate a "compelling interest," but only requires "reasonable modifications" that do not entail a "fundamental alteration in the nature of a service, program, or activity." 28 C.F.R. 35.130(b)(7). In general, governmental entities need not provide

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[5/] Alexander was discussing Section 504 of the Rehabilitation Act. This Court, however, has held that the ADA imposes substantive requirements similar to Section 504. See, e.g., Woodman v. Runyon, 132 F.3d 1330, 1338-1339 & n.8 (10th Cir. 1997).

accommodations if they can show "undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3), 35.164 (emphasis added).

3. In Enacting The ADA, Congress Was Redressing Constitutionally Cognizable Injuries

In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. As discussed above, the Equal Protection Clause prohibits invidious discrimination, that is, "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446. In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

While a majority of the Court declined to deem classifications based on disability as suspect or "quasi-suspect," it elected not to do so, in part, because it would

unduly limit legislative solutions to problems faced by the disabled. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." Id. at 442-443. It specifically noted with approval legislation such as Section 504 and IDEA, which aimed at protecting persons with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." Id. at 444.

Nevertheless, the Court did affirm that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," id. at 446, and found the actions at issue in that case unconstitutional. In doing so, it articulated several criteria for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others" did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine all conceivable rationales for the differential treatment of the mentally retarded; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at

450 (stating that "this record does not clarify how * * * the characteristics of [people with mental retardation] rationally justify denying" to them what would be permitted to others). Third, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable * * * are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448. Thus, the Equal Protection Clause of its own force already proscribes treating persons with disabilities differently when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2)(A). Thus, as to those life activities, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. While it is true that the

"'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,'" Plyler v. Doe, 457 U.S. 202, 216 (1982), it is also true that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[6/]

Thus, there is a basis in constitutional law for recognizing that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much

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[6/] In a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Court has held that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause in treating indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S. Ct. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires States to waive such fees in order to ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a State permits an indigent person to appeal without charge, but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)); see also Lewis v. Casey, 518 U.S. 343, 356-357 (1996) (holding that State has not met its obligation to provide illiterate prisoners access to courts simply by providing a law library).

a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974). Similarly, it is also a denial of equality when access to facilities, benefits and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

4. Unlike The Statute Found Unconstitutional In City Of Boerne, The ADA Is A Remedial And Preventive Scheme Proportional To The Injury

Of course, there is no need for this Court to decide whether every requirement of the ADA could be ordered by a court under the authority of the Equal Protection Clause. It is sufficient that Congress found that the ADA was appropriate legislation to redress the rampant discrimination it discovered in its decades-long examination of the question. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." City of Boerne, 117 S. Ct. at 2163.

Congress' decision to follow the teachings of Cleburne in enacting the ADA distinguishes this case from City of Boerne. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. (the statute at issue in City of Boerne), was enacted by Congress in response to the Supreme Court's decision in

Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 117 S. Ct. at 2169. Rather, the Court found that Congress simply disagreed with the Court's decision about the substance of the Free Exercise Clause and was "attempt[ing] a substantive change in constitutional protections." Id. at 2170.

As such, the Court found RFRA an unconstitutional exercise of Section 5. It explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 2163, 2172. And it reaffirmed that Congress can prohibit activities that themselves were not unconstitutional in furtherance of its remedial scheme. Id. at 2163, 2167, 2169. It stressed, however, that Congress' power had to be linked to constitutional injuries, and that there must be a "congruence and proportionality" between the identified harms and the statutory

remedy. Id. at 2164.

In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. Id. at 2170. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 2171; see also id. at 2169 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, it could no longer be viewed as remedial or preventive. Id. at 2169-2170.

As we have shown above, despite the defendants' assertions (Br. 33-36), none of the specific concerns articulated by the Court apply to the ADA.[1/] But the ADA differs from RFRA in a

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[1/] First, there was substantial evidence by which Congress could have determined that there was a "pattern or practice of unconstitutional conduct." Second, the statutory scheme imposed by Congress did not attempt to impose a compelling interest standard, but a more flexible test that requires "reasonable modifications." This finely-tuned balance between the interests of persons with disabilities and public entities plainly manifests a "congruence" between the "means used" and the "ends to be achieved." See City of Boerne, 117 S. Ct. at 2169. Moreover, there is no problem regarding judicially manageable standards, as the courts have regularly applied the "reasonable accommodation"

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more fundamental way. RFRA was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. The ADA, on the other hand, is simply seeking to make effective the right to be free from invidious discrimination by establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination. Moreover, unlike the background to RFRA -- which demonstrated that Congress acted out of displeasure with the Court's decision in Smith -- there is no evidence that Congress enacted the ADA because of its disagreement with any decision of the Court. "In the ADA, Congress included no language attempting to upset the balance of powers and usurp the Court's function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court." Coolbaugh, 136 F.3d at 438.

Viewed in light of the underlying Equal Protection principles, the ADA is appropriate preventive and remedial legislation. First, it is preventive in that it established a statutory scheme that attempts to detect government activities likely tainted by discrimination. By requiring the State to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs, and services, are not the result of prejudice or stereotypes, but

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1/ (...continued)
test under Section 504 to recipients of federal funds for the past 20 years.

rather based on legitimate governmental objectives, it attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision. See Bangerter, 46 F.3d 1503 & n.20; cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-285 (1987). This is similar to the standards articulated by the Court in Cleburne.

Second, the ADA is remedial in that it attempts to ensure that the interests of people with disabilities are given their due. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. 12101(a)(2), the needs of persons with disabilities were not taken into account when buildings were designed, standards were set, and rules were promulgated. Thus, for example, sidewalks and buildings were often built based on the standards for those who are not disabled. The ability of people in wheelchairs to use them or of people with visual impairments to navigate within them was not likely considered. See U.S. Commission on Civil Rights, supra, at 21-22, 38. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance, traceable to the prolonged social and cultural isolation of [persons with disabilities] continue to stymie recognition of [their] dignity and individuality." Cleburne, 473 U.S. at 467 (Marshall, J.).

Policies and criteria restricting access to government programs and services are just as much a barrier to some as physical barriers are to others. As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- of benign neglect" to the interaction between

those purportedly "neutral" rules and persons with disabilities.[8/] As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society. See 42 U.S.C. 12101(a)(5); see also U.S. Commission on Civil Rights, supra, at 99. When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove, 448 U.S. at 477-478.

The ADA thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Similarly, the courts of appeals have unanimously upheld the application of Title VII's disparate

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[8/] Senate Report, supra, at 6 (quoting without attribution Alexander v. Choate, 469 U.S. 287, 295 (1985)); House Report, supra, at 29 (same); 136 Cong. Rec. 10,870 (1990) (Rep. Fish); id. at 11,467 (Rep. Dellums).

impact standard to States as a valid exercise of Congress' Section 5 authority. See Grano v. Department of Dev., 637 F.2d 1073, 1080 n.6 (6th Cir. 1980) (collecting cases); see also City of Boerne, 117 S. Ct. at 2169 (agreeing that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause").[9/]

There can be no dispute that "well-cataloged instances of invidious discrimination against the handicapped do exist." Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985). In exercising its broad power under Section 5 to remedy the ongoing effects of past discrimination and prevent present and future discrimination, Congress is afforded "wide latitude." City of Boerne, 117 S. Ct. at 2164. As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to

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[9/] Defendants' reliance (Br. 36) on New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 117 S. Ct. 2365 (1997), is misplaced. Title II does not require "the forced participation of the States' executive in the actual administration of a federal program." Printz, 117 S. Ct. at 2376. Rather, Title II simply forbids States from discriminating against the disabled in their provision of services, just as it prohibits private employers and places of public accommodation from engaging in such discrimination. See 42 U.S.C. 12112, 12182; West v. Anne Arundel County, 137 F.3d 752, 757-760 (4th Cir.) (Printz does not overrule Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), which permits imposition of generally applicable requirements on state entities), petition for cert. filed (Aug. 11, 1998) (No. 98-266); cf. Brinkman v. Kansas Dep't of Corrections, 21 F.3d 370, 371 (10th Cir.) (no Tenth Amendment bar to applying Fair Labor Standards Act to the States), cert. denied, 513 U.S. 927 (1994). Second, because Congress enacted Title II pursuant to its Fourteenth Amendment powers as well, the principles of federalism reflected in the Tenth Amendment and cases such as Printz have little relevance here. See City of Rome, 446 U.S. at 178-180; Milliken v. Bradley, 433 U.S. 267, 290-291 (1977); Fitzpatrick, 427 U.S. at 455.

'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 2172 (quoting Katzenbach, 384 U.S. at 651).

Following this tradition, the Fifth Circuit recently held that "the ADA represents Congress' considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. * * * We cannot say * * *, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the Flores proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions." Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), petition for cert. filed, 66 U.S.L.W. 3783 (May 28, 1998) (No. 97-1941). This holding is consistent with all the other courts of appeals that have considered the issue since Seminole Tribe. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir. 1998); see also Autio v. Minnesota, 140 F.3d 802 (8th Cir.), vacated for reh'g en banc (July 7, 1998).[10/]

[10/] But see Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451 (E.D.N.C. 1997), appeal pending, No. 97-2784 (4th Cir.); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933 (6th Cir.); Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996) (dictum), aff'd on other grounds, 131 F.3d 136 (Table), 1997 WL 770564 (4th Cir. 1997), petition for cert. filed (Mar. 10, 1998) (No. 97-8592).

III

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." The Supreme Court has characterized Section 2000d-7 as meeting its requirement that Congress must unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See Lane v. Pena, 518 U.S. 187, 198 (1996); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 72 (1992); id. at 78 (Scalia, J., concurring). As with the ADA, the only question is whether it is a valid exercise of any of Congress' powers.

As explained more fully below, the State waived its Eleventh Amendment immunity to Section 504 suits when it elected to accept federal funds after the effective date of Section 2000d-7. Moreover, Congress properly abrogated Eleventh Amendment immunity from Section 504 claims pursuant to its authority under Section 5 of the Fourteenth Amendment.

A. Defendants Waived Their Eleventh Amendment Immunity To Section 504 Suits By Accepting Federal Funds After The Enactment Of Section 2000d-7

Section 2000d-7 may be upheld as a valid exercise of Congress' power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance. Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity so long

as, as here, the statute provides unequivocal notice to the States of this condition.

States may waive their Eleventh Amendment immunity. See Seminole Tribe, 517 U.S. at 65; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); In re Straight, 143 F.3d 1387, 1390 (10th Cir. 1998); Premo v. Martin, 119 F.3d 764, 770-771 (9th ~~Cir. 1997)~~, ~~cert.~~ denied, ~~118~~ S. Ct. 1163 (1998). It is well-settled that a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("[a] State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program").

As the defendants note (Br. 9), Atascadero held that Congress had not used sufficiently clear statutory language to abrogate States' Eleventh Amendment immunity for Section 504 claims. And it reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. Id. at 247; see also Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring).

Section 2000d-7 was a direct response to the Supreme Court's decision in Atascadero. See 131 Cong. Rec. 22,344-22,345 (1985).

And Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under Section 504 if they accepted federal funds. See Lane, 518 U.S. at 200 (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7). Thus, as the Ninth Circuit held, Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998).

Seminole Tribe does not preclude Congress from using its Spending Clause power to abrogate a State's Eleventh Amendment immunity. Although the effect is the same, when Congress acts under the Spending Clause, it does not abrogate Eleventh Amendment immunity. Instead, Congress conditions the receipt of federal funds on a waiver of that immunity by the States themselves. See Beasley v. Alabama State Univ., 3 F. Supp.2d 1304, 1310 (M.D. Ala. 1998). As the Department of Justice explained to Congress at the time the statute was being considered, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to

suit in federal court for alleged violations of Section 504.

To the extent the defendants might suggest that Congress may not require the waiver of Eleventh Amendment immunity as a condition for receiving federal funds because it could not directly abrogate immunity under the Spending Clause, they would be mistaken. The Supreme Court has explained that when exercising its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." South Dakota v. Dole, 483 U.S. 203, 210 (1987). Indeed, the Court held that even "a perceived [constitutional] limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." Ibid. (citing Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947)). "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." Massachusetts v. Mellon, 262 U.S. 447, 480 (1923); see also Glenpool Utility Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1215-1216 (10th Cir. 1988), cert. denied, 490 U.S. 1067 (1989).

Any State reading the U.S. Code would have known that after the effective date of Section 2000d-7 it could be sued in federal court for violations of Section 504 (and other anti-discrimination statutes tied to federal funding) if it applied for and received federal funds. Cf. In re Straight, 143 F.3d at 1390 (statute can be used "to alert any governmental unit" of the Eleventh Amendment consequences of "voluntarily" taking certain

actions). Since the defendants accepted federal funds after the effective date of Section 2000d-7, they have waived their Eleventh Amendment immunity to suit in this case. See Clark, 123 F.3d at 1271; Litman v. George Mason Univ., 5 F. Supp.2d 366, 375-376 (E.D. Va. 1998); Beasley, 3 F. Supp.2d at 1311-1312; Sandoval v. Hagan, No. 96-D-1875-N, 1998 WL 295891, at *25-*26 (M.D. Ala. June 3, 1998). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

B. The Abrogation Of Eleventh Amendment Immunity Contained In 42 U.S.C. 2000d-7 Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

In addition, for the reasons discussed in Part II, Section 2000d-7 is also valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment to permit private suits against States for discriminating against individuals with disabilities in violation of federal law. The defendants expressly concede (Br. 9) that Section 504 "was enacted pursuant to the Fourteenth Amendment." See Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987) (stating in dictum that "[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment."). But see Br. 33. We agree.

Congress need not expressly state its intent to rely upon its Section 5 authority. See EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983). Nevertheless, the legislative history makes clear that in enacting Section 2000d-7, Congress intended to exercise its Section 5 authority. See Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) (relying on legislative history in

determining whether "Congress exercised its power under § 5 of the Fourteenth Amendment"); Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1543-1544 (10th Cir. 1997) (upholding Age Discrimination in Employment Act as valid Section 5 legislation in part due to legislative history).

Senator Cranston, the provision's primary sponsor, described the proposed legislation as "clearly authorized" by both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of these constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that

> [t]he proposed amendment * * * fulfills the requirements that the Supreme Court laid out in Atascadero. Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress' intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts.

132 Cong. Rec. 28,624 (1986) (citations omitted).[11/]

[11/] The appropriate question is whether Congress enacted the abrogation pursuant to Section 5, not whether the underlying statute was so enacted. See Varner v. Illinois State Univ., No. 97-3253, 1998 WL 407011, at *7 n.7 (7th Cir. July 21, 1998); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838-839 n.7 (6th Cir. 1997). Thus even assuming arguendo that Section 504 as enacted in 1973 was solely Spending Clause legislation, that would not be dispositive as to the constitutional basis of Section 2000d-7.

In Fitzpatrick, for example, the Supreme Court found that the abrogation of States' Eleventh Amendment immunity for Title VII suits was a valid exercise of Congress' Section 5 authority, see 427 U.S. at 456, even though Title VII itself originally governed only private employers and was enacted pursuant to the

(continued...)

Not surprisingly, every court of appeals considering the constitutional basis of Section 2000d-7 since Seminole Tribe was decided has treated it as a proper exercise of Congress' Section 5 authority. See Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (No. 98-126); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Clark, 123 F.3d at 1270.[12/] This was also the consensus before Seminole Tribe.[13/]

[11/](...continued)
Commerce Clause, see United Steelworkers of America v. Weber, 443 U.S. 193, 206 n.6 (1979). Similarly, this Court in Hurd held that the abrogation of States' Eleventh Amendment immunity for the ADEA was a valid exercise of Congress' Section 5 authority, even though the ADEA originally governed only private employers and was enacted pursuant to the Commerce Clause. See 109 F.3d at 1543-1544 Thus the abrogation of States' Eleventh Amendment immunity in Section 504 may be upheld as a valid exercise of Congress' Section 5 authority, even if Section 504 itself was originally enacted solely pursuant to the Spending Clause.

[12/] See also Bryant v. New Jersey Dep't of Transp., 1 F. Supp.2d 426, 432-435 (D.N.J. 1998) (Title VI); Thorpe v. Virginia State Univ., No. Civ. 3:96CV975, 1998 WL 261973, *7-*10 (E.D. Va. May 8, 1998) (Title IX); Wilson v. North Carolina, No. 5:94-CV-878, 1997 U.S. Dist. LEXIS 1037 (E.D.N.C. Jan. 16, 1997) (Section 504); Hunter v. Chiles, 944 F. Supp. 914, 917 (S.D. Fla. 1996) (Section 504); Mayer v. University of Minn., 940 F. Supp. 1474, 1478-1480 (D. Minn. 1996) (Section 504); Niece v. Fitzner, 941 F. Supp. 1497, 1501-1504 (E.D. Mich. 1996) (Section 504); Armstrong v. Wilson, 942 F. Supp. 1252, 1262-1263 (N.D. Cal. 1996), aff'd on other grounds, 124 F.3d 1019 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) (Section 504).

[13/] See United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990) (Title VI); Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1363-1364 (D.S.C. 1995), rev'd in part on other grounds, 84 F.3d 707 (4th Cir. 1996) (Title VI); Martin v. Voinovich, 840 F. Supp. 1175, 1187 (S.D. Ohio 1993) (Section 504).

IV

20 U.S.C. 1403 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

For substantially the same reasons discussed above, the abrogation of Eleventh Amendment immunity contained in IDEA is valid under the Spending Clause and Section 5 of the Fourteenth Amendment. Section 1403(a) of Title 20 provides that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." Courts of appeals have properly characterized Section 1403 as meeting the requirement that Congress must unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See Marie O. v. Edgar, 131 F.3d 610, 617-618 (7th Cir. 1997); Beth V. v. Carroll, 87 F.3d 80, 88 (3d Cir. 1996).

As with Section 504, the defendants waived their Eleventh Amendment immunity to IDEA suits when they elected to accept federal funds after the effective date of Section 1403. And like the ADA and Section 504, Congress properly abrogated Eleventh Amendment immunity from IDEA claims pursuant to its authority under Section 5 of the Fourteenth Amendment. Under either theory, the Eleventh Amendment is no bar to plaintiffs' IDEA claims.

A. Defendants Waived Their Eleventh Amendment Immunity To IDEA Suits By Accepting Federal Funds After The Enactment Of Section 1403

As explained more fully above, Atascadero established that a statute must clearly express an intent to condition the receipt

of federal funds on a State's consent to suit in federal court in order to overcome a State's Eleventh Amendment immunity. In 1989, the Supreme Court held that IDEA was not sufficiently unequivocal to meet the standards articulated in Atascadero. See Dellmuth v. Muth, 491 U.S. 223, 232 (1989). Section 1403 was enacted in response to Dellmuth and was crafted in light of the rule articulated in Atascadero. See 135 Cong. Rec. 16,916-16,917 (1989).

Section 1403 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court if they accepted federal funds under IDEA. States apply for money on the condition that they will comply with IDEA and the Department of Education's regulations, and know that disputes regarding their compliance can be resolved in federal court. See Board of Educ. v. Rowley, 458 U.S. 176, 182-183 (1982); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890-891 nn.7-8 (1984). Because the state defendants accepted federal funds after the effective date of Section 1403, they are properly subject to this suit.[14/]

[14/] The Seventh Circuit in Marie O. v. Edgar, 131 F.3d at 617-618, commented favorably on the waiver theory as applied to Section 1403 of IDEA, but did not make a definitive holding because the case could be decided on Ex Parte Young grounds. It suggested, however, that Congress' use of the word "abrogation" in the title of the section ("Abrogation of state sovereign immunity") might introduce some ambiguity as to whether the provision could constitute a condition that the States waive their immunity. But the Supreme Court has used the terms "abrogation" and "waiver" inexactly in the past, see, e.g., Lane, 518 U.S. at 200; Supreme Court of Va. v. Consumers Union, Inc., 446 U.S. 719, 738 (1980); Edelman, 415 U.S. at 672, so there is no reason to think Congress was intending to embody a substantive choice in the legislation by its use of the word "abrogation" in the section heading. Indeed, it is well-settled that section

(continued...)

B. The Abrogation Of Eleventh Amendment Immunity Contained In Section 1403 Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

In addition, Section 1403 is a valid abrogation of Eleventh Amendment immunity because it is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment under the standards articulated in City of Boerne.

1. Congress declared that its intent in enacting IDEA was to "assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975); see also S. Rep. No. 168, 94th Cong., 1st Sess. 13, 22 (1975); H.R. Rep. No. 332, 94th Cong., 1st Sess. 14 (1975); Rowley, 458 U.S. at 198 & n.22. When Congress reauthorized IDEA in 1997, it retained this finding. See 20 U.S.C. 1400(c)(6).

Congress did not view IDEA as simply a Spending Clause statute imposing conditions for the receipt of federal funds. As Senator Harkin recently explained: "We recognized [in 1975] that the right of disabled children to a free appropriate public education is a constitutional right established in the early 1970's by two landmark Federal district court cases. * * * IDEA was enacted for two reasons: First, to establish a consistent policy of what constitutes compliance with the equal protection clause so that there would be no need to continue pursuing separate court challenges around the country. Second, to help

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[14/](...continued)
titles cannot limit the plain import of the text. See United States v. Glover, 52 F.3d 283, 286 (10th Cir. 1995).

States meet their constitutional obligations." 143 Cong. Rec. S4298 (daily ed. May 12, 1997). This understanding of IDEA was often reiterated during the 1997 reauthorization debates. See, e.g., 143 Cong. Rec. S4357 (May 13, 1997) (Sen. Jeffords); id. at S4361 (May 13, 1997) (Sen. Harkin); id. at S4364 (May 13, 1997) (Sen. Frist); id. at S4403 (May 14, 1997) (Sen. Harkin); id. at S4410 (May 14, 1997) (Sen. Lott).

While such declarations are not dispositive, neither should they be ignored. "Given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court is "not lightly [to] second-guess such legislative judgments." Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990) (opinion of O'Connor, J.).

2. Congress enacted IDEA based on a well-documented history of past discrimination in education against children with disabilities. In enacting IDEA's predecessor in 1975, Congress found that one million disabled children were "excluded entirely from the public school system." 20 U.S.C. 1400(c)(2)(C). But outright exclusion was not the only injury suffered by children with disabilities. Some children were given permission to enter the schoolhouse, but were learning nothing because the schools failed to account for their disabilities. See Rowley, 458 U.S. at 191; id. at 213 n.1 (White, J., dissenting). Congress was acting in response to its finding that "millions of handicapped children 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" Id. at 191 (quoting H.R. Rep.

No. 332, supra, at 2). This state of affairs was rooted in decades of unwarranted discrimination against children with disabilities. See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., A History of Unequal Treatment, 15 Santa Clara Lawyer 855, 870-875 (1975).

These conditions continue to exist. After the extensive factfinding by the Executive and Legislative branches prior to the enactment of the ADA discussed above, Congress found in 1990 that "discrimination against individuals with disabilities persists in such critical areas as * * * education." 42 U.S.C. 12101(a)(3) (emphasis added); accord 29 U.S.C. 701(a)(5). This finding is supported by testimony credited by both houses of Congress in enacting the ADA about exclusion of people with disabilities from education. See Senate Report, supra, at 7; House Report, supra, at 29. This finding is also consistent with the conclusion of the United States Commission on Civil Rights, also before Congress, that tens of thousands of children with disabilities "continue to be excluded from the public schools, and others are placed in inappropriate programs." U.S. Commission on Civil Rights, supra, at 28 & n.77; see also Cook, supra, at 413-414 (noting continued segregation of children with disabilities in education).

3. Congress tied these facts directly to the deprivations of constitutional rights. As explained by the Supreme Court in Rowley, the impetus for IDEA included two federal cases establishing that the States' failures to provide children a free public education appropriate to their needs were constitutional violations. See 458 U.S. at 180 n.2, 192-200 (discussing Mills

v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) and Pennsylvania Ass'n for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972)). Indeed, when Congress enacted IDEA, plaintiffs were winning similar suits across the nation. See Burgdorf & Burgdorf, supra, at 878 & n.136. The Supreme Court discussed the decisions in these cases with approval in Rowley and reaffirmed the constitutional basis of IDEA's "appropriate education" requirement in later cases. For example, the Supreme Court held that IDEA precluded Section 1983 claims based on the Equal Protection Clause because Congress intended IDEA to be the "vehicle for protecting the constitutional right of a handicapped child to a public education." Smith v. Robinson, 468 U.S. 992, 1013 (1984).[15/]

4. Given Congress' superior factfinding ability and the attendant "wide latitude" to which it is entitled in exercising its Section 5 authority, City of Boerne, 117 S. Ct. at 2164, its findings that state and local governments excluded children with disabilities from public education are sufficient to sustain IDEA's abrogation as valid Section 5 legislation. Not surprisingly, every court to consider the question is in agreement that IDEA is "appropriate legislation" to enforce the Fourteenth Amendment. See David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421-422 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1037-1038 (5th Cir.

[15/] Congress later amended IDEA to permit Section 1983 claims because it did not intend for IDEA to be the exclusive remedy for Equal Protection violations. See 20 U.S.C. 1415(l); Marie O., 131 F.3d at 621-622.

1983); Mitten v. Muscogee County Sch. Dist., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988) (so holding and collecting older cases); Peter v. Johnson, 958 F. Supp. 1383, 1394 (D. Minn. 1997); Emma C. v. Eastin, 985 F. Supp. 940, 947 (N.D. Cal. 1997). Although some of these decisions pre-date City of Boerne, for the reasons discussed above they remain good law.

CONCLUSION

The Eleventh Amendment is no bar to the district court's jurisdiction over plaintiffs' claims under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act.

Respectfully submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because the constitutionality of federal statutes are at issue, the United States believes that its presence at oral argument would be appropriate. See 28 U.S.C. 2403(a).

A D D E N D U M

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Americans with Disabilities Act
42 U.S.C. 12101

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Rehabilitation Act of 1973
29 U.S.C. 701

§ 701. Findings; purpose; policy

(a) Findings

Congress finds that—

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to—

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through the provision of individualized training, independent living services, educational and support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to—

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose

The purposes of this chapter are—

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through—

(A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(c) Policy

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of—

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of a parent, a family member, a guardian, an advocate, or an authorized representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

Individuals with Disabilities Education Act (as amended, 1997)
20 U.S.C. 1400

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act.

(b) [Omitted]

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94–142)—

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 1998, two copies of the foregoing Brief for the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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